

## 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** [1997] 25 E.H.R.R. 234 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 information to the defence can therefore be satisfied through either (a) providing copies of such information to the defence; or (b) providing suitable access to view the information. 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 information 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 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..

### 23.3 Safeguarding the Information provided to the Unrepresented Accused

23.3.1 Where disclosure is made to the accused's representatives, there are safeguards in place to ensure that the information 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.

23.3.2 Until recently there were no similar safeguards in place to protect information provided directly to the unrepresented accused and therefore the Crown required to apply to the court for a "protective order", setting out the terms on which disclosure was made. If the accused then breached that order that would have constituted contempt of court.

23.3.3 Following implementation of Part 6 of the Criminal Justice and Licensing (Scotland) Act 2010 on 6<sup>th</sup> June 2011, in particular sections 162 and 163 which serve to protect the confidentiality of disclosed information, it is no longer necessary for the Crown to apply to the Court for a protective order when disclosing information directly to the unrepresented accused. Statute now provides that if a person, including the unrepresented accused, knowingly uses or discloses information for a purpose other than that for which it had been disclosed by the prosecutor, they commit an offence.

23.3.4 The unrepresented accused, may only use or disclose the information in the following circumstances:

- (i) for the purposes of the proper preparation and presentation of their case in the same proceedings in which the information was disclosed i.e. the original proceedings;
- (ii) with a view to the taking of an appeal in relation to the matter giving rise to the original proceedings;
- (iii) for the purposes of the proper preparation and presentation of their case in any such appeal

23.3.5 Use or disclosure of the information for any purpose other than those set out at paragraph 23.3.4 above is an offence punishable on summary conviction with a term of imprisonment not exceeding 12 months and/or a fine not exceeding the statutory maximum; and on indictment with a term of imprisonment not exceeding 2 years and/or a fine.

23.3.6 For the avoidance of doubt, where information is disclosed by the Crown in order to satisfy its disclosure obligations, that information cannot then be used for civil proceedings. In **Taylor v Director of the Serious Fraud Office** [1999] 2 A.C. 177, the court held that in civil proceedings there is an implied undertaking that documents disclosed on discovery must not be used for any purpose other than the purposes of the case in which they are disclosed.

## **23.4 Determining the Appropriate Method of Disclosure**

### Summary Cases

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

23.4.2 The method by which disclosure is made to the unrepresented accused will depend upon the nature of the information to be disclosed. Where there are only police witnesses (and there are no sensitivity or intelligence issues) disclosure will be affected by providing the accused with copies of the information. Similarly, where there are additional witnesses and their evidence is formal in nature (e.g. the licensee of premises) it may be appropriate to provide the unrepresented accused with copies of the information.

24.4.3 The following information should only **ever** be disclosed **by access** to the accused for both Summary and Solemn cases (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.

23.4.4 Before disclosing information to the unrepresented accused by provision of copies (as opposed to by access) the Crown must be satisfied that the accused will act responsibly and lawfully in terms of the way in which that information is used. In order to do that the Crown must obtain a signed receipt from the accused confirming that the information has been provided and also that the accused has been made aware of his or her legal obligations under sections 162 and 163 of the Criminal Justice and Licensing (Scotland) Act 2010 in terms of the use of that information. A style receipt is available in the FOS templates.

23.4.5 It is important to note that in order to prove that an accused has committed an offence under section 163 the Crown must establish that the accused **knowingly** used or disclosed the information in contravention of section 162. Therefore it is vital that, for corroboration purposes, two members of COPFS staff witness the accused being asked to sign, and signing, the receipt confirming that the accused has been provided with copies of the information and made aware of their legal obligations as regards the use of the information.

23.4.6 If an accused refuses to sign the receipt, then this fact, and the two members of staff who can speak to it, should be recorded in the case papers.

23.4.7 It is important to note that refusal by the accused to sign the receipt is not justification for refusing disclosure of the information however in such circumstances the accused should be invited to view the information under supervision.

23.4.8 Even where the Crown can be satisfied that the unrepresented accused will act responsibly, it may be necessary, having regard to the information in the case and the forum of the case, to disclose information by way of allowing the accused access to the information rather than providing copies of it. There are some general presumptions that need to be considered and applied. Further details of these are contained below.

23.4.9 Under **no circumstances** should information be disclosed by provision of copies where that information, or any part of it, relates to vulnerable or child witnesses or is sensitive or intelligence based.

23.4.10 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 Director of Serious Casework. The report should contain clear details of the information in the case, and recommendations on the proposed method of disclosure.

#### Solemn Cases

23.4.11 In solemn cases any information, including statements, should only be disclosed to the unrepresented accused upon receipt of Crown Counsel's Instructions.

23.4.12 In all solemn cases, regardless of whether the case is being recommended for Sheriff and Jury or High Court proceedings, the Case Preparer must give careful consideration, in close consultation with the Solemn Legal Manager, to the appropriate method of disclosure, frame recommendations and seek Crown Counsel's Instructions before disclosing anything.

23.4.13 In both Sheriff and Jury and High Court cases, the Case Preparer should highlight in the Disclosure Page that the accused is unrepresented and that Crown Counsel's instructions to disclose in a particular manner have been sought.

23.4.14 When determining whether to recommend disclosure by provision of information or by access to it, 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 information to be disclosed; and/or
- anywhere else in the case papers.

23.4.15 It is anticipated that in Solemn cases the vast majority of disclosure will be affected by access rather than provision of copies to the unrepresented accused. The following information should only **ever** be disclosed **by access** to the accused for both Summary and Solemn cases (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.

23.4.16 Before allowing the unrepresented access to information the Crown must be satisfied that the accused will act responsibly and lawfully in terms of the way in which that information is used. In order to do that the Crown must obtain signed confirmation that the accused has been made aware of his or her legal obligations under sections 162 and 163 of the Criminal Justice and Licensing (Scotland) Act 2010 in terms of the use of that information. A style receipt is available in the FOS templates on the intranet [DISCUNREPACCREC.DOC].

23.4.17 It is important to note that in order to prove that an accused has committed an offence under section 163, the Crown must establish that the accused **knowingly** used or disclosed the information in contravention of section 162. Therefore it is vital that, for corroboration purposes, two members of COPFS staff witness the accused being asked to sign, and signing, the document confirming that the accused has had access to the information and been made aware of their legal obligations as regards the use of the information.

23.4.18 If an accused refuses to sign confirmation of the above, then that fact and the two members of staff who can speak to it, should be recorded in the Disclosure Page.

23.4.19 It is important to note that refusal by the accused to sign the confirmation document is not justification for refusing access to the information.

### **23.5 Access to Information for the duration of the Trial**

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

23.5.2 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.

23.5.3 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.

### **23.6 Arrangements for Access to Information**

23.6.1 Arrangements for the accused to view “access only” information should be agreed at a local level between the police and the Procurator Fiscal and consideration given as to whether it would be more appropriate to have access to disclosure information made at a police office or prison. Further guidance is given at 23.14.8 – 23.14.10, which outlines practical arrangements for the provision of access to information.

23.6.2 Where information 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.

23.6.3 The accused should **always** be supervised when viewing information (see Section 23.8 below). In addition, the accused should **always** be required to sign an acknowledgement to confirm that they have been given access to view certain information. The acknowledgement should contain details of all of the information to which the accused has been given access as well as confirmation that they have been made aware of their legal obligations as regards the use of the information they have been given access to.

23.6.4 Where necessary, full guidance on interpreting, translating and transcription of information 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 Policy Division.

### **23.7 Consideration of Information prior to disclosure**

23.7.1 Where information is being disclosed to an unrepresented accused, be it by access or provision of copies of the actual information, 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.

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

### **23.8 Restrictions placed on accused during access to information**

23.8.1 Where information is only provided to the accused by access, this is usually done to further restrict the possibility of the accused misusing the information, e.g. publication on the internet. Accordingly, albeit the accused will have been made aware that improper use of the information constitutes a criminal offence, it is essential that the accused's access to such information is supervised and, where appropriate, restrictions are put in place.

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

#### **Provision of Copies**

23.8.3 Copies of any information to be provided to the accused should then be handed over to the accused in court if at all possible, along with 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 information constitutes a criminal offence.

23.8.4 In addition, the accused should **always** be required to sign an acknowledgement to confirm receipt of copies of the disclosure bundles, along with a covering notice. The acknowledgement should contain details of all of the information of which the accused has been provided with copies. Should the accused refuse to sign the acknowledgement, the information should not be provided to the accused. Instead, the accused should be invited to make arrangements to view the information 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 two members of COPFS staff witnessing the provision of the material to the accused. This will ensure that in the event of subsequent misuse of the information the fact the accused was aware of his or her obligations in terms of its use can be proved by corroborated evidence.

23.8.5 A template of the covering notice mentioned at paragraph 23.8.3 above can be accessed in the FOS templates [DISCNOTUNREP].

23.8.6 In summary cases where:

- (i) the accused has never appeared in person, and information is to be provided by **access** (including where disclosure will be made by partly providing copies of information to the accused, and partly by providing the accused with access to view certain information); 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.

23.8.7 In summary cases, where the accused has never appeared in person, and only copies of the disclosure information are to be provided to the accused, 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 information constitutes a criminal offence, should be sent to the accused along with a covering letter advising that the accused should attend at the Procurator Fiscal's Office to uplift the information. A style letter for this purpose has been created and can be accessed in the FOS templates [DISCCOPILET].

### **Provision by Access**

23.8.8 Where information is to be provided by access, 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].

23.8.9 Where the accused receives access to information at the Procurator Fiscal's Office, an acknowledgment must be signed by the accused confirming access to the information. This acknowledgment will specify the information being accessed and must also be signed by two members of COPFS staff both of whom witnessed the accused being advised of his or her legal obligations in terms of the use of the information, and one of whom supervised the access. A template of the acknowledgment to be signed when information is accessed has been created and is available in the FOS templates [DISCRCPTEVIDMAT]

23.8.10 Where the accused is to receive access to information 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 two members of police staff both of whom witnessed the accused being advised of his or her legal obligations in terms of the use of the information, and one being 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** information, e.g. redacted sensitive statements, the reporting officer **must** be sent copies of the redacted information to show the accused, otherwise there is a danger that the accused will be shown unredacted copies.

### **Provision of Copies and by Access**

23.8.11 Where the accused is to be provided with access to some information and copies of the remainder of the information, 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 information and (b) attend at the Procurator Fiscal's Office to uplift the relevant copies of the information. A style letter for this purpose has been created and can be accessed in the FOS templates [DISCACCESSCOPLET].

23.8.12 The accused will be required to sign an acknowledgment for receipt of the copies of the information 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 information constitutes a criminal offence [DISCACKCOP]. The acknowledgment should contain details of all of the information of which the accused has been provided with copies. A receipt should subsequently be signed by both the accused and the two members of COPFS staff witnessing the provision of the material to the accused. This will ensure that in the event of subsequent misuse of the information the fact the accused was aware of his or her obligations in terms of its use can be proved by corroborated evidence. Should the accused refuse to sign the acknowledgement, the information should not be provided to the accused. Instead, the accused should be invited to make arrangements to view the information under supervision. A template of the acknowledgment and receipt where copies are provided can be accessed in the FOS templates [DISCACKCOP]. As regards that material which is being disclosed by access, the accused should be sent an acknowledgment confirming access to information [DISCRCPTEVIDMAT]. Again a receipt detailing all of the information of which the accused has been provided access to must be signed by the accused and by two members of COPFS staff both of whom witnessed the accused being advised of his or her legal obligations in terms of the use of the information, and one of whom supervised the access.

## **23.9 Misuse of disclosed information**

23.9.1 Where the Crown obtains any information to suggest that the accused has committed an offence under sections 162 and 163 of the Criminal Justice and Licensing (Scotland) Act 2010 by **knowingly** using or disclosing the information other than:

- (i) for the purposes of the proper preparation and presentation of their case in the same proceedings in which the information was disclosed i.e. the original proceedings;
- (ii) with a view to the taking of an appeal in relation to the matter giving rise to the original proceedings;
- (iii) for the purposes of the proper preparation and presentation of their case in any such appeal

the Crown should instruct the police to carry out further enquiries and to submit a report regarding the alleged misuse.

23.9.2. It should be borne in mind that the offence of knowingly misusing disclosed information can be committed by persons other than just the accused in the original proceedings. Section 162(4) of the Criminal Justice and Licensing (Scotland) Act 2010 provides that it is also an offence for any person, to whom information has been disclosed by the accused in accordance with the proper purposes of disclosure listed at paragraph 23.9.1 above, to use or further disclose that information, or anything recorded in it, for any other purpose,



23.9.3 Once satisfied that there is sufficient evidence to establish that the accused, or any other person, has committed an offence by using or further disclosing the information, or anything recorded in it, for purposes other than those listed at paragraph 23.9.1 above, the Crown should consider whether it is in the public interest to commence proceedings.

23.9.4 Factors to consider will include, but not be restricted to, whether the misuse of the information was for the purpose of intimidating a witness into changing their evidence, or whether the misuse has caused or was intended to cause distress or alarm to witnesses in the proceedings.

23.9.5 If the Crown is satisfied that a criminal offence has been committed, there is sufficient admissible evidence to prove it and it is in the public interest to prosecute, then, subject to the procedures set down below proceedings should be raised.

23.9.6 There is a general presumption that the appropriate forum for the crime will be the same or higher forum than that in which the original proceedings have been raised e.g. if the substantive case is proceeding in the Sheriff Summary court, then proceedings arising from the misuse of the disclosed information 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 offence.

## **23.10 Procedure following misuse of disclosed information**

23.10.1 Where satisfied that there is sufficient evidence of misuse of disclosed information, a report should be submitted to the Director of Serious Casework for Crown Counsel's Instructions. This report should set out the following sections:

- i) Background Information – this should detail the following:
  - Details of when, where and how the disclosure was made;
  - Details of witnesses corroborating the “knowingly” aspect of the charge i.e. those members of staff who witnessed the accused signing the necessary acknowledgments and/or being made aware of the legal obligations and implications under sections 162 and 163 of the Criminal Justice and Licensing (Scotland) Act 2010.
- ii) Details of the Offence and supporting evidence:
  - The nature and the extent of the alleged offence
  - The evidence that supports that the alleged offence has been committed by the accused
- iii) Recommendations – this should set out recommendations regarding whether criminal proceedings should be raised. Where criminal proceedings are to be recommended, a draft charge should be included.

## **23.11 Limitations on the Cases in which an Accused can be Unrepresented**

23.11.1 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.

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

- (i) Rape (whether at common law or under s1(1) of the Sexual Offences (Scotland) Act 2009;
- (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) An offence under any of the following provisions of the Sexual Offences (Scotland) Act 2009-  
Sections 2,3,4,5,6,7,8,9,18,19,20,21,22,23,24,25,26,28,29,30,31,32,33,34,35,36,37,42,43,46
- (xi) Attempting to commit any of the offences set out above;
- (xii) 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.

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

23.11.4 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.

23.11.5 **Section 288E** of the 1995 Act, as inserted by section 6 of the Vulnerable Witnesses (Scotland) Act 2004, provides that an accused is prohibited from conducting his/her own defence at a preliminary hearing or trial in certain cases involving child witnesses under the age of 12. Except where the proceedings are commenced in the Justice of the Peace courts, an accused cannot represent him/herself where a child under the age of 12 on the date of the commencement of proceedings is to give evidence at or for the purposes of the trial and the accused is being prosecuted for any of the following offences:

- (i) Murder,
- (ii) Culpable homicide,
- (iii) Any offence which involves an assault on, or injury or threat of injury to, any person (including any offence involving neglect or ill-treatment of, or other cruelty to, a child) but it is not an offence to which section 288C applies,
- (iv) Abduction
- (v) Plagium.

23.11.6 **Section 288F** of the 1995 Act further provides that the court, on the application of the prosecutor or *ex proprio motu*, can make an order prohibiting an accused from conducting his/her own defence in person at the trial where it is in the best interests of a vulnerable witness. As with section 288E, this section does not apply where proceedings are commenced in the district/JP courts. Equally it does not apply where section 288C or 288E applies.

23.11.7 Where an order in terms of sections 288E or 288F is made, an accused is not entitled to represent themselves and, accordingly, should not be provided with copies of **any** witness statements in the case, nor should they be allowed to view any productions in the case. This applies whether the case is a summary case or a case proceeding on indictment.

## **23.12 Third Party Interests**

23.12.1 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.

23.12.2 Any such requests should be reported to the Director of Serious Casework for Crown Counsel's Instructions.