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 as provided in part 6 of the 2010 Act and in light of common law (**McLeod v HMA, McDonald**).

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 Information – Witness Statements

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 information from the investigating agency; or
(ii) not to disclose irrelevant information held by the Crown to the defence.

27.2.2 Notwithstanding the disclosure duty on the Crown to disclose all statements of all witnesses on the Crown and defence lists, the investigating agency must submit to the Crown *every* statement obtained during the course of an investigation. This means that any information which has not been submitted by the investigating agency, 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 information 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 if it falls within the parameters 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..

27.2.4 It is essential that the Crown continues to keep the relevancy of such information under review. While at the start of the precognition process, such information 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 information is not submitted by the police, it is vital that the prosecutor is aware of what information 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 Information – 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 this might arise where a conviction for indecent assault has been redacted but the defence position in an assault case is that the accused only punched the witness because the witness attempted to sexually assault the accused.

27.4 Schedules of Information in Solemn Proceedings

27.4.1 The schedules submitted by the investigating agency in solemn proceedings will list all the information obtained or generated by the investigating agency during the course of the investigation. Once completed by the Crown, it will also provide an up to date record of all the information disclosed – and not disclosed – to the defence.

27.4.2 It is essential that the schedules are kept under review throughout the proceedings to ensure that the decision not to disclose an item of information remains the appropriate decision.

27.4.3 Whenever new information comes to the attention of the Crown, from the investigating agency, the defence or any source, the precognoscer or trial depute must consider whether this new information has any impact on a previous assessment of a piece of information as being *immaterial*.

27.4.4 If information previously listed in the schedules becomes *material* information at a later stage in proceedings, then, subject to any public interest immunity considerations, the information should be disclosed to the defence. In addition, the schedule on which that item of information is listed must be updated to record the new disclosure action. If the schedule is a non-sensitive schedule, a copy of the updated schedule should also be provided to the defence.

27.4.5 Guidance on updating schedules is contained in Sections 37.11 and 37.12 of this Manual.