

Chapter 31: The Disclosure Page

31.1 Introduction

31.1.1 As was re-emphasised by the Privy Council in **McDonald [PC]** it is essential that the Crown is in a position to demonstrate to the Court that the necessary procedures in place to ensure that the Crown discharges its disclosure obligations have been followed.

31.1.2 The Disclosure Page, alongside the Reconciliation Inventories and the Disclosure Reconciliation Checklist, is designed to provide the trial Depute with a snapshot record in relation to compliance with these procedures.

31.1.3 The Disclosure Page sits between the f107 Observations Page and the Witness Non-Availability sheet in the precognition and should be completed in all solemn cases, including Sheriff and Jury reports.

31.1.4 The purpose of the disclosure page is to:

- (i) serve as an overall summary of all disclosure actions, e.g. to record that precognitions have been considered against the witness statements and any material additional/different information disclosed;
- (ii) Record decisions taken to withhold information and the reasons for the decision in order that it can be kept under review throughout the life of the case;
- (iii) Highlight any problems or potential problems encountered or envisaged by the Case Preparer/solemn legal manager;
- (iv) Seek and record Crown Counsel's instructions in regard to the disclosure of criminal history records of witnesses (and where there are none to note this); and
- (v) Provide a summary of the reconciliation process carried out as part of the scheduling process.

31.1.5 The Disclosure Page, like the f107 Observations Page, is a living document and must be regularly updated as disclosure decisions are taken, reconsidered and reviewed. Further guidance in relation to updating the disclosure page is set down in section 31.8 below.

31.1.6 It should be noted that it is not necessary to duplicate the information provided in the Disclosure Schedules which serve a different – but complementary – purpose:

- (i) Disclosure Schedules – provide (a) detailed lists of all information obtained or generated during the investigation that may be relevant, (b) a record of what information has been submitted to the PF for consideration and (c) a record of the disclosure action in respect of each individual item of information; and
- (ii) Disclosure Page – provides a record of disclosure decisions and a high level summary of all disclosure actions and is used to seek and record CCIs in relation to any disclosure issues at the stage the precognition is submitted to Crown Office.

31.2 Layout of the Disclosure Page

31.2.1 The disclosure page is separated into 6 sections:

- (i) Statements;
- (ii) Productions;
- (iii) Issues at Precognition;
- (iv) Criminal History Records;
- (v) General Issues/Observations; and
- (vi) Schedules Summary and Reconciliation Record

31.2.2 Each section should include certain information and further details on how to complete each section is detailed below. The examples given here are by no means prescriptive or exhaustive.

31.2.3 It is essential that the information provided under each section is clear and concise as the disclosure page must be an accurate form of reference throughout the life of the case.

31.3 Statements

31.3.1 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.

31.3.2 In terms of the policy set down in section 4.2 of this Manual, the defence should be provided with copies of all statements of all witnesses that are in Crown's possession. It should be noted that, as stated in paragraph 4.2.1, this is not limited to those witnesses that the Crown intends to call at trial.

Recording Disclosure of Statements

31.3.3 In High Court cases, it is not necessary to record in detail in the disclosure page that disclosure of statements has been carried out as this will be recorded in the associated schedules. However, as a matter of best practice in both High Court and Sheriff and Jury cases, a summary of key disclosure dates should be recorded, e.g. *initial disclosure of statements made on x date; further disclosure of statements of witnesses on section 67 notice made on x date.*

31.3.4 Where disclosure is carried out in a manner that is not the normal manner, this should also be recorded here, e.g. where due to the scale of the statements, they are disclosed to the defence on a CD, in which case a copy of the CD should also be retained for auditing purposes.

Recording Decisions to withhold statements completely or temporarily

31.3.5 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 exceptional circumstances, the Crown may withhold a statement completely.

31.3.6 Where a statement has been withheld in whole or in part, completely or meantime, that decision must be kept under review. New information and other developments in the case may require the question of disclosure to be revisited.

31.3.7 It is critical to this process, therefore, that a record is kept of all decisions not to disclose statements or to withhold them meantime. To allow the decision to be kept properly under review this must include the date the decision was made, by

whom and the reasons behind it. Where the material has been withheld temporarily, the record should clearly state the action upon which disclosure is dependent, e.g. precognition of the witness.

31.3.8 Where instructions from Crown Counsel are sought regarding non-disclosure, this should be recorded along with the date of submission of any related report. Where Crown Counsel has provided instructions, this should also be recorded. It is equally important to record receipt of instructions and effect on disclosure.

Recording any issues/problems with statements

31.3.9 Any issues or problems that have been identified in relation to witness statements should also be recorded here along with any action taken in respect of them. The most common examples would be where:

- (i) a statement has not yet been submitted by the investigating agency;
- (ii) material discrepancies have been identified between a handwritten statement and the typescript version;
- (iii) a typescript version of the statement was disclosed to the defence but the officer who took the statement subsequently identifies an error in the typescript version and, as a result, a further updated version of the statement is disclosed to the defence;
- (iv) The witness has subsequently stated that they made up the information contained within their statement.

Seeking Crown Counsel's instructions

31.3.10 Where CCIs are sought in relation to the disclosure of a statement, e.g. on whether to withhold a statement completely, then this should be recorded in this section of the disclosure page.

Redacted Statements

31.3.11 Where a statement is redacted (see chapter 29) and the information which is redacted does not simply relate to the personal details of a witness or third party, the case preparer will include a copy of the redacted statement in the precognition behind the relevant full statement. Having done this a note will be added to the Disclosure Page to reflect the redaction of the statement and the nature of the redaction. Below is an example of a completed statement section of the disclosure page:

Statements	Present Position
Initial disclosure of statements	Date disclosed
Statement of witness xxxx still to be received from the investigating agency	Date requested
Statement of witness xxxx not disclosed	Disclosure withheld, reason, date and person making decision
Statement of witness xxxx redacted	Redactions relate to non-relevant medical condition of the witness.
Statement of witness xxxx redacted	Redaction relate to non-relevant evidence of security of address of witness

31.4 Productions

31.4.1 The general practice to be adopted by the Crown in relation to the provision of productions to the accused's representatives is set out in chapters 6, 22 and 29 of this Manual.

31.4.2 Unless expressly stated otherwise, any references to productions should be interpreted as including both documentary and label productions.

31.4.3 In all solemn cases, the Case Preparer must decide, in close consultation with the relevant Solemn Legal Manager, what productions should be disclosed to the defence and whether it should be by provision of a copy or by access. A record of decisions taken should be kept in the Disclosure Page of the precognition and where it is not clear whether a production should be disclosed, a recommendation on disclosure should be sought from Crown Counsel.

31.4.4 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 certain documents as soon as practicable.

31.4.5 The Crown will order all necessary productions in accordance with the timescales set out at paragraph 22.10.3 in this Manual. The timescales in respect of forensic science reports are subject to different timescales agreed between COPFS and Police Scotland and SPA and these can be accessed in the National Forensic Science Protocol Accessing Forensic Science Services in Scotland.

Recording disclosure of productions

31.4.6 Where productions are disclosed to the defence, a summary in relation to this should be included in this section, e.g. all productions listed on the indictment disclosed on x date.

31.4.7 Where a decision is taken that disclosure of any production is to be done by providing a witness with access to it, rather than by providing them with a copy, then this must be clearly recorded here. If the production is of a type or in a format that is usually disclosed through provision of a copy, then the reason for providing access only should be listed here, e.g. DVD provided by access as relates to child witness interview – agent attended and viewed at office on x date.

Recording Decisions to withhold material productions completely or temporarily

31.4.8 Where a production is assessed as being both relevant and material then, in terms of the materiality test i.e. it 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, it should be disclosed to the defence. If, however, the production is sensitive (under section 122(4) of the Criminal Justice and Licensing (Scotland) Act 2010) and it would not be in the public interest to disclose it, then Crown Counsel's instructions must be obtained.

31.4.9 Where CCIs are sought this should be recorded in this section of the disclosure page along with the recommendation being made. Where Crown Counsel instruct that the material should be withheld, then this should be carefully recorded along with the date of the instructions and the reason for the non-disclosure.

31.4.10 Where the production is being withheld temporarily, the record should clearly state the action upon which disclosure is dependent.

Recording any issues/problems with productions

31.4.11 Any issues or problems that have been identified in relation to productions should also be recorded here along with any action taken in respect of them. The most common examples would be where:

- (i) a production has not yet been submitted by the investigating agency;
- (ii) the production is still being forensically/expertly examined and is not available for disclosure;
- (iii) a production is only available in a particular format that makes disclosure by access the only option, e.g. where on a hard drive;

Seeking Crown Counsel's instructions

31.4.12 Where CCIs are sought in relation to the disclosure of a production, e.g. on whether to withhold a production completely, then this should be recorded in this section of the disclosure page.

Example

31.4.13 Below is an example of a completed production section of the disclosure page:

Productions	Present Position
All productions disclosed	Date disclosed
Label No 5. (DVD)	Defence advised in writing and by phone on x date that video available for viewing – not yet attended to view

31.5 Issues at Precognition

31.5.1 Lord Rodger of Earlsferry confirmed in **McDonald [PC]** that the obligation to routinely disclose statements does not extend to precognitions but does extend to information contained within a precognition. In **Harvey v HMA** (2008 HCJAC 46) the Appeal Court reaffirmed that the confidential status of a precognition and the fact that it did not fall to be disclosed. However any new or additional material information elicited at precognition which may demonstrate material inconsistencies in a witness's evidence, or otherwise fall 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 will be disclosable. Where such information is found, it must be disclosed to the defence (usually in the form of a letter containing an extract of this material information).

31.5.2 Once the case preparer has obtained a precognition from a witness, consideration must be given as to whether or not there is any information in the precognition which should be disclosed. This should be done by comparing the precognition with all witness statements obtained from the witness.

31.5.3 Material discrepancies between the contents of an investigating agency statement and the witness' position at precognition may bear on the witness' credibility and/or reliability and would fall to be disclosed. Similarly, any material additional information 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 must be disclosed.

31.5.4 Where information is disclosed to the defence, a record of this having been done should be made in this section of the precognition, referring to the letter sent to the defence advising them of the material information and the date the letter was issued,

31.5.5 Where there are no issues, then that fact should also be recorded in this section, in order that the Crown has a record of the fact that the precognition was carefully considered to determine whether any material information required to be disclosed. If a new line, or a change in the line of defence is intimated within a defence statement, the Crown should consider whether there is now information contained within the precognition which was not previously considered disclosable, which should now be disclosed in light of the new line of defence. Full guidance in relation to defence statements and the associated disclosure obligations can be found in Chapter 42 of this Manual.

Example

31.5.6 Below is an example of a completed issues section of the disclosure page:

<i>Issues at Precognition</i>	<i>Present Position</i>
Witnesses 1-4 precognosed	
Wit 4 – material variation from investigating agency statement – CCIs instructions sought re disclosure	Date report submitted to CC – no instructions issued yet
Witness 2 – material variation from investigating agency statement	Details of variation sent to defence in letter dated X
No issues arising from precognitions of witnesses 1 & 3.	

31.6 Criminal History Records

31.6.1 The Crown must obtain criminal history records for all witnesses that the Crown intends to cite. This applies to all cases and to all witnesses listed on the indictment whether they are civilian, police or professional/ expert/ official witnesses. Thereafter, the criminal history records must be considered to ascertain whether there are any convictions, pending cases, children's hearing appearances and/or direct measures (including fixed penalties issued by the police or other Specialist Reporting Agency) contained within the record which meet the materiality test i.e. 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, and therefore fall to be disclosed. Guidance on the redaction of criminal history records is contained in Chapter 19 of this Manual.

31.6.2 In all solemn cases, criminal history record information should not be disclosed until the stage the indictment is served. Crown Counsel's instructions must be sought using this section of the disclosure page.

High Court Cases

31.6.3 The criminal history records should be requested at the same time as witness statements are requested in order that they can properly be considered during the precognition process.

31.6.4 If the witness is precognosed, then in terms of paragraph 10.7.2 of this manual, the case preparer must advise the witness that details of their criminal history record must be disclosed. Additionally, they must canvass with the witness if there are any grounds for non-disclosure, as set out in Chapter 17 of this Manual

31.6.5 Where the witness does specify grounds for non-disclosure of a part of their record, this should be clearly recorded in this section along with details of the reasons for non-disclosure.

31.6.6 When preparing the precognition, the Case Preparer should include a copy of the criminal history record behind the precognition and statement of the witness.

31.6.7 Thereafter, the Case Preparer must summarise the witnesses' criminal history record and make a recommendation as to which records within the CHR are immaterial and sensitive and seek Crown Counsel's instructions on whether they should be redacted prior to disclosure of the record.

31.6.8 Crown Counsel must take the final decision about what information requires to be redacted. Their instructions will be given at the same time as instructions on proceedings are given. If instructions have been sought but not provided, then a further request should be submitted via the Deputy Head of the High Court Unit.

31.6.9 Once Crown Counsel's instructions have been received, the disclosure page should be updated to record the instructions. Thereafter, they should be further updated to record when any records are disclosed.

31.6.10 Where a witness has no CHR, then that fact should also be recorded in this section, in order that the Crown has a record of this fact.

Sheriff and Jury Cases

31.6.11 The criminal history records should be requested at the same time as witness statements are requested in order that they can properly be considered during the precognition process.

31.6.12 If the witness is precognosed, then in terms of paragraph 10.7.2 of this manual, the Case Preparer must advise the witness that details of their criminal history record must be disclosed. Additionally, they must canvass with the witness if there are any grounds for non-disclosure, as set out in Chapter 17 of this Manual

31.6.13 Where the witness does specify grounds for non-disclosure of a part of their record, this should be clearly recorded in this section along with details of the reasons for non-disclosure.

31.6.14 When preparing the precognition, the Case Preparer should include a copy of the criminal history record behind the precognition and statement of the witness.

31.6.15 Thereafter, the Case Preparer must liaise with the Solemn Legal Manager to determine whether any of the records contain immaterial and sensitive information and then the actions detailed below should be taken.

31.6.16 If the witness has a record that also contains immaterial and sensitive convictions etc, then this should be recorded in this section of the disclosure page at the stage the precognition is submitted to Crown Office.

31.6.17 Thereafter, it should be updated to record, at the stage the indictment is served, that the record has been disclosed;

- (i) If the witness has a record that also contains immaterial and sensitive convictions etc, this should be recorded, detailing which are immaterial and sensitive and therefore not being disclosed at that stage.
- (ii) If the witness has a record that contains **material** criminal history information that you wish to withhold, then Crown Counsel's instructions should be sought, under the procedures detailed in section 25.8 of this Manual, to allow the material parts of the record to be withheld. This should be recorded in this section and should be updated once CCIs are received.

31.6.18 Where a witness has no CHR, then that fact should also be recorded in this section, in order that the Crown has a record of this fact.

Example

31.6.19 Below is an example of a completed criminal history record section of the disclosure page:

CHRs	Present Position
<p>Wit 2 has CHR containing 2 pending RTA offences; 3 convictions for dishonesty offences; and 1 conviction for assault.</p> <p>Recommend disclosure of dishonesty convictions and assault conviction on basis of materiality.</p> <p>Recommend that pending cases are also disclosed on basis that although they are immaterial they are not sensitive, having regard to the material convictions being disclosed.</p>	<p>Crown Counsels instructions are now sought on these recommendations</p>
<p>Wit 1 has 1 conviction for indecent assault – 20 years old - although technically material on basis that relates to assault, it is historical and relates to under age sex – no obvious link to this defence of self-defence. Wit owns a shop near a school and is worried his business might suffer if knowledge of conviction gets out.</p> <p>Recommend non- disclosure</p>	<p>A report has been prepared by the Federation Head, Federation functional lead (PF/Asst PF High Court/ Sheriff and Jury) and submitted for Crown Counsels instructions.</p>
<p>All remaining witnesses have no CHRs</p>	<p>No action required</p>

31.7 General Issues/Observations

31.7.1 This section is used to detail any other disclosure issues that do not properly fall into any of the sections above[

31.7.2 An obvious example would be where the defence have lodged a defence statement (Criminal Justice and Licensing (Scotland) Act 2010 sections 124-126)

31.7.3 Where the defence has lodged a defence statement, in respect of solemn or summary proceedings (Criminal Justice and Liscensing (Scotland) Act 204, and considers that the prosecutor has failed, in their response to that statement, to disclose an item of information which is disclosable in terms of the materiality test, namely information which:-

- Would materially weaken or undermine the evidence that is likely to be led by the prosecutor in the proceedings against the accused,
- Would materially strengthen the accused's case, or
- Is likely to form part of the evidence to be led by the prosecutor

the accused may apply (under the Criminal Justice and Licensing (Scotland) Act 2010 section 128(2)) to the Court for a ruling on whether the information in question falls within the ambit of the test. Guidance on applications for such rulings can be found in Chapter 39 of this Manual.

31.7.4 Where such an application is lodged, this should be recorded in this section of the disclosure page and the result of the application should be recorded once known.

Example

31.7.5 Below is an example of a completed general issues/observation section of the disclosure page:

General Issues/Observations	Present Position
Application for Court Ruling re social work records of complainer lodged	Ruling that no part of the social work records is disclosable on x date
2nd Application for Court Ruling re medical records of Wit 2 (corroborating eye-witness) sought –defence looking to attack reliability of witness on basis of medical history	Hearing fixed for x date

31.8 Schedules Summary and Reconciliation Record

31.8.1 This section consists of a table, divided into 3 sub-sections;

- i) Schedules Summary
- ii) Reconciliation Process Checklist
- iii) Disclosure of Non-Sensitive Schedules to the Defence

31.8.2 The Schedules Summary sub-section will provide a summary of all non-sensitive and sensitive schedules submitted by the police. This summary consists of providing:

- i) The number of non-sensitive schedules and the date each of these has been submitted;
- ii) The number of sensitive schedules and the date each of these has been submitted; and
- iii) The date of the most recent undertaking by the Reviewing Officer that all information that may be relevant has been provided (revealed) to the Crown.

31.8.3 Below is an example of a completed part of the schedules summary and reconciliation table in relation to this subsection:

SCHEDULES SUMMARY				
No. of Non-sensitive schedules submitted	3	Date(s) submitted	1.	18 March 2009
			2.	6 June 2009
			3.	5 January 2009

No. of Sensitive schedules submitted	1	Date submitted	18 March 2009
Date of most recent undertaking from RVO that all relevant information has been submitted			5 January 2009

31.8.4 The Reconciliation Process Checklist sub-section will provide confirmation that all information submitted by the investigating agency, as listed in the schedule(s) has been received and that all information received by the investigating agency has been listed in one of the schedules submitted.

31.8.5 Below is an example of a completed part of the schedules summary and reconciliation table in relation to this subsection:

RECONCILIATION PROCESS CHECKLIST		✓ (to confirm completed)
CONFIRM	All information submitted by investigating agency (<i>as listed in the schedule(s) referred to above</i>) has been received	✓
CONFIRM	All information received by investigating agency is listed in one of the schedules referred to above	✓

31.8.6 The Disclosure of Non-Sensitive information to the defence sub-section will provide confirmation of the date that each non-sensitive schedule in the case has been disclosed to the defence, along with details of the date that any updated schedule has been disclosed.

31.8.7 Below is an example of a completed part of the schedules summary and reconciliation table in relation to this subsection:

DISCLOSURE OF NON-SENSITIVE SCHEDULES TO DEFENCE	
Schedule Reference	Date disclosed to the Defence
GR09001023 KCID NS 1	27 March 2009 Updated versions disclosed 19 April 2009 & 27 May 2009
GR09001023 KCID NS 2	13 June 2009
GR09001023 KCID NS 3	14 January 2009

31.9 Updating the Disclosure Page

31.9.1 The disclosure page must be completed in all solemn cases and must be updated with all changes that are relevant to disclosure. It is imperative that this document is available within the case papers to ensure that there is an accurate record of the position which can be presented to the court if a point is raised by the defence.

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

31.9.3 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 disclosure

page included with the precognition (e.g. further statements are taken by the investigating agency, submitted by the investigating agency and/or disclosed to the defence), then the Case Preparer must update the electronic version of the disclosure page stored in SOS-R.

31.9.4 In addition, in High Court cases an updated hard copy should be sent to Crown Office (or other appropriate location depending on the stage of the case, e.g. where the papers have been transmitted to another office in advance of the preliminary hearing or trial taking place there) for inclusion in the Advocate Depute's papers. In Sheriff and Jury papers, an updated hard copy should be slotted into the precognition.

31.9.5 It is the responsibility of the Case Preparer and the Solemn Legal Manager in supervision of the Case Preparer to ensure that the disclosure page is updated in SOS-R and that an up-to-date hard copy version is included with the Advocate/ trial Depute's papers.

31.10 Disclosure Court Minute Sheet – Solemn Proceedings

31.10.1 In terms of sections 11.6 and 11.7 of this Manual, in any solemn proceedings, any disclosure of information in court (either by provision of copies or access) must be recorded on the Disclosure Court Minute Sheet.

31.10.2 After court, this Disclosure Court Minute Sheet must be returned to either High Court Registry or the relevant solemn administrative staff, who should then transfer the information contained within this minute sheet into the electronic copy of the Disclosure Page. This updated Disclosure Page should then be printed off and inserted into the precognition.