Chapter 39: Debates, Applications for Court Rulings, Compatibility Issues and Petitions for Recovery

39.1 General Principles

39.1.1 Disclosure of information to the defence is a crucial and integral component of the criminal justice system in Scotland. A failure, by the Crown, to disclose information which falls within the materiality test, i.e. 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 may prejudice the fairness of the trial and may result in a breach of Article 6 of the Convention, as set down in section 2.5 of this Manual.

39.1.2 During the course of proceedings, the defence may challenge actions and decisions taken by the Crown in relation to disclosure through:

i) Applications for Court Rulings
ii) Common law points raised at preliminary hearing/ first diet/ intermediate diet;
iii) Compatibility Issues
iv) Petition for Commission and Diligence / Recovery of Documents

39.1.3 Any debates, Compatibility Issues or applications for Court rulings on disclosure issues **must** be handled and conducted by experienced legal members of staff who have received the mandatory disclosure training.

39.1.4.1 Further, debates and hearings should be marked for advance notice preparation in order to ensure that the depute conducting the debate or hearing is properly prepared for it, and the appropriate legal manager should be informed of it.

39.2 Applications for Court Rulings

39.2.1 Where an accused has lodged a defence statement, in respect of solemn (Criminal Procedure (Scotland) Act 1995 section 70A) or summary proceedings (Criminal Justice and Licensing (Scotland) Act 2010 section 125), 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 section 128(2) of the Criminal Justice and Licensing (Scotland) Act 2010) to the Court for a ruling on whether the information in question falls within the realms of the test.

39.2.2 The application should be assigned to the Justice of the Peace, Sheriff or Judge who is presiding, or is to preside, at the accused's trial unless it is impracticable to do so.

39.2.3 Such an application must be made in writing (On Form 56.3 per Act of Adjournal (Criminal Procedure Rules Amendment)(Miscellaneous) 2011) and must set out:

- Where the accused is charged with more than one offence, the charge or charges to which the application applies
- A description of the information in question
- The grounds upon which the accused claims the information is disclosable

39.2.4 No less than 48 hours before the application is lodged the accused must intimate a copy to the prosecutor (as per Act of Adjournal (Criminal Procedure Rules Amendment)(Miscellaneous) 2001 56.3).

39.3 The Hearing

39.3.1 The Court, on receipt of an application, must appoint a hearing (Under section 128(4) of the Criminal Justice and Licensing (Scotland) Act 2010), at which both the prosecutor and the accused must be given an opportunity to be heard. If the Court considers that the application does not specify the details outlined above or otherwise disclose any reasonable grounds for considering that the information in question meets the materiality test the Court may dispose of the application without appointing a hearing.

39.3.2 At the hearing the prosecutor will be called upon to explain the reasoning behind the initial decision not to disclose the information in question, i.e. why COPFS consider that the information in question does not meet the materiality test. It is therefore crucial that all decisions in relation to disclosure and the explanation for them are meticulously recorded.

39.3.3 In solemn cases all such decisions and explanations should be recorded on the Disclosure Page of the precognition. In summary cases they should be clearly noted on the Minute sheet within the papers.

39.4 Court Determination of the Original Application

39.4.1 The Court must in determination of the application:-

- Make a ruling on whether the information in question, or any part of it, is disclosable, i.e. does it meet the materiality test, **and**
- Where the accused is charged with more than one offence, specify the charge or charges to which the ruling relates

39.5 Application to Review the Court's Ruling

39.5.1 Where the court has made a determination that information is not disclosable i.e. does not meet the materiality test and the accused:

(i) becomes aware of secondary information which was not available to the Court at the time of making the ruling; and

(ii) considers that if the Court had been aware of this secondary information it would have made a ruling that the information in question did meet the materiality test and was therefore disclosable

the accused may apply to the Court which made the ruling for a review. However this secondary information must have come to the attention of the accused in the period between the ruling being made and the conclusion of the proceedings against the accused.

39.5.2 Proceedings are taken to be concluded if –

(i) a plea of guilty is recorded against the accused,

(ii) the accused is acquitted,

(iii) the proceedings against the accused are deserted simpliciter,

(iv) the accused is convicted and does not appeal against the conviction before the expiry of the time allowed for such an appeal,

(v) the accused is convicted and appeals against the conviction before the expiry of the time allowed for such an appeal

(vi) the proceedings are deserted pro loco et tempore for any reason and no further trial diet is appointed, or

(vii) the complaint falls or is for any other reason not brought to trial, the diet is not continued, adjourned or postponed and no further proceedings are in contemplation.

39.5.3 The application for a review must be made in writing (on Form 56.4 per Act of Adjournal (Criminal Procedure Rules Amendment)(Miscellaneous) 2011)) and set out:-

- Where the accused is charged with more than one offence, the charge or charges to which the application applies
- A description of the information in question and the secondary information
- The grounds upon which the accused claims the information is disclosable.

and should be assigned to the Justice of the Peace, Sheriff or Judge who dealt with the original application for a ruling unless it is impracticable to do so.

39.6 The Review Hearing

39.6.1 The Court on receiving an application must appoint a hearing (under section 129(4) of the Criminal Justice and Licensing (Scotland) Act 2010) at which both the prosecutor and the accused must be given an opportunity to be heard, unless the application does not specify the details outlined above or otherwise disclose any reasonable grounds for considering that the information in question meets the materiality test.

39.6.2 At the review hearing the prosecutor may be called upon to explain the reasoning behind the initial decision not to disclose the information in question, i.e. why COPFS consider that the information in question does not meet the materiality test. It is therefore crucial that all disclosure decisions and the explanation for them are meticulously recorded.

39.7 Court Determination of an Application for Review

39.7.1 On determining the application for review the court may:

- affirm the original ruling or
- recall that ruling and make a fresh ruling that the information in question, or any part of it, is disclosable i.e. meets the materiality test and specify the charge or charges to which this ruling relates.

39.7.2 It is important to note that a Court ruling that information is disclosable, is not per se a ruling to disclose the information. In circumstances where the Crown continues to be of the view that it is not in the public interest to disclose the information (even in a redacted form) a report should be submitted urgently to the Director of Serious Casework for Crown Counsel's Instructions as to whether or not the case at hand merits risking the Crown being held to have breached it's disclosure obligations. It should be remembered that breach of the Crown's disclosure obligations will not always result in an unfair trial in terms of Article 6 ECHR. This approach should only be followed in exceptional circumstances and under the authority of the Director of Serious Casework and Crown Counsel.

39.8 Appeals against the Court's Ruling on Disclosure

39.8.1 Within a period of seven days, beginning with the day on which a ruling is made, the prosecutor or the accused may appeal against the ruling to the High Court of Justiciary.

39.8.2 When marking such an appeal, or upon receipt of intimation that an accused has marked such an appeal, the matter must be referred timeously to the Appeals Unit within Crown Office (On Form 56.5 per Act of Adjournal (Criminal Procedure Rules Amendment)(Miscellaneous) 2011) for the matter to be progressed and the case allocated to an Advocate Depute

39.8.3 Where an appeal is brought, either the High Court or the Court of First Instance may:-

- Postpone any trial diet that has been appointed for such period as it thinks appropriate

- Adjourn, or further adjourn, any hearing for such period as it thinks appropriate

- Direct that any such period of postponement or adjournment (or any part of such period) does not count towards any time limits applicable to the case

39.8.4 In disposing of an appeal against a Court ruling on disclosure, the High Court may:-

- affirm the original ruling, or
- remit the case back to the Court of first instance with such directions as felt appropriate

39.9 Common Law Points on Disclosure Issues: Solemn Proceedings

39.9.1 As stated in section 71 of the 1995 Act, the purpose of a first diet is to ascertain the state of preparation of both the prosecutor and the defence. In addition, the court will consider, under subsection 2, any preliminary plea or preliminary issue of which the parties have given notice, not less than 2 clear days before the first diet, to the court and to other parties.

39.9.2 Section 72 of the 1995 Act provides that the duty of the preliminary hearing in High Court cases is to ascertain parties' readiness for trial and to deal with any preliminary issues of which the parties have given notice, not less than 7 clear days before the preliminary hearing, to the court and to the other parties.

39.9.3 It is not uncommon, at these diets, for issues of disclosure to arise. In particular, a defence agent may argue that they are not prepared for trial on the basis that the Crown has not complied with its disclosure obligations. Also, the defence may choose to make a common law plea seeking disclosure of certain information setting out that non-disclosure of the information amounts to oppression, e.g. **HMA v G.B** (2006 S.C.C.R. 692).

39.9.4 Where the defence do raise such a common law plea in relation to a disclosure issue, the preliminary hearing/ first diet depute should first ascertain whether the issue has already been the subject of a Court ruling on whether or not the information sought is disclosable, and if so obtain the Minutes of the hearing.

39.9.5 If the Court has previously ruled that the information is disclosable, the court depute must ascertain whether it is the Crown's position that this information has now been disclosed, through reference to the Disclosure Page and the schedules of relevant information. If the Crown accepts that the information has not yet been disclosed, and that it should have been, or is otherwise unable to satisfy the Court that it has been, then the Crown should seek a continued preliminary hearing/ first diet in order to check the position and disclose as soon as possible, if appropriate, after the hearing.

39.9.6 It is important to remember that a Court ruling that information is disclosable, is not per se a ruling to disclose the information. In circumstances where the Crown continues to be of the view that it is not in the public interest to disclose the information (even in a redacted form) a report should be submitted to the Director of Serious Casework for Crown Counsel's Instructions as to whether or not the case in hand risks the Crown being held to have breached it's disclosure obligations. Breach of the Crown's disclosure obligations will not always result in an unfair trial in terms of Article 6 ECHR and therefore it does not always follow that a Court ruling that information is disclosable will be followed by disclosure of that information.

39.9.7 Accordingly, it is essential that the Court depute is fully prepared and is aware of all previous debates, hearings, decisions, including the reasoning for all such decisions, and any Crown Counsel's Instructions already obtained and is in a position to confirm what information has been disclosed to the defence and at what stage in the proceedings that disclosure took place. It is therefore imperative that, in

solemn proceedings, the Disclosure Page is kept fully up-to-date as regards all disclosure decisions and instructions.

39.9.8 If the common law plea in bar of trial alleges the non-disclosure of information which in the view of the defence is material (but which the Crown, and perhaps the Court, has previously assessed as being *immaterial*), then the court depute should resist being put in a position of arguing the merits of the non-disclosure decision at the preliminary hearing/ first diet where it has not previously been intimated to the Crown. If the court orders the disclosure of the information following a common law plea without hearing the parties in argument, the Crown should seek leave to appeal that decision as set down below.

39.9.9 If the alleged failure of the Crown relates to the wider criteria of non-disclosure of information that might have a legitimate bearing on the issues at trial, the defence should be invited, in the first instance, to submit an application to the court for a ruling on whether the information is disclosable. The procedure for applications for Court Rulings on Disclosure is outlined fully at paragraphs 39.2 – 39.8 above.

39.10 Common Law Points on Disclosure Issues: Summary Proceedings

39.10.1 As stated in section 148 of the 1995 Act, the purpose of an intermediate diet is to ascertain the state of preparation of the prosecutor and of the accused for the trial. Again, it is not unusual for issues of disclosure to arise at the intermediate (or even the trial) diet, specifically where defence agents argues that they are unprepared for trial due to a failure on the part of the Crown in relation to disclosure.

39.10.2 In such circumstances, the role of the court depute is the same as if the issue were raised in a first diet or preliminary hearing. In the first instance, the depute should confirm the nature of alleged failing. If it relates to a core disclosure requirement as referred to in paragraph 39.2.4 above, then the depute should address the Court on this and, if necessary, seek a continued intermediate diet in order to effect disclosure. Again, therefore, it is essential that the Court depute is fully prepared and is aware of what information has been disclosed to the defence, at what stage in the proceedings that information was disclosed and the reasoning behind any decisions not to disclose certain information. It is therefore vital that in summary proceedings the Minute Sheets contain full details and reasoning of disclosure issues and decisions taken in respect of those issues. 39.10.3 If the alleged failure of the Crown relates to an item of information that the Crown has considered and deemed to be *immaterial*, the matter should not be argued at the intermediate diet. Instead the defence should be invited, in the first instance, to submit an application for a Court Ruling. The procedure for applications for Court Rulings on Disclosure is outlined fully at paragraphs 39.2 – 39.8 above.

39.10.3 The court depute should resist being put in a position of arguing the merits of the non-disclosure decision at the intermediate diet. If the court orders the disclosure of the information, the Crown should consider advocating that decision, by reporting the matter to the Appeals Unit.

39.11 Common Law Points: Appealing the Decision of the Court

39.11.1 In solemn proceedings, under section 74 of the 1995 Act, the Crown can appeal against a decision in regard to a preliminary plea (defined in section 79(2)(a)(iii) as including a plea in bar of trial) taken at the first diet or preliminary hearing. Such an appeal must be taken within 2 days of the court's decision. Leave

to appeal must be sought at the preliminary hearing or first diet. If leave is refused (or if the 2 day time limit has been missed), the matter should still be reported to the Appeals Unit for consideration of a Crown Bill of Advocation. Section 75 of the 1995 Act provides that where the last day of the 2 day time limit falls on a Saturday, Sunday or court holiday, then the period will extend to and include the next day which is not a Saturday, Sunday or court holiday.

39.11.2 In summary proceedings, the Crown can appeal by Bill of Advocation against a decision in regard to a common law issue taken at the intermediate diet. Leave to appeal is not required, nor is there a time limit for lodging the Bill of Advocation. However, the matter should be reported to the Appeals Unit for consideration of a Bill of Advocation within 7 days.

39.11.3 Accordingly, it is essential that a report is submitted to the Appeals Unit immediately following the decision. This should be done initially by telephone and then followed up by a report. The report should be prepared by the depute who appeared in court. If, however, this is not possible, reports should not be delayed. The report should provide the following information:

- Identify relevant court depute;
- Provide a brief summary of the offence(s);
- Provide a procedural history of the case;
- Provide a note of the disclosure history of the case;
- Note the salient points of the defence and Crown arguments presented to the court;
- Note of the Court's determination; and
- Submissions on why the appeal should be supported
- Certified copies of the court minutes form the lower court

39.11.4 Pending the determination of such an appeal, the information should not be disclosed to the defence. If, however, the Appeals Unit determine that an appeal is not appropriate, then the information should be disclosed as soon as reasonably practicable after this decision has been intimated. The disclosure page and schedules or the case papers should then be updated accordingly.

39.12 Recovery of Documents: Overview

39.12.1 As noted above the appropriate method by which the defence can seek disclosure of information that the Crown considers *immaterial* is by application for a Court Ruling on the matter – as described at paragraphs 39.2 to 39.8 above.

39.12.2 However, as recognised by the Appeal Court in **Al Megrahi v HMA** ([2009] HCJAC 1; Appeal Number XC524/07), the test to be applied by the court in petitions for recovery of documents is a wider test than the one that is applied when determining whether information falls to be disclosed by virtue of the Crown's disclosure duty in terms of article 6 of the Convention (where the criteria is whether the information would meet the materiality test[j] (**McDonald [PC]**):

> *"There was a distinction between the class of documents which are "disclosable" (in the sense of items which either materially weaken the Crown case or materially strengthen the appellant's case) and the potentially wider class of documents which are likely to be of material assistance to the proper preparation and presentation of the appeal. "*

Where, therefore, the defence are seeking information that does not meet the materiality test, they should make an application for recovery rather than an application for a Court Ruling under section 128(2) of the Criminal Justice and Licensing (Scotland) Act 2010.

39.13 Recovery of Documents: Solemn Proceedings

High Court Proceedings

39.13.1 Where the case is proceeding in the High Court and the defence seek to recover documents, this should be done through the common law remedy of commission and diligence for the recovery of documents.

39.13.2 If the defence application is refused, the defence may in certain circumstances seek to petition the Nobile Officium to effectively appeal the decision. **McLeod v HMA** 1998 SCCR 77 provides authority for the proposition that the appropriate method of appealing petitions for recovery in High Court proceedings is the common law method of Petitioning the Nobile Officium. Leave to appeal is not required. If, however, the petition was heard as a preliminary issue in terms of section 79(2)(b)(vi) of the 1995 Act, then the decision can be appealed by virtue of section 74(1), in which case the defence must seek leave to appeal and the appeal must be taken within 2 days of the decision of the court. Section 75 of the 1995 Act provides that where the last day of the 2 day time limit falls on a Saturday, Sunday or court holiday, then the period will extend to and include the next day which is not a Saturday, Sunday or court holiday.

39.13.3 If the defence application is granted or partially granted, the Crown may also in certain circumstances seek to petition the Nobile Officium to appeal the decision. Again, leave to appeal is not required. Again, if the petition was heard as a preliminary issue in terms of section 79(2)(b)(vi) of the 1995 Act, the decision can be appealed by the Crown by virtue of section 74(1). Leave to appeal will be required and the appeal must be taken within 2 days of the decision of the court. Accordingly, where leave to appeal is sought and granted, a report should be immediately submitted to the Appeals Unit for consideration. Section 75 of the 1995 Act provides that where the last day of the 2 day time limit falls on a Saturday, Sunday or court holiday, then the period will extend to and include the next day which is not a Saturday, Sunday or court holiday.

Sheriff and Jury Proceedings

39.13.4 In Sheriff and Jury proceedings, the defence can apply to the Sheriff Court for an order granting commission and diligence or an order for the recovery of documents by virtue of section 301A of the 1995 Act. Under subsection (4), this can only be done after the indictment has been served on the accused or the accused has been cited under section 66(4)(b) of the 1995 Act.

39.13.5 Under section 301A(5), any decision made by the Sheriff can be appealed to the High Court, who can uphold, vary or quash the decision of the Sheriff as appropriate. No leave to appeal is required (**Harvey v HMA** [2008] H.C.J.A.C. 46) however the appeal must be lodged within 2 days in terms of Rule 27A.1 of the Act of Adjournal (Criminal Procedure Rules) 1996. Under the rule, where the last day of this period falls on a Saturday, Sunday or court holiday, then the period is extended to and will include the next day which is not a Saturday, Sunday or a court holiday.

39.13.6 Where an application for an order granting commission and diligence or an order for recovery of documents is lodged, care must be taken to ensure that the indictment remains live during that period and, if necessary, adjournments of the first diet should be sought to await the outcome of the petition along with any necessary extensions of the time bar.

39.14 Recovery of Documents: Summary Proceedings

39.14.1 In summary proceedings, the defence can apply to the Sheriff Court for an order granting commission and diligence or an order for the recovery of documents by virtue of section 301A of the 1995 Act. Under subsection (4), this can only be done after the accused has answered the complaint.

39.14.2 Under section 301A(5), any decision made by the Sheriff can be appealed to the High Court, who can uphold, vary or quash the decision of the Sheriff as appropriate. No leave to appeal is required (**Harvey v HMA**) however the appeal must be lodged within 2 days in terms of Rule 27A.1 of the Act of Adjournal (Criminal Procedure Rules) 1996. Under the rule, where the last day of this period falls on a Saturday, Sunday or court holiday, then the period is extended to and will include the next day which is not a Saturday, Sunday or a court holiday.

39.14.3 Where an application for an order granting commission and diligence or an order for recovery of documents is lodged, care must be taken to ensure that the complaint remains live during that period and, if necessary, adjournments of the intermediate (or trial) diet should be sought to await the outcome of the petition.

39.15 Recovery of Documents: Preparation and Appearance in Court

39.15.1 Where a petition for an order granting commission and diligence or an order for recovery is made, it should not necessarily be assumed that it must proceed to a court hearing. The information contained within the application should first be considered to ascertain whether it provides sufficient information to satisfy the Crown that the information that the defence is seeking to recover is *material* and therefore disclosable.

<u>Solemn Proceedings</u>

39.15.2 On receipt of a petition for an order granting commission and diligence or an order for recovery of documents, the precognoscer, in close consultation with the appropriate solemn legal manager, should first consider the terms of the application, which will specify the reasons why the defence consider the information to have a legitimate bearing on the case to determine whether the information being sought may materially weaken the prosecution case or materially strengthen the defence case. If the precognoscer is satisfied that the information does meet the *materiality* test, then it should be disclosed to the defence without proceeding to a court hearing.

39.15.3 Where it has been determined that the information being sought is not *material* and therefore not disclosable, the petition should proceed to adjudication by the Court.

39.15.4 Where a petition for an order granting commission and diligence or an order for recovery of documents relates to a number of different pieces of information, then each item of information should be considered separately and disclosed if appropriate. Where some of the items are still considered not to meet the *materiality* test, then the petition should continue in respect of those items.

39.15.5 In High Court cases, the petition will be argued by an Advocate Depute.

39.15.6 In Sheriff and Jury proceedings, the debate should be allocated to an experienced depute at the earliest opportunity in order that the circumstances of the case and the disclosure position generally can be considered carefully. As part of the preparation for the debate, the depute should consult with the case preparer and the appropriate solemn legal manager to determine whether, based on the information provided by the defence in the petition, the information being sought is *material* and therefore disclosable. If the depute is satisfied that the information does meet the *materiality* test then it should be disclosed to the defence without proceeding to a court hearing.

39.15.7 In cases of particular difficulty or sensitivity, a report should be submitted to the Director of Serious Casework for Crown Counsel's instructions on whether to disclose the information or to proceed to a court hearing for adjudication on the disclosability of the information.

39.15.8 It is also essential that the depute is fully aware of the Crown's disclosure policy and the legal obligations in respect of disclosure as the Court may ask the Crown to address them on either or both of these issues.

39.15.9 When preparing the debate, the depute should also carefully consider, in close consultation with the appropriate legal manager whether an appeal would be appropriate if the petition is granted or partially granted by the Court.

39.15.10 If, after arguments, the petition is granted or partially granted, the depute should arrange for the relevant information to be disclosed to the defence as soon as reasonably practicable, unless the decision is to be appealed. The Disclosure Page and the appropriate schedule listing the information should both be updated accordingly. If an order granting commission and diligence is made, an experienced person should be made ready to deal with the necessary arrangements and an appropriate haver should be made ready to attend the hearing before the commissioner.

<u>Summary Proceedings</u>

39.15.11 In summary proceedings, the debate should be allocated to an experienced depute at the earliest opportunity in order that they can familiarise themselves with the circumstances of the case and the disclosure position generally. As part of the preparation for the debate, the depute should consult with the summary legal manager to determine whether, based on the information provided by the defence in the petition, the information being sought is *material* and therefore disclosable. If the depute is satisfied that the information does meet the *materiality* test then it should be disclosed to the defence without proceeding to a court hearing.

39.15.12 Where a petition for recovery of documents relates to a number of different pieces of information, then each item of information should be considered separately and disclosed if appropriate. Where some of the items are still considered not to meet the *materiality* test, then the petition for recovery should continue in respect of those items.

39.15.13 In cases of particular difficulty or sensitivity, a report should be submitted to the Director of Serious Casework for Crown Counsel's instructions on whether to

disclose the information or to proceed to a court hearing for adjudication on the disclosability of the information.

39.15.14 It is also essential that the depute is fully aware of the Crown's disclosure policy and the legal obligations in respect of disclosure as the Court may ask the Crown to address them on either or both of these issues.

39.15.15 When preparing the debate, the depute should also carefully consider, in close consultation with the appropriate legal manager whether an appeal would be appropriate if the petition is granted or partially granted by the Court.

39.15.16 If, after arguments, the petition is granted or partially granted, the depute should arrange for the relevant information to be disclosed to the defence as soon as reasonably practicable, unless the decision is to be appealed. The disclosure of the information should be carefully recorded in the case papers. If an order granting commission and diligence is made, an experienced person should be made ready to deal with the necessary arrangements and an appropriate haver should be made ready to attend the hearing before the commissioner.

39.16 Recovery of Documents: Appealing the Decision of the Court

39.16.1 Where a petition for an order granting commission and diligence or an order for recovery is successful or partly successful, the Crown can appeal for a review of that decision:

i) In High Court cases, by lodging a petition to the Nobile Officium;
ii) In Sheriff and Jury cases under section 301A(5) of the 1995 Act; and
iii) In Summary proceedings under section 301A(5) of the 1995 Act.

39.16.2 Leave to appeal need not be sought (**Harvey v HMA**). However, the intention to appeal must be intimated within 2 days of the decision being appealed (In terms of Rule 27A.1 of the Act of Adjournal (Criminal Procedure Rules) 1996). Accordingly, it is essential that a report is submitted to the Appeals Unit immediately following the decision. This should be done initially by telephone and then followed up by a report. The report should be prepared by the depute who appeared in court. If, however, this is not possible, reports should not be delayed. The report should provide the following information:

- Identify relevant court depute;
- Provide a brief summary of the offence(s);
- Provide a procedural history of the case;
- Provide a note of the disclosure history of the case;
- Note the salient points of the defence and Crown arguments presented to the court;
- Note of the Court's determination; and
- Submissions on why the appeal should be supported
- Certified copy of court minutes from the lower court

39.16.3 Pending the determination of such an appeal, the information should not be disclosed to the defence. If, however, the Appeals Unit determine that an appeal is not appropriate, then the information should be disclosed as soon as reasonably practicable after this decision has been made. The disclosure page and schedules or the case papers should then be updated accordingly.

39.17 Compatibility Issues: Overview

39.17.1 The issue of the fairness of the trial is usually not considered until after the trial has been completed. However, as highlighted in the cases of **Transco plc v HMA (No. 2)** (2004 SCCR 553) , **Dyer v Von, Dyer v Hume** (2008 SCCR 265) and **Thomson v Burns** (2009 S.L.T. 645), the Courts may consider this issue in advance of trial prospectively. In such circumstances, however, as stated by Lord Nimmo Smith in **Thomson v Burns** *"a high test falls to be applied to the question whether it can be said, in advance of trial, that an accused person will not receive a fair trial".* In addition, Lord Nimmo Smith stated that it is for the accused to show that the proceedings would ***necessarily*** be a breach of Article 6 of the Convention or would ***inevitably*** result in the proceeding as a whole being unfair. Further, the fairness of a trial can only ever be determined pre-trial in the most ***exceptional and blatant cases***.

39.17.2 Notwithstanding this, the defence may still, on occasion, choose to raise a compatibility issue in respect of non-disclosure of information pre-trial. It should be noted, however, that in practice most compatibility issues will be capable of being formulated in terms of a common law plea, such as oppression. Proceeding by way of a compatibility issue, however, will enable the minute to be referred to the High Court and Supreme Court where appropriate.

39.17.3 Under section 36(2) of the Scotland Act 2012 acts or failures to act by the Lord Advocate in prosecuting any offence or as the head of the system of criminal prosecutions will not be rendered ultra vires by virtue of section 57(2) of the Scotland Act 1998. Section 36(4) of the Scotland Act 2012 amends the definition of a devolution issue so that it does not include questions arising in criminal proceedings in Scotland which relate to the compatibility with any of the Convention rights or with EU law of an Act of the Scottish Parliament or any provision of the Scottish Parliament, or a function, the purported or proposed exercise of a function or a failure to act. These are **compatibility issues** which are defined as questions arising in criminal proceedings about EU law and ECHR issues or challenges to Acts of the Scottish Parliament on ECHR or EU compatibility grounds.

39.17.5 The criteria for disclosure of information referred to in a compatibility issue are narrower than the criteria for recovery of documents. The criterion for disclosure under article 6 of the Convention is whether or not the information would materially weaken the Crown case or materially strengthen the defence case. The criterion in recovery of documents is whether the information is likely to be of material assistance to the proper preparation or presentation of the defence and it is for the defence to show how the documents relate to the charge or charges and the proposed defence to be led at the trial.

39.17.6 It should usually be clear whether the defence is seeking disclosure in terms of Article 6 or whether the agent is seeking the information under the wider test.

39.17.7 Where the defence seeks to stop a trial on the basis that it would be unfair to proceed any further without the disclosure of the information, it would be appropriate for the defence to raise a compatibility issue. This will most generally apply to cases where witness statements or criminal history information have not been disclosed.

39.17.8 As set out in General Minute to Legal Staff No. 25/03, General Minute No 12/2006 and Operational Instruction No. 9 of 2013 the Appeals Unit should be

notified of all compatibility issues. However, a report need only be submitted where the point raised is considered novel, high profile or sensitive or Crown Counsel's instructions are otherwise sought on any point.

39.18 Compatibility Issues: Solemn Proceedings

39.18.1 In Solemn proceedings, where a party proposes to raise a compatibility issue written notice of the intention to do so will be submitted by minute in Form 40.2. This minute must be lodged with the Clerk of Court and served on the other parties no later than 14 clear days before the preliminary hearing or as the case may be the first diet. The minute can be lodged later than this period on cause shown. In proceedings on appeal where the issue is being raised for the first time, where a party proposes to raise a compatibility issue this will be done in the note of appeal.

39.18.2 As specified in Rule 40.6, the compatibility issue must specify the facts and circumstances and contentions of law.

39.19 Compatibility Issues: Summary Proceedings

39.19.1 In Summary proceedings, where a party proposes to raise a compatibility issue notice shall be given in written report to do so by minute in Form 40.3. The minute must be lodged before the intermediate diet or no later than 14 clear days before the trial diet. The minute can be lodged later than this period on cause shown. In proceedings on appeal where the issue is being raised for the first time, where a party proposes to raise a compatibility issue that shall be done in the application for a stated case.

39.19.2 As specified in Rule 40.6, the compatibility issue must specify the facts and circumstances and contentions of law

39.20 Compatibility Issues: Preparation and Appearance in Court

39.20.1 Where a compatibility issue relating to non-disclosure of information is raised, it should not necessarily be assumed that it must proceed to a court hearing. The information contained within the application should first be considered to ascertain whether it provides sufficient information to satisfy the Crown that the information that the defence is seeking to recover is *material* and therefore disclosable.

39.20.2 Where the compatibility issue relates to the non-disclosure of a number of different pieces of information, then each item of information should be considered separately and disclosed if appropriate. Where some of the items are still considered not to meet the *materiality* test, then the minute should continue in respect of those items.

39.20.3 Where it has been determined that the information being sought is not *material* and therefore not disclosable, the minute should proceed to adjudication by the Court.

39.20.4 The debate, whether it be under summary or solemn procedure must be allocated to an experienced depute at the earliest opportunity in order that the circumstances of the case and the disclosure position generally can be considered. It is essential that the depute is **fully** aware of the Crown's disclosure policy and the

legal obligations in respect of disclosure as the Court may ask the Crown to address them on either or both of these issues. As part of the preparation for the devolution debate, the depute should consult with the appropriate legal manager to determine whether, based on the information provided by the defence in the minute, the information being sought is *material* and therefore disclosable. If the depute is satisfied that the information does meet the *materiality* test then it should be disclosed to the defence without proceeding to a court hearing.

39.20.5 In cases of particular difficulty or sensitivity, a report should be submitted to the Director of Serious Casework office for Crown Counsel's instructions on whether to disclose the information or to proceed to a court hearing for adjudication on the disclosability of the information.

39.20.6 When preparing the debate, the depute should also carefully consider, in close consultation with the appropriate legal manager whether an appeal would be appropriate if the minute is granted or partially granted by the Court.

39.20.7 If, after arguments, the compatibility issue is upheld or partially upheld, the depute should arrange for the relevant information to be disclosed to the defence as soon as reasonably practicable, unless the decision is to be appealed. If the case is being prosecuted on indictment, the Disclosure Page and the appropriate schedule listing the information should both be updated accordingly. Where it is a summary case, the case papers should be updated accordingly.

39.21 Compatibility Issues: References to the High Court or Supreme Court

39.21.1 Subs (1) of section 288ZB of the Criminal Procedure (Scotland) Act 1995 states that instead of determining the compatibility issue a Court may refer the issue to the High Court. Subs (2) states that the Lord Advocate or the Advocate General for Scotland, if party to criminal proceedings before a Court may require the Court to refer to the High Court any compatibility issue which has arisen in the proceedings. Subs (3) states the High Court may, instead of determining a compatibility issue which has been referred to it, refer the issue to the Supreme Court. Subs (4) states that where a compatibility issue has arisen in criminal proceedings before a Court consisting of two or more judges of the High Court otherwise than by reference then the Court may instead of determining the compatibility issue refer it to the Supreme Court. Subs (5) states that the Lord Advocate or the Advocate General for Scotland if a party to criminal proceedings before a court consisting of two or more judges of the High Court, may require the court to refer to the Supreme Court a compatibility issue which has arisen in the proceedings otherwise than on a reference.

39.21 Compatibility Issues: Appealing the Decision of the Court

39.21.1 Subs (1) of section 288AA of the Criminal Procedure (Scotland) Act 1995 states that an appeal can be taken against a determination in criminal proceedings by a court of two or more judges of the High Court. Subs (2) states that the power of the Supreme Court will be exercisable only for the purpose of determining the compatibility issue and for that purpose the Supreme Court may make any change in the formulation of that issue that it thinks necessary in the interests of justice. Subs (5) indicates that the appeal lies only with the permission of the High Court or, failing that, the permission of the Supreme Court unless it is an appeal by the Lord

Advocate or the Advocate General where they have previously referred the case to the High Court

39.21.2 Where the application is to be made to the High Court under subs (5) it must be made using Form 40.9 and must be made within 28 days of the date of the determination against which the appeal lies or a longer period which the High Court considers equitable having regard to all of the circumstances. Where the application is to be made to the Supreme Court under subs (5) the appeal must be made within 28 days of the date on which the High Court refused permission or within such longer period as the Supreme Court considers equitable having regard to all the circumstances.

39.21.3 It is essential that a report is submitted to the Appeals Unit immediately following any decision which may be appealed. This should be done initially by telephone and then followed up by a report. The report should be prepared by the depute who appeared in court. If, however, this is not possible, reports should not be delayed. The report should provide the following information:

- Identify relevant court depute;
- Provide a summary of the offence(s);
- Provide a procedural history of the case;
- Provide a note of the disclosure history of the case;
- Note the salient points of the defence and Crown arguments presented to the court;
- Note of the Court's determination; and
- Reasons why the appeal should be supported
- Certified copy court minutes from the lower court.

39.21.5 If the appeal is in respect of a petition for the recovery of documents or any other form of disclosure, the information sought by the defence should not be disclosed pending the determination of the appeal., If Crown Counsel determines that an appeal is not appropriate, then the specified information that the defence were seeking should be disclosed as soon as reasonably practicable. The disclosure page and schedules or the case papers should then be updated accordingly.

39.22 Information withheld in the Public Interest

39.22.1 In some circumstances, the defence may seek the recovery of information that the Crown has assessed as being *material* information but has withheld on the basis that its disclosure would jeopardise an important public interest, e.g. information covered by public interest immunity, or which raises Convention issues, such as where there is a threat to the life or limb of a witness or other persons. See **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. Further guidance on dealing with such issues is contained in Chapter 25 of this Manual.

39.22.2 Where the terms of a preliminary plea, petition for recovery of documents or compatibility issue is seeking the recovery of such information, this should immediately be referred to the Federation Head or Functional Lead (High Court /

Sheriff & Jury / Summary) to prepare a report for Crown Counsel's instructions. This should be submitted through the Director of Serious Casework.