

Chapter 42: Defence Statements

42.1 Introduction

42.1.1 Section 124 of the Criminal Justice and Licensing (Scotland) Act 2010 inserts section 70A into the Criminal Procedure (Scotland) Act 1995. Section 70A provides that in the course of all **solemn** cases, following service of the indictment, the defence **must** lodge a defence statement at least 14 days before the first diet/preliminary hearing and thereafter must, at least 7 days before the trial diet either lodge another defence statement or a statement intimating that there has been no material change in circumstances since the previous defence statement was lodged.

42.1.2 Defence statements **may** also be lodged in **summary** cases but this is not mandatory.

42.2 What is a Defence Statement?

42.2.1 Defence Statement is the term given to a document prepared and lodged by the defence setting out –

- (i) the nature of the accused's defence, including any particular defences on which the accused intends to rely,
- (ii) any matters of fact on which the accused takes issue with the prosecution and the reasons for doing so,
- (iii) particulars of the matters of fact on which the accused intends to rely for the purposes of the accused's defence,
- (iv) any point of law which the accused wishes to take and any authority on which the accused intends to rely for that purpose,
- (v) the nature of any information that the accused requires the prosecutor to disclose by reference to the accused's defence, and
- (vi) the reasons why the accused considers that disclosure by the prosecutor of the information outlined at (v) above is necessary

42.2.2 It is important not to confuse these documents with defence witness statements.

42.3 Lodging of Defence Statements in Solemn Proceedings

42.3.1 Defence statements are now **mandatory** in all **solemn** cases and shall be in the prescribed form (Form 56.2-A as laid down by Act of Adjournal (Criminal Procedure Rules Amendment)(Miscellaneous) 2011).

42.3.2 Where a defence statement is lodged and the defence consists of or includes a special defence, the statutory requirement to lodge and intimate such a special defence does not apply (Criminal Procedure (Scotland) Act 1995 section 78).

42.3.3 In the course of a solemn case, following service of the indictment, the defence must either lodge a defence statement or a statement intimating that there has been no material change in circumstances in relation to the accused's defence

since the last defence statement was lodged. This must be done at the following stages:

1. at least 14 days before the first diet or preliminary hearing
2. at least 7 days before the trial diet

42.3.4 If after lodging a defence statement, at one or both of the key stages outlined above, there is a material change in circumstances in relation to the accused's defence, a further defence statement must be lodged. This will be in the prescribed form (Form 56.2-A as laid down by Act of Adjournal (Criminal Procedure Rules Amendment)(Miscellaneous) 2011). This additional defence statement must be lodged before the trial begins unless the Court has, on cause shown, allowed it to be lodged during the course of the trial.

42.3.5 As soon as practicable after lodging a defence statement or a statement intimating that there has been no material change in circumstances in relation to the accused's defence since the last defence statement was lodged, the accused must send a copy of the statement to the prosecutor and any co-accused.

42.4 Prosecutor's Duty to Review

42.4.1 The prosecutor is under a statutory obligation to review all the information not previously disclosed that may be relevant to the case for or against the accused of which the prosecutor is aware. This must be done as soon as is practicable following receipt of a defence statement.

42.4.2 The legislation places the responsibility on the prosecutor. However reviews of information previously considered irrelevant will have to be achieved through communication of the content of the defence statement with the Reviewing Officer in the case. The Reviewing Officer will be aware of all information held and particularly information which was previously considered to be manifestly irrelevant and not revealed to the prosecutor.

42.4.3 In order to comply with the statutory obligation the case preparer, in close consultation with the SLM, must review the content of the defence statement and consider whether it raises any issue(s) which merit a review to be carried out by the police of information previously deemed to be manifestly irrelevant by them. In making this assessment, consideration should be given to factors such as, but not limited to, whether any fresh lines of enquiry are raised, additional witnesses are referred to, lines of defence intimated which require further investigation e.g. alibi or incrimination.

42.4.4 If there is any doubt regarding whether or not the content of a defence statement merits a review by the police of all the information previously considered manifestly irrelevant then, erring on the side of caution, the defence statement should be urgently passed to the police for review.

42.4.5 Where necessary intimation of the content of the defence statement should be made to the reviewing officer as soon as possible to allow a full review to be carried out. It is important to be aware that this has the potential to be a time consuming process and depending on when the defence statement was received it may be impractical to achieve this prior to the next scheduled calling of the case.

42.4.6 Where an adjournment of the case is needed to allow time for the necessary review this will need to be explained to the court. It is necessary therefore to seek a realistic timescale for completion of the review from the Reviewing Officer in advance of that hearing. It is important to be aware of the time bar of cases in such circumstances and to seek an extension if required.

42.4.7 In solemn cases revelation would be accomplished in the normal way i.e. submission of a non-sensitive, sensitive and/or highly sensitive schedule.

42.4.8 The Crown has a duty, which exists in perpetuity, to provide to the defence all material information, namely that information which:

- (a) would materially weaken or undermine the evidence that is likely to be led by the prosecutor in the proceedings against the accused,
- (b) would materially strengthen the accused's case, or
- (c) is likely to form part of the evidence to be led by the prosecutor in the proceedings against the accused

42.4.9 Thus, upon receipt of a defence statement, the Crown has a statutory obligation to review all potentially relevant information held i.e. all information revealed to the prosecutor by the police/investigating agency which was not previously considered material and therefore disclosable.

42.4.10 All information which was not previously disclosed must therefore be reviewed in order to ascertain whether it should now be considered material and disclosable in light of the contents of the defence statement.

42.4.11 Where it is decided that information does not require to be disclosed in light of a defence statement, this decision and the reasons for it should be highlighted, in solemn cases, in the Disclosure Page in the precognition, and in summary cases, recorded in the case papers.

42.4.12 Full details on the process for submitting defence statements to the police can be found in the Case Processing Manual.

42.5 Prosecutor's Duty to Disclose

42.5.1 Following the revelation by the police/investigating agency of all additional information that may be relevant to the case for or against the accused i.e. submission of additional disclosure schedule(s), the prosecutor must, as soon as practicable, disclose to the accused material information, namely information which:

- (i) would materially weaken or undermine the evidence that is likely to be led by the prosecutor in the proceedings against the accused,
- (ii) would materially strengthen the accused's case, or

- (iii) is likely to form part of the evidence to be led by the prosecutor in the proceedings against the accused

42.6 Lodging of Defence Statements in Summary Proceedings

42.6.1 Whilst it is not mandatory that a defence statement is lodged in respect of summary cases there may be cases in which it is appropriate to do so (Section 125 of the Criminal Justice and Licensing (Scotland) Act 2010). Where a defence statement is to be lodged it has to be in the prescribed form (Form 56.2-A as laid down by Act of Adjournment (Criminal Procedure Rules Amendment)(Miscellaneous) 2011).

42.6.2 A defence statement may be lodged at any stage during the “relevant period”. This relevant period is defined as the period beginning with the recording of the accused’s plea of not guilty and ending with the conclusion of the proceedings to which the plea relates. 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 proceedings are deserted pro loco et tempore for any reason and no further trial diet is appointed, or
- (vi) 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.

42.6.3 Where a defence statement is lodged

- at or before an intermediate diet, **or**
- where such a diet is not to be held, is lodged no later than 10 clear days before the trial diet, **and**
- the line of defence consists of or includes a special defence, a defence which may be made out by leading evidence calculated to exculpate the accused by incriminating a co-accused, a defence of automatism or coercion, or a defence of consent in a prosecution for certain sexual offences (section 288C of the Criminal Procedure (Scotland) 1995)

the statutory requirement to lodge and intimate a notice of defence does not apply (section 149B of the Criminal Procedure (Scotland) Act 1995).

42.6.4 Defence statements must however be lodged in summary proceedings before the accused can seek recourse to the court for a court ruling on disclosure (section 128 of the Criminal Justice and Licensing (Scotland) Act 2010). See Chapter 39 for full guidance in Court Rulings.

42.6.5 When lodging a defence statement in respect of a summary case, the document must set out –

- (i) the nature of the accused's defence, including any particular defences on which the accused intends to rely,
- (ii) any matters of fact on which the accused takes issue with the prosecution and the reasons for doing so,
- (iii) particulars of the matters of fact on which the accused intends to rely for the purposes of the accused's defence,
- (iv) any point of law which the accused wishes to take and any authority on which the accused intends to rely for that purpose,
- (v) the nature of any information that the accused requires the prosecutor to disclose by reference to the accused's defence, and
- (vi) the reasons why the accused considers that disclosure by the prosecutor of the information outlined at (v) above is necessary

42.6.6 If an accused lodges a defence statement at least 14 days before the trial diet in summary proceedings, then no less than 7 days before the trial :

- (i) where there has been a material change in circumstances a further defence statement must be lodged; or
- (ii) where there has been no material change in circumstances, a statement confirming that must be lodged.

This will be in the prescribed form (Form 56.2-B as laid down by Act of Adjournal (Criminal Procedure Rules Amendment)(Miscellaneous) 2011).

42.6.7 If after lodging a defence statement, there is a material change in circumstances in relation to the accused's defence, a further defence statement must be lodged. This additional defence statement must be lodged before the trial begins unless the Court has, on cause shown, allowed it to be lodged during the course of the trial.

42.6.8 As soon as practicable after lodging a defence statement in summary proceedings the accused must send a copy of the statement to the prosecutor and any co-accused.

42.7 Prosecutor's Duty to Review

42.7.1 As with solemn cases the prosecutor is under a statutory obligation to review all the information that may be relevant to the case for or against the accused of which the prosecutor is aware. This must be done as soon as is practicable following receipt of a defence statement.

42.7.2 The guidance regarding reviews of information following receipt of a defence statement at 42.3 above applies equally to summary cases and should be adhered to when handling defence statements in respect of summary proceedings.

42.8 Prosecutor's Duty to Disclose

42.8.1 As with solemn cases the prosecutor is under a statutory obligation to disclose all material information which comes to light following a review to the defence.

42.8.2 With the exception of the reference to disclosure schedules, the guidance regarding disclosure of material information following a review at 42.4 above applies equally to summary cases and should be adhered to when handling defence statements in respect of summary proceedings.

42.9 Further guidance

42.9.1 Prosecutors dealing with issues as they arise in Court in relation to:

- (i) the late lodging of a defence statement
- (ii) refusal to lodge a defence statement
- (iii) the lodging of a defence statement which is lacking in specification

are directed to Operational Instruction 1 of 2013 for further guidance,