

## Chapter 5: Criminal History Records

### 5.1 The Law

5.1.1 In **Holland v HMA** (2005 SCCR 417), Lord Rodger of Earlsferry stated (at para 72) that information about the previous convictions of any witness who is to be led at the trial is information that would be likely to be of material assistance to the proper preparation or presentation of the accused's defence, and that the accused's agents and counsel are accordingly entitled to have that information disclosed so that they can prepare his defence.

5.1.2 He also stated that information about any outstanding criminal charges that a witness faces is also considered to be information that would be likely to be of material assistance to the proper preparation and presentation of the accused's defence, so that, in principle, the Crown should disclose this information.

5.1.3 The Privy Council confirmed in **HMA v Murtagh** ([2009] UKPC 35 at para 40) that this obligation extends to PF direct measures, including warnings and fixed penalties issued by the police or other specialist agencies.

5.1.4 The Privy Council also confirmed that the obligation to disclose criminal history information is restricted to those convictions and outstanding charges, if any, that *materially* weaken the Crown's case or *materially* strengthen the defence case.

5.1.5 When determining whether or not a conviction or outstanding charge is material, and therefore, disclosable, a generous approach should be taken. The Crown should not consider a conviction, outstanding charge or direct measure as being immaterial purely on the basis that an objection to its relevance at trial could be successfully taken. Any decision as to what may be used to support an attack on credibility or character is a matter for the Court (**HMA v Murtagh** para 31).

5.1.6 Immaterial convictions, outstanding charges or direct measures, however, should only be withheld where it would be likely to be embarrassing or damaging to the witness if the conviction or charge was disclosed.

5.1.7 Accordingly, while in law the Crown is only obliged to disclose material criminal history record information, following the dicta in **HMA v Murtagh**, the Crown will adopt a generous approach and disclose all criminal history record information except those parts which are both immaterial and sensitive (Criminal Justice and Licensing (Scotland) Act 2010 s122(4)). Full guidance on the considerations to apply when redacting criminal history records is contained in Chapter 19 of this Manual.

### 5.2 Policy: Civilian Witnesses

5.2.1 Criminal history records, i.e. details of previous convictions, outstanding charges and direct measures should be obtained in respect of all civilian witnesses that the Crown intends to rely on at trial in summary proceedings and in respect of all civilian witnesses listed on the provisional list of witnesses in solemn cases.

5.2.2 All previous convictions, outstanding charges and direct measures in respect of all civilian witnesses cited for trial in summary cases, and on the indictment in solemn cases, should be disclosed, except for those parts of the record assessed as being both immaterial and sensitive. Further guidance is provided in Chapter 19 of this Manual.

5.2.3 Guidance on the procedures to follow for the disclosure of criminal history records is contained in Chapters 8 - 10 of this Manual.

5.2.4 Guidance on the content and redaction of criminal history records is contained in Chapters 17 - 19 of this Manual.

### **5.3 Policy: Police Witnesses**

5.3.1 Guidance on obtaining and disclosing criminal history records for police officers and police civilian staff is contained in Chapter 20 of this Manual.

### **5.4 Policy: Professional, Expert and Official Witnesses**

5.4.1 Criminal history records, i.e. details of previous convictions, outstanding charges and direct measures should be obtained in respect of all professional, expert and official witnesses that the Crown intends to rely on at trial in summary proceedings, and in respect of all professional, expert and official witnesses listed on the provisional list of witnesses in solemn cases.

5.4.2 All previous convictions, outstanding charges and direct measures in respect of all professional, expert and official witnesses cited for trial in summary cases, and on the indictment in solemn cases, should be disclosed, except for those parts of the record assessed as being both immaterial and sensitive. Further guidance is contained in Chapter 19 of this Manual.

5.4.3 Guidance on the procedures to follow for the disclosure of criminal history records is contained in Chapters 8 - 10 of this Manual.

5.4.4 Guidance on the content and redaction of criminal history records is contained in Chapters 17-19 of this Manual.

### **5.5 Policy: English & Welsh and Foreign Convictions**

5.5.1 In terms of **Holland** the obligation to routinely obtain and disclose material criminal history information is limited to information held by SCRO/SPSA. Accordingly, there is no obligation on the police/investigating agency to *routinely* obtain PNC information from England and Wales or criminal history information from other jurisdictions. It has been agreed that, at present, the Police/Agencies should not routinely conduct criminal history checks other than CHS, however should there be **reasonable belief** (for whatever reason) that an accused/witness has relevant PCOCs elsewhere than CHS, these records should be interrogated and PCOCs revealed to the prosecutor.

5.5.2 The obligation to disclose relevant and material information remains but only crystallises, for the purpose of further enquiry as to the existence of criminal history information held on PNC, if information regarding the existence of such material information comes to light either through the Crown's own investigation or from any reasonable indication from the defence at any stage that there is such material information. If such circumstances arise, details of any criminal history information held on PNC should be sought (through the reporting officer) and then considered for disclosure purposes. If any of the criminal history information is material information, it should then be disclosed to the defence.

### **5.6 Evidence introduced by Section 259 Certificate**

5.6.1 Where a witness is deceased, or falls within any of the other categories listed at section 259(2) of the Criminal Procedure (Scotland) Act 1995 (unfit or unable to give evidence due to his/her bodily or mental condition; resides outwith the UK or cannot be located; refuses to give evidence on basis of incrimination; refuses to give evidence at trial or refuses to take the oath), and evidence of a statement made by that person is being introduced by section 259, then, for the purposes of disclosure, witnesses must be treated as if they were giving oral evidence (**Allison v HMA** [2010] UKSC 6).

5.6.2 Accordingly, the criminal history record for the witness must be obtained and any material convictions or outstanding charges must be disclosed, along with all statements obtained from this witness (**Allison v HMA** [2008] HCJAC 63).

## 5.7 Criminal History Records for Defence Witnesses

5.7.1 Where the Crown has obtained criminal history records for any witnesses that the defence intend to lead at trial, then any convictions, outstanding charges or direct measures that are not deemed to be immaterial and sensitive must be disclosed to the defence, in the same way as for witnesses that the Crown intends to lead at trial.

5.7.2 Accordingly, where the Crown obtains a criminal history record for a defence witness, then it must be considered in terms of Chapter 19 of this Manual, and all information, except that which is both immaterial and sensitive, should be disclosed, along with any statements obtained from this witness subject to redaction.

5.7.3 Where information contained within a criminal history record relating to a defence witness requires to be disclosed, and there are co-accused, the information must be disclosed to the agents for all accused, not just the accused who has intimated the intention to lead the defence witness.

5.7.4 Where there are any concerns regarding the appropriateness of disclosing material criminal history record information to a co-accused then a report should be submitted to the Director of Serious Casework for Crown Counsel's instructions.

## 5.8 Recording of CHRS on Schedules

5.8.1 In terms of Section 2 of the Data Protection Act 1998, sensitive personal data includes information about (i) the commission or alleged commission by that person of any offence and information and (ii) proceedings for any offence committed or alleged to have been committed by a person, the disposal of such proceedings or the sentence in such proceedings.

5.8.2 On that basis, where a witness (civilian, police, professional, expert or official) holds a criminal history record, the existence of that record will be recorded in the sensitive schedule.

5.8.3 However, as criminal history records for witnesses who are cited as witnesses will *always* be relevant and *potentially* material, it is essential that the defence are advised of the existence of a criminal history record where the witness is listed on the indictment and the record is considered to be wholly *immaterial*.