

## **Chapter 9: Procedures for Requesting and Disclosing Statements & Criminal History Records: Summary Cases**

### **9.1 Marking Witnesses for Citing**

9.1.1 When marking witnesses for citing, staff should take care to cite only the minimum number of witnesses reasonably required to prove the charge(s) libelled, as detailed in Paragraph 7.61 of the Book of Regulations.

### **9.2 Statements & Witness 'S' (CHS) Numbers: What to Request**

9.2.1 Statements will be requested for all witnesses listed in the police report (SPR – Standard Prosecution Report). Statement requests will **not** be restricted to those witnesses marked for citing.

9.2.2 'S' (CHS) numbers will be requested for all civilian and professional, expert and official witnesses that have been marked for citing.

9.2.3 Full statements and 'S' (CHS) numbers must be ordered through the administration record. Details of how to request full statements and 'S' (CHS) numbers can be viewed in the Summary Administration Instructions.

### **9.3 Statements & Witness 'S' (CHS) Numbers: When to Request**

9.3.1 Where the accused pleads not guilty and is remanded in custody, statements and witness 'S' (CHS) numbers should be ordered immediately after court (i.e. on the same day). This is particularly important where the plea is tendered on a Friday. Where the plea of not guilty is tendered in a court that does not finish until after office hours, care should be taken to ensure that the statements and witness 'S' (CHS) numbers are ordered the following morning. Local arrangements should be put in place to deal with courts that overrun on a Friday to ensure that the police are advised at the earliest opportunity that statements are required, e.g. obtaining local agreement to order statements before court, in cases where bail is opposed.

9.3.2 Where the accused pleads not guilty and is bailed or ordained to appear, statements and witness 'S' (CHS) numbers should be ordered, as soon as possible after the plea is tendered but not later than 3 working days after the pleading diet.

9.3.3 Where the accused pleads not guilty and is bailed or ordained to appear and the court has fixed custody diets, due to the nature of the case, statements and witness 'S' (CHS) numbers should be ordered as if it were a custody case.

9.3.4 In FOS, a COP update is required in order to request statements through a checklist. If, at the stage statements require to be ordered in order to comply with the above timescales, a COP update has not yet been provided, statements should be requested outwith the checklist. In each such case, the appropriate member of staff must go into each individual case manually and set the BU.

### **9.4 Event Records**

9.4.1 When requesting full statements and witness 'S' (CHS) numbers, the "FOS BU" date should be set for 28 calendar days after the date of the pleading diet, where the accused is on bail or ordained to appear. This will be the date by which the police must submit full statements and witness 'S' (CHS) numbers.

9.4.2 Where the accused is remanded in custody, the “FOS BU date” should be entered set for 7 calendar days after the pleading diet, i.e. the date on which a plea of not guilty was tendered.

## **9.5 Submission of Statements & Witness ‘S’ (CHS) numbers**

9.5.1 The investigating agency should submit full statements for all witnesses, along with ‘S’ (CHS) numbers, where they exist, for those civilian witnesses who have been cited, within agreed timescales. The timescales depend on whether the case is a custody or bail case. The investigating agency should also submit, within the same timescales, the “S” numbers for those professional, expert and official witnesses who have been cited.

9.5.2 Where the accused is remanded in custody, the investigating agency should submit statements and witness ‘S’ (CHS) numbers within 7 days of the plea of not guilty being tendered.

9.5.3 Where the accused is at liberty, the investigating agency should submit statements and witness ‘S’ (CHS) numbers within 28 calendar days of the plea of not guilty being tendered.

9.5.4 Where the accused is at liberty and, due to the nature of the case, custody diets have been fixed, the police should submit statements and witness ‘S’ (CHS) numbers within 7 days of the plea of not guilty being tendered. The fulfilment by the police of this requirement will be dependant on the Crown advising the police of the custody diets that have been fixed.

9.5.5 Where a case is identified as a priority case at case marking, and subsequently a plea of not guilty is tendered and custody diets are fixed, the court depute (or other appropriate member of staff according to local arrangement) at the time the plea of not guilty is tendered must send an ISCJIS email to the Reporting Officer immediately after court (i.e. on the same day), advising that the case is a priority case, that custody diets have been fixed and the relevant dates, and requesting the submission of full statements within 7 days of that date, i.e. the date on which a plea of not guilty was tendered. The email request must make clear that the 7 day deadline for submission of full statements applies notwithstanding any other timescale specified in any other *standard* full statement request.

9.5.6 After the Reporting Officer has been advised of these details by way of an ISCJIS email, the papers should be passed to the relevant member of staff to request full statements in the usual way, but with an instruction that the request must be sent that day, i.e. the date on which a plea of not guilty was tendered.

9.5.7 Notwithstanding the timescale specified in the standard full statement request, a FOS BU date should be entered, set for 7 calendar days after the pleading diet, i.e. the date on which a plea of not guilty was tendered.

9.5.8 Policy Division and ISD are working to achieve a solution which will allow priority cases to be identified at the marking stage and thereafter any full statement requests to be made, in the usual way, automatically within the custody timescales, without the need to notify the Reporting Officer that the case is a priority case.

## **9.6 List of Witnesses**

9.6.1 The defence should be provided with a list of witnesses 14 days after the plea of not guilty being tendered where the accused is at liberty, subject to the defence confirming in writing that they act for the accused. In custody cases and other cases where custody diets have been fixed, this list should be provided within 3 working days of the pleading diet.

9.6.2 This list should include all the witnesses listed in the SPR, and should not be restricted to the witnesses that the Crown is citing for trial.

9.6.3 The list of witnesses should generally be provided to the defence in advance of the disclosure of statements, previous convictions and outstanding charges.

9.6.4 Further guidance on the creation of a disclosable provisional list of witnesses is contained in Chapter 12 of this Manual.

## 9.7 Consideration of Statements

9.7.1 Once statements have been submitted by the investigating agency to the Crown, a legal member of staff should consider the statements and decide whether they should be withheld or disclosed to the defence in terms of the guidance set out in Chapters 4, 13 & 14 of this Manual. If the statement is to be disclosed or withheld meantime, it should then be considered for redaction purposes in terms of the guidance set out in Chapter 15 of this Manual.

9.7.2 Where there are only investigating agency witnesses in the case, statements do not need to be checked prior to disclosure to the defence. Where, however, there are civilian and investigating agency witnesses, the investigating agency witness statements should be checked to ensure that they do not contain any sensitive information about the civilian witnesses. Sensitive information is defined under section 122(4) of the Criminal Justice and Licensing (Scotland) Act 2010.

9.7.3 Where a legal member of staff considers that it is appropriate to withhold a statement completely, which contains either irrelevant or relevant *and* immaterial information, the decision not to disclose the statement must be taken by the functional lead for Summary or other senior legal manager expressly authorised to act on his or her behalf in this regard. If a statement is withheld on these grounds, the witness may not be called to give evidence. **(See Chapter 4, in particular, paragraphs 4.2.3 – 4.2.5, and Chapter 13, paragraphs 13.3.1 – 13.3.4.)**

9.7.4 However, if a particular witness statement contains material information, i.e. information which falls within 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

and there is a compelling reason why it should not be disclosed, e.g. it contains material covered by public interest immunity, or which raises Article 8 issues, such as where there is a threat to the life or limb of a witness or other persons, the matter should be referred initially to the functional lead for Summary, the Federation Head or other appropriately vetted member of COPFS staff. Thereafter the matter should be reported, including an appropriate recommendation, by that person to the Director of Serious Casework for the onward attention of Crown Counsel. Crown Counsel will

issue a final decision as to how the issue should be addressed. However, non disclosure should be the last option after all other possibilities have been considered. **(See Chapter 4, paragraph 4.2.6, and Chapter 13, paragraphs 13.3.5 – 13.3.9.)**

## **9.8 Consideration of Criminal History Records**

9.8.1 On receipt of the witness statements, where a witness is identified as having an 'S' (CHS) number, the criminal history record for that 'S' (CHS) number should be electronically requested from the Criminal History System (CHS). Further details on this are contained in Chapter 18 of this Manual.

9.8.2 Once criminal history records have been obtained, they should be checked to ascertain whether, and to what extent, they should be disclosed, subject to the materiality test.

## **9.9 Disclosure to the Accused's Legal Representative**

9.9.1 Once the statements and criminal history records have been checked, and where appropriate redacted, they should be disclosed to the accused's representative.

9.9.2 Where the accused is remanded in custody pending trial and intimation has been received in writing from the defence solicitors that they are representing the accused, the Procurator Fiscal should, not later than 7 calendar days before the intermediate diet, provide the defence solicitor with those statements and criminal history records in their possession, which require to be disclosed.

9.9.3 Where the accused is at liberty and intimation has been received in writing from the defence solicitors that they are representing the accused, the Procurator Fiscal should, not later than 28 calendar days before the intermediate diet, provide the defence solicitor with those statements and criminal history records in their possession, which require to be disclosed.

9.9.4 Where the accused is at liberty but the case has been assigned a custody diet and intimation has been received in writing from the defence solicitors that they are representing the accused, the Procurator Fiscal should, not later than 7 days before the intermediate diet, provide the defence solicitor with those statements and criminal history records in their possession, which require to be disclosed.

9.9.5 After disclosure has been made, and if further statements and/or criminal history records are submitted to the Procurator Fiscal, these should be checked and, where appropriate, disclosed to the defence at the earliest opportunity.

9.9.6 The prosecutor may disclose information by any means (Criminal Justice and Licensing (Scotland) Act s2010 s160). Guidance on the method by which information should be disclosed to the accused's legal representative is contained within Chapter 11 of this Manual.

## **9.10 Disclosure to Solicitors from England, Wales & Northern Ireland**

9.10.1 In cases where the accused instructs agents who are solicitors based in England, Wales or Northern Ireland, or the agent is an in-house solicitor it should be ascertained whether they hold a practising certificate for Scotland prior to handing over any information for disclosure purposes. Larger solicitor firms in England, Wales or Northern Ireland may have employees who are dual qualified but where they do

not they should be advised that disclosure will only be made to a local agent instructed to act on their behalf. Similar principles will apply where the accused person is assisted by a “McKenzie friend”<sup>1</sup>.

9.10.2 Solicitors who are not members of the Law Society of Scotland are not governed by the provisions of Articles 11 and 12 of the Law Society Code of Conduct for Criminal Work and as such there is no safeguard on what they do with information that they receive from COPFS.

9.10.3 All criminal defence solicitors practising in Scotland require to sign an undertaking prior to COPFS handing information over. This is routinely covered by letters of engagement, which require to be submitted prior to any disclosure being made. These letters include the signed undertaking, in respect of the information disclosed in the particular case, that:

- (a) such material, or any information contained in it, will not be used or disclosed other than for the purpose of the preparation and conduct of any trial or any appeal in the case referred to;
- (b) such material will not be made available to the accused or to any other party without the express agreement in writing of the Procurator Fiscal; and
- (c) in the event of the accused becoming unrepresented, any such material will be returned to the Crown

9.10.4 The main purpose of this undertaking is to ensure that COPFS as data controller at the time of the handover of that data complies with the seventh data protection principle namely; that appropriate technical and organisational measures are taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data. The Information Commissioner has confirmed that when data is handed over to defence agents for the purpose of disclosure the agent becomes the data controller. Additionally this undertaking reminds the defence agents of their legal obligations surrounding the use and sharing of such information, in terms of Articles 11 and 12 of the Law Society Code of Conduct for Criminal Work. The Information Commissioner has confirmed that defence agents require to be registered as data controllers. The agents “process” the data once in receipt of this from COPFS and the responsibility for compliance with the terms of the Data Protection Act 1998 transfers to them at this point.

9.10.5 The general rule therefore when dealing with agents from outside Scotland is that disclosure will only be made to a local Scottish agent instructed to act on their behalf.

9.10.6 However there is provision for disclosure direct to agents in England, Wales and Northern Ireland upon request in certain circumstances and upon the acceptance by them of conditions akin to those specified in the undertaking.

9.10.7 For instance, due to the unique nature of some Health and Safety cases, disclosure can be made to solicitors who do not hold a practising certificate in Scotland prior to a complaint being served, in order that proper consideration can be

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<sup>1</sup> The role of a McKenzie friend was set out in *McKenzie v McKenzie* [1970] 3 All ER 1034, which provided that litigants are entitled to have assistance, lay or professional, unless there are exceptional circumstances. A McKenzie friend assists a litigant in person in a common law court and need not be legally qualified.

given to the issues prior to being called to plead. In such circumstances, however, the solicitor must be asked to sign an undertaking to the effect that the information is provided on the basis that:

- i) The information disclosed will not be used or further disclosed other than:-
  - (a) For the purposes of the proper preparation and presentation of the accused's case in the original proceedings;
  - (b) With a view to the taking of an appeal in relation to the matter giving rise to the original proceedings;
  - (c) For the purposes of the proper preparation and presentation of the accused's case in any such appeal
- ii) The documents provided will not be made available to the accused or to any other party without the express agreement in writing of the Procurator Fiscal;
- iii) In the event of the accused being unrepresented, any such information will be returned to the Procurator Fiscal.

9.10.8 It is important to remember, and to remind agents when appropriate, that it is a criminal offence under section 163 and 164 of the Criminal Justice and Licensing (Scotland) Act 2010 for any person to knowingly use or disclose information, or anything recorded in it, for any purpose other than those detailed.