The Scottish Government introduced the Criminal Justice and Licensing (Scotland) Bill in the Parliament on 5 March 2009. It includes provisions to establish a statutory framework for the disclosure of evidence in criminal cases. The framework provides for disclosure by the prosecution to the accused (including the accused person’s defence team).

An effective framework for disclosure plays a vital part in protecting the right of an accused person to receive a fair trial. It should also provide a clear and workable regime for those involved in the criminal justice system (eg police and prosecution) as well as appropriate protection for other important interests (eg the safety of witnesses).

The right to a fair trial is enshrined in Article 6 of the European Convention on Human Rights.

This briefing looks at:

- the work undertaken by Lord Coulsfield (a retired High Court judge) in reviewing the law and practice of disclosure of evidence in criminal cases
- the proposals in the Bill on disclosure of evidence
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EXECUTIVE SUMMARY

- In 2006 the then Scottish Executive asked Lord Coulsfield to review the law and practice of disclosure of evidence in criminal proceedings. This followed a series of court decisions giving rise to some uncertainty about the requirements of the prosecution’s duty of disclosure.

- Lord Coulsfield’s report was published in 2007. It recommended establishing a statutory framework for disclosure by the prosecution, replacing the existing common law system.

- The Bill includes provisions to establish a framework for the disclosure of evidence, by the prosecution to the accused, in criminal cases. The relevant provisions are based, with some changes, on the recommendations in Lord Coulsfield’s report.

- The prosecution’s duty of disclosure under the Bill includes a general duty to disclose all ‘material information’ to the accused. Information is material if: (a) it would materially weaken or undermine the prosecution case; (b) it would materially strengthen the accused person’s case; or (c) it is likely to form part of the prosecution case.

- The Bill establishes a procedure under which the prosecution must apply to the court for a ‘non-disclosure order’ in relation to any item of material information if the prosecution believes that its disclosure would be likely to do any of the following: (a) cause serious injury or death to any person; (b) obstruct or prevent the prevention, detection, investigation or prosecution of crime; or (c) cause serious prejudice to the public interest.

- The Bill provides that the court may grant a non-disclosure order where it is satisfied that all of the following apply: (a) that it is indeed likely that disclosure of the information in question would lead to one of the outcomes set out in the preceding bullet point; (b) that withholding the information would be consistent with the accused person receiving a fair trial; and (c) that the granting of a non-disclosure order is the only way of protecting the public interest. Where a non-disclosure order is granted, the prosecution is prohibited from disclosing the information specified in the order.

- The Bill also includes provisions allowing the prosecution to apply for an ‘exclusion order’ (summary and solemn proceedings) or a ‘non-notification order’ plus exclusion order (solemn proceedings only). Where the court grants an exclusion order, the accused is prohibited from attending or making representations at the court hearing dealing with the related application for a non-disclosure order. Where a non-notification order is also granted, the accused is in addition prevented from receiving any notice of the fact that the prosecution has applied for exclusion and non-disclosure orders in relation to the relevant piece of information.

- The provisions on non-disclosure, exclusion and non-notification orders are intended to strike a fair balance between protecting the accused person’s right to a fair trial and avoiding problems which may be caused by the disclosure of sensitive information. However, concerns have been expressed about the compatibility of some of these provisions, in particular those relating to non-notification orders, with the right to a fair trial under Article 6 of the European Convention on Human Rights.

- The Bill provides for appeals and reviews in relation to non-disclosure, exclusion and non-notification orders. It also includes provisions allowing a court to appoint special counsel, to represent the interests of an accused person, where the court is dealing with an application, appeal or review relating to any such order.

- The prosecution has two options where it is still required to disclose sensitive information after exhausting all of the possibilities for withholding it: (a) proceed with the prosecution on the basis that the public interest in doing so outweighs the potential for harm caused by disclosure; or (b) abandon some or all of the charges against the accused so as to avoid the need for disclosure.
INTRODUCTION

In 2006 the then Scottish Executive asked Lord Coulsfield (a retired High Court judge) to review the law and practice of disclosure of evidence in criminal proceedings. His report, together with a summary document, was published in 2007:


The Coulsfield Report sets out some of the background to the review:

“The right to a fair trial is a fundamental constitutional right in the United Kingdom. It has long been recognised that a fair trial cannot be achieved unless the accused is given notice of the charge against him and of the nature of the evidence which is to be relied on to make out the case. It has also been recognised that it is the duty of a public prosecutor to act fairly towards an accused. More recently, however, there has been an increased emphasis on the duty of the prosecutor to make known to the accused evidence or other information which has come to the prosecutor’s attention and which might assist the accused’s defence. A series of decisions of the Judicial Committee of the Privy Council (JCPC) and of the High Court have redefined and perhaps expanded that duty, which is conveniently referred to as the duty of disclosure. The most important of these decisions are McLeod v HMA (No. 2) [1998] JC 67, Holland v HMA [2005] SC(PC) 3 and Sinclair v HMA [2005] SC(PC) 28. These decisions, which I discuss in detail later in this report, require, by express statements and by implication, changes in some of the established practices of the courts and the Crown Office and Procurator Fiscal Service (COPFS) and have given rise to uncertainty about the exact requirements of the duty of disclosure. That uncertainty, in turn, has given rise to difficulties for the police in carrying out criminal investigations and for prosecutors in presenting charges, and in consequence to this report.” (Coulsfield 2007a, para 1.1)

Following its publication, the Scottish Government published a consultation paper (closed January 2008) on proposals for legislation to implement the recommendations of the Coulsfield Report:

- **A Statutory Basis for Disclosure in Criminal Proceedings in Scotland: Proposals for Legislation to Implement the Recommendations in the Coulsfield Report** (Scottish Government 2007)

The Scottish Government also published an analysis of the responses to the consultation and the consultation responses themselves:

- **A Statutory Basis for Disclosure in Criminal Proceedings in Scotland: Analysis of Responses to Consultation and Next Steps** (Scottish Government 2008a)

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1 The three cases of McLeod v HMA, Holland v HMA and Sinclair v HMA are considered at paragraphs 5.5 to 5.15 of the Coulsfield Report.
The current regime governing the disclosure of evidence (and other information) by the prosecution to the accused is based on common law rules. Part 6 of the Criminal Justice and Licensing (Scotland) Bill [as introduced] (‘the Bill’) seeks to establish a statutory framework for such disclosure which will provide greater certainty for all of those involved.

THE COULSFIELD REVIEW

The Coulsfield Report identified four main issues which should be addressed in any regime governing disclosure of evidence:

- the range of information covered by the duty of disclosure (referred to in this briefing as ‘material information’)
- whether, and if so in what circumstances, the withholding of material information from the accused is permitted on the basis that such action is necessary to protect other important interests (eg national security, police methods of investigation or vulnerable witnesses)
- procedures governing the withholding of material information (assuming that non-disclosure is permitted in some circumstances)
- the consequences of any failure to disclose material information where non-disclosure was not permitted under the disclosure regime

Lord Coulsfield recommended establishing a statutory framework for the disclosure of evidence in criminal proceedings.

The proposals in the Bill (considered later in this briefing) are based on recommendations in the Coulsfield Report. Some of the more significant departures from Lord Coulsfield’s recommendations are highlighted when outlining the Bill’s provisions. This part of the briefing focuses on the principles and arguments considered by Lord Coulsfield rather than on his detailed recommendations.²

DUTY OF DISCLOSURE

Lord Coulsfield posed the question – should the prosecution’s duty of disclosure extend to all information gathered during an investigation, including information which the prosecution believes is not relevant or material? In response, the Coulsfield Report stated that:

“There is very substantial reason to think that totally unrestricted disclosure would be impracticable and probably damaging to the operation of the criminal justice system. That is evident simply from looking at the mass of paper which is generated in even a relatively straightforward enquiry”. (Coulsfield 2007a, para 5.31)

It went on to note that:

² Pages 69 to 74 of the Coulsfield Report provides a summary of the 44 recommendations made by Lord Coulsfield.
“It does, however, seem clear that if withholding information is to be justified it must be justified pragmatically, and there must then be a robust, fair and reliable system of selection of material which is not to be disclosed to make it acceptable to deprive the defence of the possibility, be it remote, of turning up some valuable piece of evidence whose significance has not been appreciated or which has been wrongly withheld.” (Coulsfield 2007a, para 5.32)

Lord Coulsfield supported a duty of disclosure applying to material information. However, he found that recent case law on disclosure of evidence had left an element of doubt in relation to the proper application of a materiality test when deciding if information is of a type which may need to be disclosed. The Coulsfield Report recommended an approach based on an objective assessment of whether or not information is material to a case.

JUSTIFIED NON-DISCLOSURE

Lord Coulsfield noted that existing law appears to recognise that there can be circumstances where it is proper to withhold material information from the defence on the basis that its disclosure would: (a) be prejudicial to individuals; or (b) cause prejudice to the public interest.

In relation to individuals, the Coulsfield Report noted that:

“It is obvious that disclosure of some types of information has the potential to expose victims and witnesses to harm. Disclosure of a witness statement may put the witness at the direct risk of intimidation or reprisals. Similarly, disclosure of sensitive video evidence given by a vulnerable witness could do great damage if it led to circulation and duplication of the video images, either as part of an effort to intimidate or out of sheer mischief. Disclosure of information such as a medical condition or a previous termination of pregnancy may expose the subject of the information to ongoing harassment or worse. Disclosure of a previous conviction of a victim or witness may do harm to the reputation or standing of the witness, out of proportion to any significance which the conviction may have for the relevant proceedings.” (Coulsfield 2007a, para 6.3)

However, the Coulsfield Report went on to note that where the privacy rights of a witness and the right to a fair trial of an accused suggest different courses of action, priority must be given to ensuring that the right to a fair trial, as enshrined in Article 6 of the European Convention on Human Rights (ECHR), is protected:

“Nevertheless, it is clear in terms of the ECHR that the accused’s right to a fair trial must ultimately take precedence over any other person’s right to privacy. The right to a fair trial in Article 6 is unqualified whereas the right to privacy [as set out in Article 8 of the ECHR] is qualified by reference to the need to protect the rights and freedoms of others. The implication for any disclosure regime is obvious. Material whose disclosure is necessary for a fair trial must always be disclosed: the need to protect the privacy of another party cannot be any kind of justification for proceeding with an unfair trial. Equally, it is imperative that sensitive information whose disclosure is not required for a fair trial should be kept confidential.” (Coulsfield 2007a, para 6.4)

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3 The question of what is ‘material information’ is considered later in this briefing when looking at the relevant provisions of the Bill.
In relation to the wider public interest, the Coulsfield Report stated that:

“The police obviously have a duty to protect their sources and their methods of intelligence gathering (...). It would obviously be very much against the public interest for surveillance techniques to find their way into the public domain because this could compromise future operations or endanger officers deployed in such activity. Likewise any exposure of the identity of CHIS [covert human intelligence sources or ‘informers’] is likely to place them in serious danger.” (Coulsfield 2007a, para 6.10)

Lord Coulsfield suggested that difficult decisions as to whether or not sensitive information can be withheld may often be avoided by proper application of the materiality test to that information (ie sensitive information may not actually be material to the case). Even where sensitive information does appear to be material, he suggested that the problem may still be avoided by, for example, detailed consideration of what is and is not truly sensitive (possibly leading to disclosure of a redacted version of the information).

However, Lord Coulsfield did conclude that there will still be a need for a system under which the prosecution can apply to the court for permission to withhold sensitive material information. The Coulsfield Report recommended a statutory system of ‘public interest immunity’ hearings along the lines of the model which currently exists in England, with the trial judge conducting the hearings. This would involve the judge examining the information at issue, in the context of the case, to see if it is possible to hold a fair trial without full disclosure of sensitive material information. This may lead to the court allowing the prosecution to withhold some or all of the information.

The Coulsfield Report envisaged different types of public interest immunity hearings (again based on the model in England). In most cases Lord Coulsfield envisaged the defence having some level of involvement in any hearing. However, he recommended that there should be the possibility, in exceptional cases, of having a court hearing to determine whether sensitive information can be withheld without notifying the defence. In making this recommendation for exceptional cases he expressed serious concerns about the compatibility of such a procedure with the right to a fair trial under the ECHR, but noted that he had been “strongly urged by police and security organisations” to include this possibility (Coulsfield 2007a, para 6.36).

The prosecution has two options where it is still required to disclose sensitive information after exhausting all of the possibilities for withholding it: (a) proceed with the prosecution on the basis that the public interest in doing so outweighs the potential for harm caused by disclosure; or (b) abandon some or all of the charges against the accused so as to avoid the need for disclosure.

CONSEQUENCES OF A FAILURE TO DISCLOSE

What are the consequences of any failure by the prosecution to disclose material information where non-disclosure was not permitted under the disclosure regime? In particular, what consequences does such a failure have for any conviction?

A person convicted by a Scottish court may appeal against conviction on the basis that there has been a miscarriage of justice.\(^4\) The Coulsfield Report noted that:

\(^4\) See sections 106(3) and 175(5) of the Criminal Procedure (Scotland) Act 1995.
“It is important in the interests of justice that prosecutions should not be defeated by minor or technical infringements which do not substantially affect the fairness of the proceedings. Most if not all systems recognise this in their laws governing criminal procedure by providing something to the effect that a conviction is not to be quashed or set aside unless there has been a miscarriage of justice, or some similar phraseology.” (Coulsfield 2007a, para 8.2)

Thus, where a failure to disclose information comes to light, one would expect the success of any appeal against conviction to be based on an argument that the failure led to a miscarriage of justice in the particular case.

However, Lord Coulsfield raised concerns about the implications of provisions in the Scotland Act 1998 for any case where a failure to disclose amounts to a breach Article 6 of the ECHR (right to a fair trial), even if it would not generally have been characterised as amounting to a miscarriage of justice. He noted that, as a consequence of section 57 of the Scotland Act 1998, a public prosecutor in Scotland does not have the power to proceed with a prosecution if this would involve a breach of one of the rights protected by the ECHR. He went on to suggest that current case law in this area may mean that even minor breaches of the ECHR (whether due to a failure to disclose material information or some other failure of the prosecution) must lead to a successful appeal.

Lord Coulsfield concluded by stating that:

“It remains the case, of course, that the interpretation of the Scotland Act is a matter for the JCPC [Judicial Committee of the Privy Council], whose decision will be binding on the Scottish Parliament and Executive. In view of the present uncertainties, I do not find it possible to make a positive recommendation, but I would find it unsatisfactory to leave the matter there, if the Executive and Parliament agree with the views which I have expressed in the previous paragraphs. I can only suggest that, if there is a remaining doubt about the consequences of a failure in disclosure, consideration should be given to the possibility that the Scottish Parliament might legislate in order to try to resolve the doubt.” (Coulsfield 2007a, para 8.10)

The Bill (as introduced) does not say anything about the implications for a conviction where there has been a failure by the prosecution to disclose material information (where that non-disclosure was not justified under the relevant provisions of the Bill). The matter is left to the existing law relating to appeals and miscarriages of justice.

In relation to the concerns raised by Lord Coulsfield, Scottish Government officials have indicated that the matter raises complex issues which are still being considered by the Scottish Government.5

THE BILL

Part 6 of the Bill seeks to establish a statutory framework for the disclosure of evidence, by the prosecution to the accused, in criminal cases.6 Evidence is covered by a general duty of disclosure if it is ‘material information’ (as outlined below).

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5 Discussions between the author of this briefing and relevant Scottish Government officials (April 2009).
The Bill would also require the Lord Advocate to issue a code of practice providing further guidance on how the disclosure regime should operate in practice.

As indicated above, it is intended that the statutory framework will provide greater certainty for all of those involved (e.g. accused persons, the police, the prosecution and the courts). However, some concerns have been raised in relation to the practicality of the provisions in the Bill. For example, a submission from the Sheriffs’ Association to a call for evidence by the Parliament’s Justice Committee, argued that the relevant part of the Bill “contains detailed, complicated and time-consuming rules about disclosure that will further delay trials” (Scottish Parliament Justice Committee 2009a, para 6.1).

**DUTY OF DISCLOSURE**

**Relevant Information and Material Information**

Under the provisions in the Bill, the prosecution will have a duty to review all information which may be relevant to a case (whether for or against the accused). In carrying out the review, the prosecution must determine whether or not each piece of information is material. Information is material if any of the following apply:

- it would materially weaken or undermine the prosecution case
- it would materially strengthen the accused person’s case
- it is likely to form part of the prosecution case

The duty to review information applies only to information of which the prosecution is aware. This will include all information which the prosecution has been provided with by the police. The Coulsfield Report notes that:

> “During the process of an investigation police officers may need to inspect a great deal of information which has been obtained or generated. It is imperative that they should accurately record and retain the information which may be relevant either to proof of the case or to exculpation, and should err on the side of recording doubtful material rather than discarding it.” (Coulsfield 2007a, para 10.14)

It also highlights the fact that the prosecution can only effectively carry out its duty of disclosure if the police are required to reveal their information to the prosecutor. In relation to cases being prosecuted under solemn procedure, the police will have a duty under the Bill to provide the prosecution with a list of all information obtained during the course of its investigations which may be relevant to the case. The Bill follows the recommendations in the Coulsfield Report in

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6 Although the Bill generally refers to the ‘accused’ rather than the accused person’s defence team, various elements of the disclosure regime discussed below also involve the defence team (assuming the accused person does have legal representation).

7 Information may be relevant to a case but not material. All material information is by definition also relevant.

8 Solemn procedure is used for more serious cases and can lead to a trial with a jury in either the High Court or one of the sheriff courts. Summary procedure is used for less serious cases and can lead to a trial without a jury in a sheriff or justice of the peace/district court.

9 The Bill would give the Scottish Ministers the power to extend this duty to other investigative agencies by way of subordinate legislation.
not placing the police under such a duty where a case is being prosecuted under summary procedure. Lord Coulsfield had argued that:

“to implement a disclosure regime in all summary cases at the same level as is recommended for solemn proceedings would risk creating a great deal of unnecessary work for both police and prosecution, and sometimes also for the defence. In the application of Article 6 [of the ECHR], it is recognised that the principle of proportionality applies in deciding what measures are necessary to implement the right to a fair trial.” (Coulsfield 2007a, para 9.3)

Organisations which have argued that the police should also have a duty to provide the prosecution with a list of all relevant information obtained during the course of its investigations in summary cases include the Scottish Criminal Cases Review Commission, the Law Society of Scotland and the Faculty of Advocates.

Following the above process of review, the prosecution has a duty under the Bill to:

- disclose material information to the accused – solemn and summary cases
- notify the accused of the existence of any other information which may be relevant but which the prosecution does not consider to be material – solemn cases only

Thus there is a process of sifting information. In relation to solemn proceedings, the accused should be notified of the existence of any information which may be relevant to the case (eg by the prosecution advising the accused that the police took a statement from a particular person). However, information will only be disclosed to the accused (eg by the prosecution providing the accused with a copy of a statement) where it is also deemed to be material.  

It might be argued that, the fact that the prosecution in summary cases will not be required to notify the accused of the existence of relevant information which it does not deem to be material, will make it harder for the accused to challenge that assessment. How can the assessment that information is not material be challenged if the accused has no indication of the existence of the information? On the other hand, it has been argued that the Bill already goes too far in seeking to legislate on detailed issues which would be best left to administrative arrangements complying with guidelines on good practice set out in the proposed code of practice.  

The prosecution’s duty of disclosure continues until the conclusion of the proceedings against the accused (eg until the accused is found guilty and does not appeal, or until the accused is acquitted). During this time, the prosecution must periodically review any information which may be relevant to see whether such information should now be classed as being material, and thus liable to be disclosed to the accused.

Where the accused is aware of the existence of relevant information which the prosecution has not disclosed, the accused (or the accused person’s lawyer) can seek to resolve any dispute as to whether or not that information is material to the case through: (a) providing the prosecution with a ‘defence statement’ (see below); (b) discussions with the prosecution; and (c) petitioning the court for a ruling on whether information is material.  

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10 The duty to disclose material information to the accused is subject to provisions dealing with justified non-disclosure (outlined later in this briefing.)

11 For example, see the submission from the Judges of the High Court of Justiciary to the Justice Committee’s call for evidence on the Bill (Scottish Parliament Justice Committee 2009b, paras 75 to 80).

12 See the Coulsfield Report at paragraphs 14.8 to 14.10.
Previous Convictions and Outstanding Charges

The information covered by the duty of disclosure includes information about any previous convictions or outstanding charges which witnesses or the complainer may have – provided that information is relevant and material (eg on the basis that a previous conviction might cast doubt on the credibility of a prosecution witness). The Coulsfield Report (para 18.1) noted that the disclosure of irrelevant previous convictions might amount to a breach of privacy rights enshrined in Article 8 of the European Convention on Human Rights (ie a possible breach of the rights of a potential witness or complainer). In relation to summary proceedings, the provisions in the Bill go somewhat further than the recommendations made by Lord Coulsfield. The Coulsfield Report stated that the prosecution should not have to disclose any criminal convictions which witnesses may have unless these are specifically requested by the accused (or defence lawyer). This recommendation was based on evidence that:

“in many summary cases the defence see no need to consider the previous criminal history records of Crown witnesses, and it would therefore be a waste of effort to disclose them routinely. I therefore recommend that disclosure of this information should only be made if it is requested.” (Coulsfield 2007a, para 18.5)

However, following consultation the Scottish Government concluded that the prosecution should be under a duty to proactively disclose relevant and material previous convictions in relation to both solemn and summary proceedings (see Scottish Government 2008a, para 38).

Defence Statements

An assessment by the prosecution as to whether or not information is material may be influenced by having some knowledge of the nature of the accused person’s intended line of defence. In light of this, the Bill includes provision for the accused to provide the prosecution with a ‘defence statement’ setting out certain details of the planned defence. Following receipt of a defence statement, the prosecution must again review any information which may be relevant to the case to see if anything else should be disclosed.

The Bill would require the accused to provide such a statement in solemn proceedings and allow the accused to provide one in summary proceedings. Lord Coulsfield, whilst recommending the possibility of submitting a defence statement, did not recommend making them mandatory in any cases. He stated that he had:

“not been convinced that a general requirement for a defence statement would give any significant additional benefit, to justify the additional work and cost which would be generated”. (Coulsfield 2007a, para 7.8)

However, the Policy Memorandum published along with the Bill notes the Scottish Government’s belief, in relation to solemn proceedings, that:

“the nature and scale of such cases are such that the prosecutor’s task in assessing what requires to be disclosed would be almost impossible without knowing some information regarding the accused’s line of defence”. (para 501)

The proposal to make defence statements mandatory in solemn cases has attracted some
criticism. A submission from the Sheriffs’ Association, to the Justice Committee’s call for evidence on the Bill, highlighted concerns that the deadline applying to the accused may require the lodging of a defence statement before there has been disclosure of the prosecution case: 

“As we have indicated (…), the Crown has difficulty in providing disclosure of the prosecution case in time for first diets and trial diets. If the prosecution has not disclosed its case, how and why is the accused to state a defence? It will no doubt be regarded as repugnant to our legal system that an accused must state a defence before the prosecution has disclosed its case.” (Scottish Parliament Justice Committee 2009a, para 6.12)

A submission from the Judges of the High Court of Justiciary questioned the need for statutory provisions on defence statements:

“We appreciate that at base the concern may be that implementation of the Crown’s duty of disclosure is to an extent dependent on awareness of the line of defence. But in our view the perception of that concern may be largely over-stated. Practitioners in the criminal courts in Scotland are well aware of the practical realities and of the respective evidential strengths and weaknesses of their respective cases. The prosecutor will normally have little real difficulty in envisaging the possible lines of defence (indeed, it would be his duty to consider those, both prior to the initiation of the prosecution and continually thereafter). Were there to be any particular matter upon which the defence sought disclosure, that can be intimated other than by the formal means of a defence statement.

The provisions on defence statements are a further example of the introduction in the Bill of unnecessary legislative complexity into what is essentially a matter of practice and procedure.” (Scottish Parliament Justice Committee 2009b, paras 84 to 85)

Thus, concerns have been raised that the provisions on defence statements may be unfair on the accused and unnecessarily bureaucratic in practice. It is also possible that defence lawyers will seek to protect the position of the accused by issuing blanket statements disputing all aspects of the prosecution case, rather than specifying a precise line of defence. Such an approach is unlikely to provide much assistance to the prosecution in considering disclosure of evidence.

Other Provisions

The Bill also includes provisions which seek to prevent the misuse of information which is disclosed to the accused.

It should be noted that the Bill specifically provides that the duty of disclosure does not apply to information where the disclosure of that information is prohibited by section 17 of the Regulation of Investigatory Powers Act 2000. The 2000 Act creates a framework for the interception of communications, use of surveillance and access to encrypted data by various investigatory agencies.

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13 Section 94 of the Bill provides that the accused must lodge a defence statement at least 14 days before the first diet or preliminary hearing of a solemn case. First diets and preliminary hearings are pre-trial court hearings held in sheriff solemn and High Court cases respectively.
JUSTIFIED NON-DISCLOSURE

Sensitive Information

As part of the process of providing the prosecution with a list of all information which may be relevant to a case prosecuted under solemn procedure, the Bill would require the police (or other investigative agency) to split that information into three categories: ‘highly sensitive’; ‘sensitive’; and ‘non-sensitive’. Information should be listed as sensitive if its disclosure would be likely to do any of the following:

- cause serious injury, or death, to any person
- obstruct or prevent the prevention, detection, investigation or prosecution of crime
- cause serious prejudice to the public interest

The Bill does not seek to define the difference between ‘sensitive’ and ‘highly sensitive’ information. However, police officers will be able to highlight information which they feel is particularly sensitive by listing it as highly sensitive. The Government’s intention is that this will help to ensure that such information is treated with additional care by the prosecution, although it might be argued that the police could make such a request without the need for two categories of sensitive information in the Bill.

The prosecution can, after reviewing the information, require the police (or other investigative agency) to re-categorise any piece of information in accordance with the prosecution’s assessment of the appropriate categorisation.

This categorisation of information is important when the prosecution is considering whether or not material information should be disclosed to the defence – see the discussion of non-disclosure orders below.

The Bill does not require the police to categorise information in this way where a case is being prosecuted under summary procedure. However, the prosecution (and the court) would use the same test outlined above in relation to sensitive information when considering whether non-disclosure of material information is justified. Thus, the question of whether or not information is sensitive would still play a central part in relation to non-disclosure (although the term ‘sensitive’ is not actually used in the provisions dealing with non-disclosure).

Non-Disclosure Orders

The Bill provides that the prosecution must apply to the court for a ‘non-disclosure order’ in relation to an item of material information if the prosecution believes that its disclosure would be likely to do any of the following:

- cause serious injury, or death, to any person
- obstruct or prevent the prevention, detection, investigation or prosecution of crime
- cause serious prejudice to the public interest

14 Discussions between the author of this briefing and relevant Scottish Government officials (April 2009).
This is the same test used for categorising information as sensitive (see above). Given this fact, this briefing also uses the term ‘sensitive’ to describe any information covered by the above test.

The application for a non-disclosure order is made to the same level of court (ie the High Court, a sheriff court or a justice of the peace court) as would deal with any trial in the case.

The court may grant a non-disclosure order in relation to material information if it is satisfied that all of the following apply:

- the information is sensitive
- withholding the information would be consistent with the accused person receiving a fair trial
- the granting of a non-disclosure order is the only way of protecting the public interest

The relevant provisions of the Bill do not say that the court ‘must/shall’ grant a non-disclosure order in such circumstances. Thus, the court may still refuse to grant an order although satisfied that all of the stated conditions apply. The Bill does not provide guidance on the grounds which might result in a court refusing to grant a non-disclosure order in such a case.

Where a non-disclosure order is granted, the prosecution is prohibited from disclosing to the accused the information specified in the order.

As indicated above, the prosecution when seeking a non-disclosure order must apply to the court. This leads to a court hearing at which the court considers the information. The prosecution is entitled to make representations at this hearing. The accused (or the accused person’s lawyer) will also have the chance to speak unless the court has, on the application of the prosecution, granted an ‘exclusion order’ (see below).

Exclusion Orders and Non-Notification Orders

In cases where the prosecution is required to apply for a non-disclosure order, the prosecution may also apply to the court for:

- an exclusion order – summary or solemn proceedings
- a non-notification order plus exclusion order – solemn proceedings only

Where the court grants an exclusion order, the accused is prohibited from attending or making representations at the court hearing dealing with the related application for a non-disclosure order.

Where a non-notification order is also granted, the accused is in addition prevented from receiving any notice of the fact that the prosecution has applied for exclusion and non-disclosure orders in relation to the relevant piece of information. ¹⁵ Thus, the prosecution can seek court orders: (a) preventing the disclosure of material information to the accused; and (b) preventing the accused from being made aware that such information has been withheld.

¹⁵ As is the case for other provisions in the Bill, these provisions apply to the accused person’s defence team in the same way that they apply to the accused.
Consideration of the prosecution’s application for a non-notification order involves a court hearing at which the prosecution is given an opportunity to make representations. The accused will not be made aware of the hearing and will not have the chance to make representations. The court may grant a non-notification order if it is satisfied that all of the following apply:

- that notifying the accused of the prosecution’s application for a non-disclosure order would be likely to disclose to the accused the nature of the information to which the application relates
- that it is not in the public interest that the nature of the information be disclosed to the accused
- that, having regard to all the circumstances, the making of a non-notification order would be consistent with the accused person receiving a fair trial

Where the court grants a non-notification order, it must also grant an exclusion order.

In cases where the court refuses to grant a non-notification order, or where the prosecution only applies for an exclusion order, a separate court hearing deals with the application for the exclusion order. The accused is given notice of this court hearing and is, along with the prosecution, entitled to make representations at the hearing. The court may grant an exclusion order if it is satisfied that all of the following apply:

- that disclosure to the accused of the nature of the information to which the application for a related non-disclosure order deal with would be likely to disclose to the accused that information
- that it is not in the public interest that the nature of the information be disclosed to the accused
- that, having regard to all the circumstances, the making of an exclusion order would be consistent with the accused person receiving a fair trial

As noted above, the Coulsfield Report did recommend that there should be the possibility, in exceptional cases, of having a court hearing to determine whether sensitive material information can be withheld without the accused (or the accused person’s lawyer) having the right to be present or even aware of the hearing. However, in making this recommendation Lord Coulsfield expressed serious concerns about the compatibility of such a procedure with the right to a fair trial under Article 6 of the ECHR. Similar concerns have been expressed by both the Law Society of Scotland and the Faculty of Advocates (in response to the Scottish Government’s 2007 consultation paper). The Scottish Parliament does not have the power to legislate in a way which would breach Article 6 of the ECHR. It may be noted that the statements on legislative competence accompanying the Bill, by both the Scottish Government and the Parliament’s Presiding Officer, express the view that all of the Bill’s provisions are within the competence of the Scottish Parliament.

The fact that the Bill does not allow the prosecution to apply for a non-notification order in relation to summary cases is in line with an assessment by the Scottish Government that their

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<sup>16</sup> The relevant provisions of the Bill are similar to those relating to non-disclosure orders in that they do not say that the court ‘shall’ grant a non-notification order in such circumstances.

<sup>17</sup> The relevant provisions of the Bill are similar to those relating to non-disclosure orders in that they do not say that the court ‘shall’ grant an exclusion order in such circumstances. Some of the drafting of the provisions relating to exclusion orders may need to be amended (eg section 105(1) of the Bill should include a reference to section 103(3) of the Bill).
use can only be justified in a limited number of serious cases. It is intended that this limitation on their use will help strike a fair (and ECHR compliant) balance between competing private and public interests. In summary cases, which deal with less serious offences, it may be argued that the public interest in carrying on with a prosecution will never justify the exceptional steps involved in the non-notification procedure and that the prosecution should, in relevant case, abandon the case. Of course, it may also be argued that the accused in a solemn case will often have more to lose if there is any possibility that the preparation of the defence will be compromised by information being withheld.

**Appeals and Reviews**

The prosecution would be entitled to appeal against the decision of a court refusing its application for a non-notification, exclusion or non-disclosure order. The intention is that this provision will also allow the prosecution to appeal in cases where the court refuses part of an application. Where an application has been refused and an appeal is unsuccessful, the prosecution would only have the ability to avoid disclosure by dropping the relevant criminal proceedings.

The accused would be entitled to appeal against the decision of a court making an exclusion or non-disclosure order.

The accused cannot appeal against the making of a non-notification order. As noted above, the accused is not made aware of such orders. However, where 'special counsel' has been appointed to represent the interest of the accused (see below), that counsel would be entitled to appeal against the making of a non-notification order.

The Bill also includes provision for the court to review any non-disclosure order in light of new information. The order may be recalled by the court if it determines that it is no longer appropriate.

**Special Counsel**

The Bill provides that the court may, in certain circumstances, appoint special counsel to represent the interests of an accused person, where the court is dealing with an application, appeal or review relating to a non-notification, exclusion or non-disclosure order. The circumstances are that the court considers such an appointment to be necessary to ensure that the accused receives a fair trial.

The Scottish Government has indicated that details of a scheme for the appointment of special counsel are under consideration. This includes questions of eligibility for appointment. However, it is likely that the court will appoint a qualified solicitor, solicitor advocate or advocate, and that an essential criterion for appointment will be that the lawyer has passed the appropriate level of security vetting.

In relation to existing provisions for special counsel in England and Wales, the Coulsfield Report noted that:

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18 Discussions between the author of this briefing and relevant Scottish Government officials (April 2009).
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“The purpose [of special counsel] is to permit the retention of a Chinese wall between the defence and any sensitive material, while allowing the interests of the defence to be represented at the PII [public interest immunity] hearing. Special counsel can engage in adversarial argument about the strength of public interest in keeping the material secret, and, briefed by the defence, draw attention to any particular issues to which the material was relevant. Communication between the defence and special counsel is, however, a one way street. Special counsel are not permitted to inform the defence of the nature of the sensitive material.” (Coulsfield 2007a, para 6.21)

The provisions on special counsel are likely to be of particular significance in relation to:

- applications for non-notification orders, given that the accused will not be told that the court will be considering such an application
- applications for non-disclosure orders where the court has made an exclusion order and thus the accused (including the accused person’s legal team) is prohibited from attending or making representations at the relevant court hearing

It is important to note that even where the accused is entitled to make representations at a court hearing dealing with a non-disclosure order, the accused is not entitled to know the subject matter of the application (ie the material information which the prosecution is seeking to withhold). Any special counsel appointed by the court will not be subject to the same restriction and may, therefore, be able to present lines of argument that the accused would not be able to present.

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21 The PII hearing is the equivalent in England and Wales of the proposals in the Bill for a court hearing dealing with an application for a non-disclosure order.
22 Of course, where the defence is not aware that the prosecution is seeking to withhold information (eg if a non-notification is made under the provisions in the Bill) it would not be able to brief special counsel.
23 As is the case for other provisions in the Bill, this restriction applies to the accused person’s defence team in the same way that it applies to the accused.
SOURCES


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