

# CRIMINAL JUSTICE AND LICENSING (SCOTLAND) ACT 2010

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 6 - Disclosure**

#### ***Section 145 – Application for section 145 order: determination***

644. This section deals with the determination of an application by the prosecutor to apply for an order which would result in the information in question either not being disclosed to the accused or disclosed in a partial or restricted manner.
645. Subsection (2) provides that the court must consider the information that the application relates to and give the prosecutor and the accused (if not excluded) the opportunity to make representations to the court. The court must then engage in a two-step process. First, it must determine (depending on whether the application is made by virtue of subsection (2) or (3) of section 141) whether the conditions in subsection (3) or (4) are met. Second, if it determines that the conditions in either of those subsections are met then it must go on to determine whether subsection (5) applies.
646. Subsection (5) provides that the court must consider whether the information could be disclosed or partly disclosed in such a way as to provide the accused with something rather than nothing and still achieve the correct balance between public and private interests. When the prosecutor makes this application during appellate proceedings or after conviction but in the absence of any live appellate proceedings the court will be asked to consider the question of whether or not, despite the trial being concluded, withholding the item of information *would have been consistent with the accused receiving a fair trial*. The intention is that the court requires to put itself back to the time of the trial and assess the evidence that is before the court for and against the accused in order to determine whether this particular information, which is the subject of the application is central to the accused receiving a fair trial. The effect of this may be that the court will require to reconsider the record of evidence from the original trial to determine this issue.
647. Subsection (8) provides for ways in which the court might decide that information could be disclosed e.g. by provision of redacted or edited information or summaries of the information.