These notes relate to the Criminal Justice and Licensing (Scotland) Act 2010 (asp 13) which received Royal Assent on 6 August 2010

CRIMINAL JUSTICE AND LICENSING (SCOTLAND) ACT 2010

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 6 - Disclosure

579. This Part of the Act makes provision in relation to the disclosure of evidence in criminal proceedings. It is a long established rule in the Scottish legal system that the Crown has an obligation to give the accused notice of the case against him, i.e. to tell him what charges he faces and what evidence the Crown intends to bring to prove the charges. Any *exculpatory* material should be identified and disclosed to the accused/defence. Disclosure has, until now, been carried out on a common law basis. A series of high profile decisions of the Judicial Committee of the Privy Council including the cases of *Holland and Sinclair*, whilst refining that duty also gave rise to some uncertainty about the exact requirements of the duty of disclosure.

580. Following these decisions Lord Coulsfield was invited to carry out a review on the law and practice of disclosure of evidence in the Scottish criminal justice system, which was published in August 2007. He recommended that disclosure would benefit from having a statutory framework. The provisions in the Act seek to give effect to that recommendation and build on other recommendations made to clarify the law and practice in disclosure in criminal proceedings.

Section 116 - Meaning of "information"

581. This section defines what the term "information" covers where it is used in the provisions, including appellate matters. It covers material of any kind which is given to or obtained by the prosecutor in connection with the proceedings. In appellate proceedings the definition of "information" includes material given to or obtained by the prosecutor in connection with the appellate proceedings and the earlier proceedings to which the appellate proceedings relate.

Section 117 – Provision of information to prosecutor: solemn cases

582. This section applies to solemn cases. It creates a duty on the investigating agency, (as defined in subsection (4) and not simply restricted to the police), to provide the prosecutor with details of all the information that may be relevant to the case for or against the accused as soon as practicable after the accused's first appearance in court in respect of the proceedings. "Information" includes information that the agency is aware of which was obtained by another agency. If the prosecutor requires the information itself, rather than just the details, the investigating agency must provide it as soon as is practicable.

Section 118 – Continuing duty to provide information: solemn cases

583. This section provides for a continuing duty on the investigating agency in solemn cases to submit to the prosecutor as soon as practicable after becoming aware of further information, the details of such information obtained during the course of the investigation that may be relevant to the case for or against the accused. This duty follows on from the initial duty to disclose under s.117. Upon receipt of these details, if the prosecutor requires the information itself, rather than only the details of it, the investigating agency must provide it as soon as practicable. Subsection (5) sets out the circumstances in which the proceedings are deemed to have been concluded, thus ending the investigating agency's duty.

Section 119 – Provision of information to prosecutor: summary cases

584. This section applies where a plea of not guilty is recorded against an accused charged on a summary complaint and sets out the duties of the investigating agency in such circumstances. The investigating agency is required to inform the prosecutor as soon as practicable after the recording of the plea of the existence of all the information that may be relevant to the case for or against the accused that the agency is aware of that was obtained in the course of the investigation of the matter. The agency must provide to the prosecutor any such information that the prosecutor then requests.

Section 120 – Continuing duty of investigating agency: summary cases

585. This section provides for a continuing duty on the investigating agency in summary cases to inform the prosecutor of the existence of further information as soon as practicable after becoming aware of it i.e information that may be relevant to the case for or against the accused, obtained during the course of the investigation. Upon receipt of this, if the prosecutor requires the information itself the investigating agency must provide it as soon as practicable. This duty continues until proceedings against the accused are concluded. Subsection (5) sets out the circumstances in which the proceedings are deemed to have been concluded.

Section 121 – Prosecutor's duty to disclose information

586. This section sets out the test by which information has to be disclosed to the accused under the statutory scheme in both solemn and summary cases. It provides that, where the accused appears for the first time in solemn proceedings, or where a plea of not guilty is recorded against the accused charged on summary complaint, the prosecutor has a duty to review all of the information of which the prosecutor is aware which may be relevant to the case for or against the accused. The prosecutor must then disclose to the accused any such information to which subsection (3) applies.

587. Subsection (3) sets out the rules which determine whether the information must be disclosed by the prosecutor. If subsection (3) applies to any of that information then the prosecutor must disclose all such information to the accused. If subsection (3) does not apply to any of that information, then the prosecutor need not disclose that information to the accused.

Section 122 – Disclosure of other information: solemn cases

588. This section applies to solemn cases only. Having complied with the duty to disclose under s.121, the prosecutor is then obliged to disclose to the accused the details of any other information which may be relevant to the case for or against the accused.

589. Subsection (3) provides that the prosecutor is not required to disclose the details of any "sensitive" information under this section.

590. Subsection (4) sets out the meaning of "sensitive" in relation to an item of information.

Section 123 – Continuing duty of prosecutor

591. This section confirms that in cases where the disclosure statutory scheme applies (both summary and solemn), the prosecutor has an ongoing duty to review all the information that may be relevant to the case for or against the accused of which the prosecutor is aware. Having done so the prosecutor must disclose to the accused any such information to which section 121(3) applies.

592. Subsection (3) applies to solemn cases only and sets out that having complied with the duty to review and disclose the information falling under section 121 the prosecutor must also disclose details of any other information of which he or she is aware that may be relevant to the case for or against the accused. Again this additional duty does not apply to "sensitive" information.

593. Subsection (6) defines when a case is deemed to have been concluded.

Section 124 – Defence statements: solemn proceedings

594. This section provides that defence statements shall be mandatory in all solemn cases and provides the timings for lodging of such statements. Subsection (2) sets out that as soon as practicable after the prosecutor receives a copy of the defence statement, the prosecutor must review all of the information which may be relevant to the case for or against the accused of which he is aware. Having done so the prosecutor must then disclose to the accused any information which falls to be disclosed under s.121(3).

595. Subsection (3) amends the Criminal Procedure (Scotland) Act 1995 by inserting a new section 70A. That section provides that the accused must lodge a defence statement at least 14 days before the first diet in sheriff and jury proceedings, and the preliminary hearing in High Court proceedings. The information that the defence statement must contain is specified in subsection (9) of new section 70A of the Criminal Procedure (Scotland) Act 1995.

596. The new section 70A also provides that, at least 7 days before the trial diet, the accused must lodge a further statement. This statement must set out whether there has or has not been a material change in circumstances since the defence statement was lodged. If a material change has occurred, the statement must set out the details of that change and what the new position is. Further material changes must similarly be detailed in subsequent statements. Any defence statements must be lodged before the trial diet unless on cause shown the court allows otherwise. Subsection (8) requires the accused to send a copy of any defence statement to the prosecutor and any co-accused.

597. Subsection (4) amends section 78 of the Criminal Procedure (Scotland) Act 1995 by providing that where a defence statement is lodged and the defence consists of or includes a special defence the requirement under section 78 of that Act to lodge and intimate such a defence does not apply.

Section 125 – Defence statements: summary proceedings

598. Unlike solemn proceedings, an accused is not obliged to lodge a defence statement in summary proceedings. This section enables him to do so however, should he wish, where a plea of not guilty is recorded against him. Importantly though, such statements require to be lodged before the accused can seek recourse to the court under section 128 to recover information he considers material to the case in terms of section 121 but which the prosecutor has not disclosed. The accused may lodge defence statements in summary cases at any time following the plea of not guilty until the conclusion of the proceedings. Subsection (6) defines when proceedings are to be taken to be concluded.

599. Subsection (2) sets out what a defence statement shall contain. Subsection (3) provides that as soon as practicable after lodging a defence statement the accused must send a copy of the statement to the prosecutor and any co-accused.

600. Under subsection (4) the prosecutor must, as soon as practicable after receiving the defence statement, review all the information that may be relevant to the case for or against the accused for the purposes of determining whether the section 121 disclosure test is satisfied. Any such information should then be disclosed.

601. Subsection (7) inserts a new provision into section 149B of the Criminal Procedure (Scotland) Act 1995 which under certain circumstances removes the requirement upon the accused to lodge notice of a special defence in terms of that section where a defence statement which sets our the special defence has already been lodged.

Section 126 – Change in circumstances following lodging of defence statement: summary proceedings

602. This section provides a continuing duty upon the accused where a defence statement in a summary cases has been lodged at least 14 days before the trial diet. Under subsection (2) where there has been no material change in circumstances in respect of the accused's defence since the statement was lodged a further statement must be lodged at least 7 days before the trial stating that fact. If such a material change has taken place a defence statement must be lodged to that effect before the trial diet begins unless on cause shown the court allows it to be lodged during the trial diet. The accused is required to send a copy of such statements to the prosecutor and any co-accused and subsection (6) provides the duties of the prosecutor upon receiving such a statement.

Section 127 – Sections 121 to 126: no need to disclose same information more than once

603. This section provides that the prosecutor only needs to disclose information once to the accused in relation to the same matter.

Section 128 – Application by accused for ruling on disclosure

604. The purpose of this section is to provide the accused with an opportunity in both summary and solemn cases to recover information from the prosecutor where the accused considers that the prosecutor has failed to disclose information which meets the disclosure test in section 121. The section allows the accused to apply to the court for a ruling on the matter. Subsection (1)(a) provides that such an application is only possible if the accused has already lodged a defence statement in the case. It is a mechanism by which the accused can contest the prosecutor's decision not to disclose information in response to their lodging a defence statement, where the accused considers that the information meets the section 121 test.

605. Subsection (3) provides the content of the accused's written application to the court.

606. Subsections (4) to (7) provide the duties of the court upon receipt of such an application including the disposals available to the court. Under subsection (8) it is provided that except where it is impracticable to do so the justice of the peace, sheriff or judge who is presiding or will preside at the trial must deal with the application.

Section 129 – Review of ruling under section 128

607. This section allows the accused to apply to the court to review its earlier ruling in terms of section 128. Such an application can be made if the accused becomes aware of further information following the ruling and considers that had this further information been available to the court at the earlier hearing, the court would have made a ruling to disclose the original information.

608. Subsection (3) provides the content of the accused's written application to the court.

609. Subsections (4) to (7) provide the duties of the court upon receipt of such an application including the disposals available to the court. Under subsection (8) unless it is

impracticable to do so the justice of the peace, sheriff or judge who is presiding or will preside at the trial must deal with the application.

Section 130 – Appeals against rulings under section 128

610. This section provides the prosecutor or the accused with a right to appeal to the High Court against a ruling made under section 128. The appeal must be made within 7 days of the ruling being made. Subsection (2) provides that the court of first instance or the High Court may, where an appeal is brought, postpone any trial diet that has been appointed for such period as it thinks appropriate, or adjourn any hearing for such period as it thinks appropriate, or direct that any period of postponement or adjournment is not to count towards any time limit applying in the case. Subsection (3) provides that the High Court may affirm the ruling or remit the case back to the court of first instance with such directions as the High Court thinks appropriate. Under subsection (4) it is provided that the section does not affect any other right of appeal which any party may have in relation to a section 128 ruling.

Section 131 – Effect of guilty plea

611. This section provides that where the prosecutor is required to disclose information to an accused, but before doing so a plea of guilty is recorded against the accused, that the prosecutor need not comply with the requirement in so far as it relates to the disclosure of information which would have been likely to have formed part of the prosecution case. If the accused withdraws the plea of guilty then this provision ceases to apply.

Section 132 – Sections 133 to 140: Interpretation

612. This section defines the terms "appellant" and "appellate proceedings" where they appear in sections 133 to 140. The definition of "appellate proceedings" lists all those proceedings which that term covers in those provisions. It covers the full range of appellate proceedings that might be raised by an appellant following his conviction where he seeks to bring his conviction under review alleging any miscarriage of justice, or in sentence appeals where he alleges a miscarriage of justice based on the existence and significance of evidence not heard in the original proceedings.

Section 133 – Duty to disclose after conclusion of proceedings at first instance

613. This section applies in cases where an appeal is taken against the verdict in the first instance proceedings. Subsection (2) requires the prosecutor to review the information of which he is aware that relates to the grounds of appeal and to disclose to the appellant that information that is specified in subsection (3). The definition of relevant act in subsection (5) specifies the trigger point for this duty, with reference to each individual type of appeal that is listed in the definition provision. The effect of this is that the duty requires to be complied with only when certain specified events have taken place. Subsection (4) provides that the prosecutor is not required to disclose anything that has already been disclosed to the appellant.

Section 134 – Continuing duty of prosecutor

614. This section sets out the continuing nature of the prosecutor's duty of disclosure in appellate proceedings, requiring the prosecutor to review information held that relates to the grounds of appeal in the appellate proceedings and to disclose information that meets the tests set out in section 133(3). Subsection (3) provides that the prosecutor is not required to disclose anything that has already been disclosed to the appellant. Subsections (4) and (5) set out the start and end points of the duty. They provide that the duty is brought to an end by the conclusion of the appeal, whether that conclusion be a final disposal or determination by the court or the abandonment of the appeal.

Section 135 – Application to prosecutor for further disclosure

615. This section enables an appellant to apply to the prosecutor to seek the disclosure of information which has not already been disclosed to him in terms of section 133(2). Its effect is to enable such an application to be made to the prosecutor, setting out, by reference to the grounds of appeal, the nature of the information that the appellant wishes the prosecutor to disclose and the reasons why he considers that disclosure by the prosecutor is necessary. The provision places a duty on the prosecutor, as soon as practicable after receiving such an application to review any information which he is aware of that relates to the request and disclose to the appellant any information which meets the tests set out in subsection (3) of section 133 which has not previously been disclosed.

Section 136 – Further duty of prosecutor: conviction upheld on appeal

616. This section sets out the prosecutor's duty of disclosure in cases where the accused's conviction is upheld following his appeal. It provides that, if, after the conclusion of the appeal, the prosecutor becomes aware of information that should have previously been disclosed then the prosecutor must, as soon as practicable after becoming aware of it, disclose the information. Subsection (3) provides that the prosecutor is not required to disclose anything that has already been disclosed. Subsection (4) provides that the section does not place a requirement on the prosecutor to proactively review the information of which he or she is aware.

Section 137 – Further duty of prosecutor: convicted persons

617. This section sets out the prosecutor's duty of disclosure in cases where the accused is convicted and does not appeal that conviction. It provides that, if, after the conclusion of the proceedings the prosecutor becomes aware of information that should have been disclosed in terms of sections 121 or 123 then, as soon as practicable after becoming aware of it, the prosecutor must disclose it to the convicted person. Subsection (3) provides that, if the convicted person appeals, then this section does not apply as the disclosure duties during an appeal are provided elsewhere. Subsection (4) provides that the prosecutor is not required to disclose anything that has already been disclosed. Subsection (5) provides that the section does not place a requirement on the prosecutor to proactively review the information of which he or she is aware.

Section 138 – Further duty of prosecutor: appeal against acquittal

618. This section provides that, where an accused person is acquitted and the prosecutor appeals against that acquittal then, if after lodging his appeal the prosecutor becomes aware of information that relates to the appeal and which meets the test in section 133 then, as soon as practicable thereafter, the prosecutor must disclose that information to the acquitted person. Subsection (3) provides that the prosecutor is not required to disclose anything that has already been disclosed. Subsection (4) provides that this duty is brought to an end by the disposal of the appeal by the High Court and subsection (5) makes it clear that there is no requirement on the prosecutor to proactively review the information of which he or she is aware.

Section 139 – Application by appellant for ruling on disclosure

619. This section allows an appellant to contest a prosecutor's decision not to disclose an item of information in response to a request for further disclosure in terms of section 135. The basis upon which the appellant would do so would be that the prosecutor had failed to disclose information that satisfies the prosecutor's duty to disclose in appellate proceedings. The section allows the accused to apply to the court for a ruling on the matter.

620. Subsection (3) provides the content of the accused's written application to the court.

621. Subsections (4) to (7) provide the duties of the court upon receipt of such an application including the appointment of a hearing and the disposals available to the court. By subsection (9) it is provided that except where it is impracticable to do so the application should be assigned to the judges who are to hear the appellant's appeal.

Section 140 – Review of ruling under section 139

622. This section allows the appellant to apply to the court to review its earlier ruling in terms of section 139. Such an application can be made if the appellant becomes aware of further information following the ruling and considers that had this further information been available to the court at the earlier hearing, the court would have made a ruling to disclose the requested information.

623. Subsection (3) provides the content of the accused's written application to the court.

624. Subsections (4) to (7) provide the duties of the court upon receipt of such an application including the appointment of a hearing and the disposals available to the court. By subsection (8) it is provided that except where it is impracticable to do so the application should be assigned to the judges who ruled upon the original application.

Sections 141 to 145 overview

625. Occasionally there will be circumstances where the prosecutor has a duty to disclose information but is unable to do so due to the risks involved to the public interest in making such information available to the accused. The remedy for the prosecutor in such a situation is to seek authority from the court to prevent the disclosure of the information. This is known as the s.145 order. Lord Coulsfield recognised that at times such risks may arise by the mere fact of the accused's presence at any hearing discussing the application to withhold the information. Furthermore the accused's knowledge that such a hearing is going to take place to discuss the withholding of information, even if he will not be present at such a hearing, may be enough to create the risk to the public interest. Lord Coulsfield envisaged therefore a scheme where the rights of the accused could be safeguarded in such circumstances whilst managing the potential risks to the public interest. The provisions are designed to give effect to this.

626. There are therefore 3 orders in this scheme. The order restricting or preventing disclosure of the information, s.145 order; the order for non notification of the s.145 hearing i.e. the accused is not told that a s.145 hearing is taking place and finally the exclusion order i.e. the accused is not allowed to attend the s.145 hearing

Section 141 – Application for section 145 order

627. This section imposes a duty upon the prosecutor to apply to the court for an order prohibiting disclosure of information which he would otherwise require to disclose where such disclosure would be likely to cause a real risk of substantial harm or damage to the public interest. The order sought from the court is referred to as a 'section 145 order'.

Section 142 – Application for non-notification order or exclusion order

628. Section 142 sets out the additional order(s) the prosecutor should consider where he has applied for an order preventing or partially preventing disclosure in terms of s.145. Subsection (2) provides that where the s.145 order relates to solemn proceedings the prosecutor may also apply to the court for a non-notification order and an exclusion order or simply an exclusion order alone. This also applies to proceedings which take place after the conclusion of the first instance proceedings.

629. Subsection (3) provides that if the s.145 order relates to summary proceedings the prosecutor may in addition apply for an exclusion order (but not a non notification

order). Again, this also applies to proceedings which take place after the conclusion of the first instance proceedings.

630. Subsection (4) explains the effect of a non-notification order i.e. that it is an order prohibiting notice being given to the accused of the making of the applications for non-notification, exclusion and s.145 orders and also the decisions of the court in relation to any of those applications.

631. Subsection (5) explains the effect of an exclusion order i.e. that it is an order prohibiting the accused from attending or making representations in proceedings relating to the application for a s.145 order.

632. Subsections (6) and (7) set out the order in which the court must consider each application. Before making a decision on whether a s.145 order should be granted the court must first make a decision in relation to any applications for non-notification and/or exclusion. This has the effect of ensuring that the court first considers whether any application for non-notification (if applied for) should be granted, then considers whether any application for exclusion should be granted (if applied for) and only then can consider whether the application for the s.145 order should be made.

Section 143 – Application for non-notification order and exclusion order

633. This section applies where the prosecutor has made an application for both a non-notification order and an exclusion order. An application for both orders can only be made in solemn cases, s.142(2).

634. Subsection (2) requires the court, first, to fix a hearing to determine whether a "non-notification" order should be made.

635. Subsections (3) and (4) provide that, where an application is made for "non notification" and exclusion orders the accused will not be notified of either the making of such applications or of the hearing appointed to consider the applications. The accused will not be present nor represented at the hearing. (Although his interests may be represented by Special Counsel if one is appointed by the court, s.150 refers).

636. Subsection (5) provides that the court may make a "non-notification" order if the requirements set out in subsection (6) are met. The court has to consider whether knowledge of the very existence of the application for a s.145 order would be likely to cause a real risk of substantial harm or damage to the public interest.

637. Subsection (7) provides that if the court makes a "non-notification" order, the court must also grant the application for an exclusion order.

638. Subsection (8) provides that, if the court refuses to make a "non-notification" order, the court will then appoint a hearing to determine the application for an exclusion order. Subsection (10) allows the prosecutor to apply to the court to exclude the accused from the hearing on the exclusion order. As there is no longer a "non notification" order in operation it is not possible to make this application in advance of the hearing. Such a motion requires to be made to the court on the day the exclusion order calls in the presence of the accused, rather than in advance of the hearing on the exclusion order. If the court agrees to the motion at that stage the accused can then be excluded by the court.

639. Subsection (9) provides that the prosecutor and if not excluded the accused, have the opportunity to be heard on the application for the exclusion order. The court may make the order if satisfied that the requirements set out in s.144 are met.

640. Subsection (11) makes provision in relation to the interpretation in sections 143-145 of references to the consideration of the accused receiving a 'fair trial'. Where the trial is ongoing the reference relates to that trial. In the case of appellate proceedings however the reference relates to the original trial which is now the subject of the appeal. The

court therefore has to consider whether the accused would have received a fair trial at the time of the original trial if the information had not been disclosed.

Section 144 – Application for exclusion order

641. Where the prosecutor makes an application for an exclusion order only the court must appoint a hearing to consider it. This is applicable to both solemn and summary procedure.

642. Subsection (3) provides that the Court may exclude the accused from the hearing. Such a motion requires to be made to the court on the day the exclusion order calls in the presence of the accused, rather than in advance of the hearing on the exclusion order. If the court agrees to the motion at that stage the accused can then be excluded by the court.

643. Having heard the prosecutor and the accused, if not excluded, on the application for the exclusion order and the section 145 order the Court may make the exclusion order providing the conditions set out in subsection (5) are met. There are two conditions. First, that disclosure to the accused of the nature of the information would be likely to cause a real risk of substantial harm or damage to the public interest. And second that, having regard to all the circumstances, the making of an exclusion order would be consistent with the accused's receiving a fair trial.

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.

Section 146 – Order preventing or restricting disclosure: application by Secretary of State

648. Sections 146 to 149 establish a system, similar to that available to the prosecutor, to enable applications to be made to the court by a Minister of the UK Government (a "Secretary of State") for orders prohibiting the disclosure of information which

the prosecutor is either required to disclose or proposes to disclose. This recognises that there may be public interest issues which arise in criminal proceedings in which Secretaries of State may have an interest.

649. Section 146 enables the Secretary of State to apply to the court before which the criminal proceedings are taking place for an order preventing or restricting the disclosure of information which the prosecutor would otherwise be required to disclose or which the prosecutor, otherwise, intends to disclose. Subsection (6) provides that the court must consider the information that the application relates to and give the prosecutor and, unless excluded, the accused the opportunity to make representations to the court. The Secretary of State is, also, entitled to be heard.

650. Under subsections (7) and (8) the court must consider whether, if the item of information were to be disclosed, there would be real risk of substantial harm or damage to the public interest, whether withholding the item of information would be consistent with the accused's receiving a fair trial and whether the only way of protecting the public interest is by making such an order. 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 subsection (3) or (4)) whether the conditions in subsection (7) or (8) 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 (9) applies.

651. 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.

652. Subsections (10) and (11) enable the court to make an order requiring the information to be disclosed, in the manner specified in the order (i.e. in whole or in part), if its disclosure would not cause a real risk of substantial harm or damage to the public interest and the disclosure (or partial disclosure) would be consistent with the accused receiving a fair trial.

653. Subsection (14) makes provision in relation to the interpretation in sections 146-149 of references to the consideration of the accused receiving a 'fair trial'. Where the trial is ongoing the reference obviously relates to that trial. In the case of the appellant proceedings however the reference relates to the original trial which is now the subject of the appeal. The court therefore has to consider whether the accused would have received a fair trial at the time of the original trial if the information had not been disclosed.

Section 147 – Application for ancillary orders: Secretary of State

654. This section allows the Secretary of State to apply to the court for ancillary orders where an application for an order is made under section 146. It sets out the procedure by which the Secretary of State may apply for a non-attendance order or a restricted notification order. These orders are similar in purpose to the "non notification" order and exclusion order which the prosecutor can apply for where an application is made for a section 145 order.

655. Subsections (2) provides that the Secretary of State may in solemn proceedings apply for both a restricted notification order and a non-attendance order or for just a non attendance order on it own. In accordance with subsection (3) he may only apply for a non-attendance order in summary proceedings. Both subsections include proceedings which take place after the conclusion of the first instance proceedings.

656. Subsection (4) explains the effect of a restricted notification order. It is an order prohibiting notice being given to the accused of both the making of any application for an order under section 146 or for a restricted notification order or non-attendance order.

657. Subsection (5) explains the effect of a non-attendance order. It is an order prohibiting the accused from attending or making representations in proceedings relating to the determination of any application under section 146 for an order preventing or restricting disclosure.

658. Subsection (7) sets out the order in which the court must consider each application mirroring the provision in section 142. It provides that the court must consider any application for ancillary orders before determining the application for the order under section 146.

Section 148 – Application for restricted notification order and non-attendance order

659. This section sets out the procedure to be followed where the Secretary of State has made an application in solemn proceedings for both a restricted notification order and a non-attendance order. Subsection (2) requires the court to fix a hearing to determine whether a restricted notification order should be made.

660. Subsections (3) and (4) provide that where an application for a restricted notification order is made, the accused will not be notified of either the making of the applications or of the hearing, nor will he be represented or appear at the hearing. However, it is possible that Special Counsel may be appointed by the court. Subsection (5) provides that the prosecutor and the Secretary of State will be entitled to be heard and further provides that the court may make a restricted notification order if the conditions set out in subsection (6) are met. Again this requires the court to consider the balance between the real risk of harm or damage to the public interest and fairness to the accused.

661. Subsection (7) provides that if the court makes a restricted notification order it must also grant the application for a non-attendance order. If the court refuses to make a restricted notification order it must then appoint a hearing to determine the application for a "non-attendance" order, subsection (8). The accused may be excluded from such a hearing by virtue of subsection (10). However as there is no longer a restricted notification order in operation it is not possible to make this application in advance of the hearing. Such a motion requires to be made to the court on the day the exclusion order calls in the presence of the accused, rather than in advance of the hearing on the non attendance order. If the court agrees to the motion at that stage the accused can then be excluded by the court.

Section 149 - Application for non-attendance order

662. This section sets out the procedure to be followed where the Secretary of State applies for a non-attendance order alone (i.e. without a restricted notification order) seeking to exclude the accused from attending, and making representations, at the hearing on the order preventing or restricting disclosure. This provision is applicable to both solemn and summary procedure. Subsection (2) provides that the court must appoint a hearing on receiving an application for a non-attendance order. Subsections (4) and (5) provide that at that hearing the Secretary of State, the prosecutor and the accused (unless excluded following application being made by the Secretary of State) will be entitled to make representations, after which, the court may make a non-attendance order if it is satisfied that the conditions are met namely the balance between a fair trial and the real risk of harm or damage to the public interest.

Section 150 – Special counsel

663. Sections 150 to 152 provide for the appointment of and the role of Special Counsel. Section 150 gives a power to the court in considering an application for various orders to appoint special counsel to represent the interests of the accused in respect of the determination of the application at a hearing or any review or appeal thereon. It is not anticipated that such appointments will be a common occurrence. The appointments only relate to the orders specified in the section and do not extend beyond that. For

example, it is not anticipated that special counsel would be present during the trial itself to represent the interests of the accused in respect of the information that was the subject of the application

664. Subsection (3) sets out the test for such an appointment, namely that is necessary to ensure that the accused receives a fair trial.

665. Subsections (4) to (6) provide that the prosecutor, or, as the case may be, the Secretary of State and, in limited circumstances, the accused, are able to make representation to the court before the court decides whether to appoint special counsel.

666. Subsections (7) to (9) makes provision for appeal against the decision of the court not to appoint special counsel.

Section 151 – Persons eligible for appointment as special counsel

667. This section provides that only solicitors or advocates may be appointed as special counsel.

Section 152 – Role of special counsel

668. This section regulates the role and functions of special counsel and the interaction between special counsel and the accused and/or his representatives. Subsection (1) sets out the duty of special counsel which is to act in the best interests of the accused insofar as ensuring that the accused receives a fair trial.

669. Subsection (2) provides that special counsel is entitled to see the confidential information concerned but must not disclose any of that information to the accused or his representatives. Subsection (3) prohibits communication with the accused in "non notification" and restricted notification cases. In any other case communication is only possible with the permission of the court, subsection (4). Both the prosecutor and where appropriate the Secretary of State must have been given an opportunity to be heard on any request to communicate with the accused, subsection (5).

Section 153 - Appeals

670. This section provides the prosecutor, the accused, the Secretary of State and Special Counsel, where appointed, with a right of appeal against the orders specified in the section. All appeals are to be to the High Court of Justiciary and subsection (6) provides that they must be lodged not later than seven days after the decision being appealed against. The section further specifies who is entitled to make representations to the court in respect of the appeals.

Section 154 – Prohibition on disclosure pending determination of certain appeals

671. This section provides that where the prosecutor or Secretary of State appeals in terms of section 153, the information to which the appeal relates should not be disclosed until the appeal has been concluded.

Section 155 – Review of section 145 order

672. This section entitles the prosecutor or the accused to apply to the court to seek review of a section 145 order. This would be on the basis that they have become aware of information which was not available at the time the order was made.

673. Subsections (1) and (2) provide that such an application for review can be made only where the court has made a section 145 order, where the prosecutor or accused becomes aware of information that was unavailable to the court at the time of making that order and that the prosecutor or accused considers that the section 145 order should be revisited in light of this new information. Where appointed, special counsel may also make the application.

674. Subsection (3) provides who can attend the review hearing. Subject to subsection (4), the same parties as were heard in relation to the section 145 order will have the opportunity to make representations.

675. In terms of subsection (4), where there was a non-notification order in place and the court is satisfied that the grounds for non-notification remain, the court may make an order prohibiting the accused from being notified of the application for review, thus having the same effect as a non-notification order.

676. Similarly, in terms of subsection (5), where there was an exclusion order in place and the court is satisfied that the grounds for exclusion remain, the court may make an order excluding the accused from the review.

677. Subsection (6) provides that if the court on reviewing the order in light of the new information is satisfied that the grounds for the section 145 order no longer remain, the court may recall the order, or make an order for partial disclosure.

678. Subsections (8) and (9) have the effect of allowing applications for review at any time following the making of the section 145 order until the conclusion of the proceedings, as defined in subsection (9).

Section 156 – Review of section 146 order

679. This section mirrors section 155 which provides for reviews of section 145 orders sought by the prosecutor.

680. Subsections (1) and (2) provide that such an application for review can be made only where the court has made a section 146 order and where the Secretary of State, prosecutor or accused becomes aware of information that was unavailable to the court at the time of making that order and that the prosecutor or accused considers that the section 146 order should be revisited in light of this new information. Where appointed, special counsel may also make the application.

681. Subsection (3) provides who can attend the review hearing. Subject to subsection (4), the same parties as were heard in relation to the section 146 order will have the opportunity to make representations.

682. In terms of subsection (4), where there was a restricted notification order in place and the court is satisfied that the grounds for making it remain, the court may make an order prohibiting the accused from being notified of the application for review, thus having the same effect as a non-notification order.

683. Similarly, in terms of subsection (5), where there was a "non attendance" order in place and the court is satisfied that the grounds for that remain, the court may make an order excluding the accused from the review.

684. Subsection (6) provides that if the court on reviewing the order in light of the new information is satisfied that the grounds for the section 146 order no longer remain, the court may recall the order, or make an order for partial disclosure.

685. Subsection (8) has the effect of allowing applications for review at any time following the making of the section 146 order until the conclusion of the proceedings against the accused.

Section 157 – Review by court of section 145 and 146 orders

686. Section 157 provides that the court is under a duty to keep under review each order made under sections 145 and 146 and consider whether they remain appropriate whilst the proceedings are ongoing.

687. Subsection (3) provides that, where the court considers that the orders might no longer be appropriate, the court must appoint a hearing to review the matter.

Section 158 – Applications and reviews: general provisions

688. This section sets out the procedure for dealing with applications, appeals and reviews of the section 145 and 146 orders and ancillary orders thereto. Subsections (3) and (4) provide that such matters must where practicable be assigned to the judge assigned to the trial or appeal to which the application relates. Where proceedings are not live the matter should where practicable be assigned to the judge who presided at the trial. The same sheriff or judge who made the section 145 or section 146 order and performed the balancing exercise is then best placed to consider any review of that order in light of the information. Subsection (5) provides that the accused is not entitled to see or be made aware of the contents of the application for such orders.

Section 159 – Exemptions from disclosure

689. This section sets out the information which is exempt from the statutory scheme for disclosure. Information, the disclosure of which is prohibited by section 17 of the Regulation of Investigatory Powers Act 2000, must not be disclosed.

Section 160 – Means of disclosure

690. This section provides that the prosecutor may disclose information by any means including allowing the information to be viewed by the accused at a reasonable time and in a reasonable place. The provision is designed to make clear that the means of disclosure is entirely a matter for the prosecutor's discretion. It will ensure that it is open to the Crown to fulfil its disclosure obligations through provision of a narrative detailing the information.

691. Subsections (4) to (7) address the disclosure of statements. In summary proceedings the prosecutor need not disclose the statements themselves and is only obliged to disclose the information within the statements which meet the disclosure test. In both summary and solemn proceedings the same is true for precognitions, victim statements and statements given by a person whom the prosecutor does not intend to call to give evidence.

692. Subsections (6) and (7) provide that in solemn proceedings, the prosecutor must disclose a copy of the statement of a witness whom he intends to lead in evidence, or a statement of a witness that the prosecutor intends to have admitted in terms of section 259 of the 1995 Act. 'Copy' should be read as meaning a typescript version of the statement rather than a photocopy of the actual manuscript version. In summary proceedings, subsections (4) and (5) provide that such statements need not be disclosed to the accused.

Section 161 – Redaction of non-disclosable information by prosecutor

693. This section applies where the prosecutor has a document or other piece of information in his possession that satisfies the disclosure test but which also contains information in relation to which there is no duty to disclose. It provides that the prosecutor is able to redact, edit or obscure the non-disclosable part of the information.

Section 162 – Confidentiality of disclosed information

694. This section covers disclosed information and restricts how the accused and others may use information that has been disclosed to him. The restrictions are set out in subsections (2) and (4). These prevent the accused and all other persons to whom the information has been disclosed, whether by the prosecutor or any other person, from using or sharing disclosed information with anyone else in any way except where subsection (3) applies. By subsection (5) if the accused discloses information to a person in a way other than in accordance with the restrictions then the person to whom the information has been disclosed must not use or disclose the information or anything recorded in it. Subsection

(6) provides that the restriction does not apply to information already in the public domain at the time of the use or disclosure.

695. Subsections (3) and (7) make provision to ensure that, notwithstanding the overall restriction, the accused may use the information disclosed to him for certain specified purposes connected with the preparation and presentation of his case or appeal and with a view to taking an appeal, which include references to the SCCRC, petitions to the *nobile officium* and applications to the European Court of Human Rights.

696. Subsection (9) ensures that other legislation is given effect to, for example Data Protection Act 1998 and any other statutory scheme which creates prohibitions or obligations of confidentiality.

Section 163 – Contravention of section 162

697. This section makes it an offence for a person to knowingly use or to disclose information in contravention of section 162. The section provides that the maximum sentence on conviction in summary proceedings is 12 months imprisonment or a fine not exceeding the statutory maximum or both and, on conviction on indictment, 2 years imprisonment or a fine or both.

Section 164 – Code of practice

698. Subsections (1) and (4) require the Lord Advocate to prepare a code of practice containing guidance about Part 6 of the Act and lay it and any revisions to the code before Parliament.

699. Subsections (2) and (3) specify those persons who must have regard to the code namely police, prosecutors and any other persons whom the Scottish Ministers prescribe, who carry out functions in relation to the investigation of crime or sudden deaths.

Section 165 – Acts of Adjournal

700. This section provides for the High Court to make such rules as it considers necessary or expedient for the purposes of, in consequences of, to give full effect to these provisions.

Section 166 – Abolition of common law rules about disclosure

701. The purpose of this section is to ensure that the statutory provisions on disclosure will displace the current common law rules on disclosure but only to the extent that they are replaced by, or are inconsistent with, the provisions of Part 6.

702. Subsection (3) provides that sections 128 and 139 do not affect any right of an accused or an appellant to seek the disclosure, or recovery, of information by or from the prosecutor under a procedure other than the proposed new statutory procedure set out in those provisions.

703. Subsections (4) to (7) clarify the interaction between the provisions in Part 6 and the existing common law remedies that are available allowing persons to recover information. If the court has ruled that information does not meet the tests set out in either section 121 or section 133 then the accused/appellant cannot then seek the recovery of the information through another remedy on substantially the same grounds. Equally a person cannot rely on the new ruling on materiality provisions to seek information when he has already sought that information on substantially the same grounds by a common law remedy and been unsuccessful in doing so.