



# Criminal Justice and Licensing (Scotland) Act 2010

2010 asp 13

## PART 6

### DISCLOSURE

#### *Meaning of “information”*

#### **116 Meaning of “information”**

- (1) In this Part, “information”, in relation to criminal proceedings relating to a person, means material of any kind given to or obtained by the prosecutor in connection with the proceedings.
- (2) In this Part, “information”, in relation to appellate proceedings, includes material of any kind given to or obtained by the prosecutor in connection with the appellate proceedings or the earlier proceedings.
- (3) In subsection (2)—
  - “appellate proceedings” has the meaning given by section 132,
  - “earlier proceedings” has the meaning given by section 133(5).

#### *Provision of information to prosecutor*

#### **117 Provision of information to prosecutor: solemn cases**

- (1) This section applies where in a prosecution—
  - (a) an accused appears for the first time on petition, or
  - (b) an accused appears for the first time on indictment (not having appeared on petition in relation to the same matter).
- (2) As soon as practicable after the appearance, the investigating agency must provide the prosecutor with details 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 (whether by the

agency or otherwise) in the course of investigating the matter to which the appearance relates.

- (3) As soon as practicable after being required to do so by the prosecutor, the investigating agency must provide the prosecutor with any of that information that the prosecutor specifies in the requirement.
- (4) In this section, “investigating agency” means—
- (a) a police force, or
  - (b) such other person who—
    - (i) engages (to any extent) in the investigation of crime or sudden deaths, and
    - (ii) submits reports relating to those investigations to the procurator fiscal,
 as the Scottish Ministers may prescribe by regulations.

## **118 Continuing duty to provide information: solemn cases**

- (1) This section applies where—
- (a) an investigating agency has complied with section 117(2) in relation to an accused, and
  - (b) during the relevant period the investigating agency becomes aware that further information that may be relevant to the case for or against the accused has been obtained (whether by the agency or otherwise) in the course of investigating the accused’s case.
- (2) As soon as practicable after becoming aware of the further information, the investigating agency must provide the prosecutor with details of it.
- (3) As soon as practicable after being required to do so by the prosecutor, the investigating agency must provide the prosecutor with any of that further information that the prosecutor specifies in the requirement.
- (4) In this section, “relevant period” means the period—
- (a) beginning with the investigating agency’s compliance with section 117(2) in relation to the accused, and
  - (b) ending with the agency’s receiving notice from the prosecutor of the conclusion of the proceedings against the accused.
- (5) For the purposes of subsection (4), proceedings against an accused are to be taken to be concluded if—
- (a) a plea of guilty is recorded against the accused,
  - (b) the accused is acquitted,
  - (c) the proceedings against the accused are deserted simpliciter,
  - (d) the accused is convicted and does not appeal against the conviction before the expiry of the time allowed for such an appeal,
  - (e) the accused is convicted and appeals against the conviction before the expiry of the time allowed for such an appeal,
  - (f) the proceedings are deserted *pro loco et tempore* for any reason and no further trial diet is appointed, or

- (g) the indictment falls or is for any other reason not brought to trial, the diet is not continued, adjourned or postponed and no further proceedings are in contemplation.

#### **119 Provision of information to prosecutor: summary cases**

- (1) This section applies where a plea of not guilty is recorded against an accused charged on summary complaint.
- (2) As soon as practicable after the recording of the plea, the investigating agency must inform the prosecutor 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 (whether by the agency or otherwise) in the course of investigating the matter to which the plea relates.
- (3) As soon as practicable after being required to do so by the prosecutor, the investigating agency must provide the prosecutor with any of that information that the prosecutor specifies in the requirement.

#### **120 Continuing duty of investigating agency: summary cases**

- (1) This section applies where—
  - (a) an investigating agency has complied with section 119(2) in relation to an accused, and
  - (b) during the relevant period the investigating agency becomes aware that further information that may be relevant to the case for or against the accused has been obtained (whether by the agency or otherwise) in the course of investigating the accused's case.
- (2) As soon as practicable after becoming aware of the further information, the investigating agency must inform the prosecutor of the existence of the information.
- (3) As soon as practicable after being required to do so by the prosecutor, the investigating agency must provide the prosecutor with any of that further information that the prosecutor specifies in the requirement.
- (4) In this section, “relevant period” means the period—
  - (a) beginning with the investigating agency's compliance with section 119(2) in relation to the accused, and
  - (b) ending with the agency's receiving notice from the prosecutor of the conclusion of the proceedings against the accused.
- (5) For the purposes of subsection (4), proceedings against an accused are to be taken to be concluded if—
  - (a) a plea of guilty is recorded against the accused,
  - (b) the accused is acquitted,
  - (c) the proceedings against the accused are deserted simpliciter,
  - (d) the accused is convicted and does not appeal against the conviction before the expiry of the time allowed for such an appeal,
  - (e) the accused is convicted and appeals against the conviction before the expiry of the time allowed for such an appeal,
  - (f) the proceedings are deserted *pro loco et tempore* for any reason and no further trial diet is appointed, or

- (g) the complaint falls or is for any other reason not brought to trial, the diet is not continued, adjourned or postponed and no further proceedings are in contemplation.

*Prosecutor's duty to disclose information*

**121 Prosecutor's duty to disclose information**

- (1) This section applies where in a prosecution—
  - (a) an accused appears for the first time on petition,
  - (b) an accused appears for the first time on indictment (not having appeared on petition in relation to the same matter), or
  - (c) a plea of not guilty is recorded against an accused charged on summary complaint.
- (2) As soon as practicable after the appearance or the recording of the plea, the prosecutor must—
  - (a) review all the information that may be relevant to the case for or against the accused of which the prosecutor is aware, and
  - (b) disclose to the accused the information to which subsection (3) applies.
- (3) This subsection applies to information if—
  - (a) the information would materially weaken or undermine the evidence that is likely to be led by the prosecutor in the proceedings against the accused,
  - (b) the information would materially strengthen the accused's case, or
  - (c) the information is likely to form part of the evidence to be led by the prosecutor in the proceedings against the accused.

**122 Disclosure of other information: solemn cases**

- (1) This section applies where by virtue of subsection (2)(b) of section 121 the prosecutor is required to disclose information to an accused who falls within paragraph (a) or (b) of subsection (1) of that section.
- (2) As soon as practicable after complying with the requirement, the prosecutor must disclose to the accused details of any information which the prosecutor is not required to disclose under section 121(2)(b) but which may be relevant to the case for or against the accused.
- (3) The prosecutor need not disclose under subsection (2) details of sensitive information.
- (4) In subsection (3), “sensitive”, in relation to an item of information, means that if it were to be disclosed there would be a risk of—
  - (a) causing serious injury, or death, to any person,
  - (b) obstructing or preventing the prevention, detection, investigation or prosecution of crime, or
  - (c) causing serious prejudice to the public interest.

## **123 Continuing duty of prosecutor**

- (1) Subsection (2) applies where the prosecutor has complied with section 121(2)(b) in relation to an accused.
- (2) During the relevant period, the prosecutor must—
  - (a) from time to time review all the information that may be relevant to the case for or against the accused of which the prosecutor is aware, and
  - (b) disclose to the accused any information to which section 121(3) applies.
- (3) As soon as practicable after complying with subsection (2) in relation to an accused who falls within section 121(1)(a) or (b), the prosecutor must disclose to the accused details of any other information that may be relevant to the case for or against the accused of which the prosecutor is aware.
- (4) The prosecutor need not disclose under subsection (3) details of sensitive information.
- (5) In subsection (2)—

“relevant period” means the period—

  - (a) beginning with the prosecutor’s compliance with section 121(2)(b) in relation to an accused, and
  - (b) ending with the conclusion of the proceedings against the accused,

“sensitive” has the meaning given by section 122(4).
  - (6) For the purposes of subsection (5), proceedings against an accused are to be taken to be concluded if—
    - (a) a plea of guilty is recorded against the accused,
    - (b) the accused is acquitted,
    - (c) the proceedings against the accused are deserted simpliciter,
    - (d) the accused is convicted and does not appeal against the conviction before the expiry of the time allowed for such an appeal,
    - (e) the accused is convicted and appeals against the conviction before the expiry of the time allowed for such an appeal,
    - (f) the proceedings are deserted *pro loco et tempore* for any reason and no further trial diet is appointed, or
    - (g) the indictment or complaint falls or is for any other reason not brought to trial, the diet is not continued, adjourned or postponed and no further proceedings are in contemplation.

### *Defence statements*

## **124 Defence statements: solemn proceedings**

- (1) This section applies where the accused lodges a defence statement under section 70A of the 1995 Act.
- (2) As soon as practicable after the prosecutor receives a copy of the defence statement, the prosecutor must—
  - (a) review all the information that may be relevant to the case for or against the accused of which the prosecutor is aware, and
  - (b) disclose to the accused any information to which section 121(3) applies.

(3) After section 70 of the 1995 Act insert—

**“70A Defence statements**

- (1) This section applies where an indictment is served on an accused.
  - (2) The accused must lodge a defence statement at least 14 days before the first diet.
  - (3) The accused must lodge a defence statement at least 14 days before the preliminary hearing.
  - (4) At least 7 days before the trial diet the accused must—
    - (a) where there has been no material change in circumstances in relation to the accused’s defence since the last defence statement was lodged, lodge a statement stating that fact,
    - (b) where there has been a material change in circumstances in relation to the accused’s defence since the last defence statement was lodged, lodge a defence statement.
  - (5) If after lodging a statement under subsection (2), (3) or (4) there is a material change in circumstances in relation to the accused’s defence, the accused must lodge a defence statement.
  - (6) Where subsection (5) requires a defence statement to be lodged, it must be lodged before the trial diet begins unless on cause shown the court allows it to be lodged during the trial diet.
  - (7) The accused may lodge a defence statement—
    - (a) at any time before the trial diet, or
    - (b) during the trial diet if the court on cause shown allows it.
  - (8) As soon as practicable after lodging a defence statement or a statement under subsection (4)(a), the accused must send a copy of the statement to the prosecutor and any co-accused.
  - (9) In this section, “defence statement” means a statement setting out—
    - (a) the nature of the accused’s defence, including any particular defences on which the accused intends to rely,
    - (b) any matters of fact on which the accused takes issue with the prosecution and the reason for doing so,
    - (c) particulars of the matters of fact on which the accused intends to rely for the purposes of the accused’s defence,
    - (d) any point of law which the accused wishes to take and any authority on which the accused intends to rely for that purpose,
    - (e) by reference to the accused’s defence, the nature of any information that the accused requires the prosecutor to disclose, and
    - (f) the reasons why the accused considers that disclosure by the prosecutor of any such information is necessary.”
- (4) In section 78 of the 1995 Act (special defences, incrimination, notice of witnesses etc.), after subsection (1) insert—

“(1A) Subsection (1) does not apply where—

- (a) the accused lodges a defence statement under section 70A, and
- (b) the accused's defence consists of or includes a special defence.”.

## **125 Defence statements: summary proceedings**

- (1) This section applies where—
  - (a) a plea of not guilty is recorded against an accused charged on summary complaint, and
  - (b) during the relevant period the accused lodges a defence statement.
- (2) A defence statement must set out—
  - (a) the nature of the accused's defence, including any particular defences on which the accused intends to rely,
  - (b) any matters of fact on which the accused takes issue with the prosecution and the reason for doing so,
  - (c) particulars of the matters of fact on which the accused intends to rely for the purposes of the accused's defence,
  - (d) any point of law which the accused wishes to take and any authority on which the accused intends to rely for that purpose,
  - (e) by reference to the accused's defence, the nature of any information that the accused wishes the prosecutor to disclose, and
  - (f) the reasons why the accused considers that disclosure by the prosecutor of any such information is necessary.
- (3) 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.
- (4) As soon as practicable after receiving a copy of the defence statement the prosecutor must—
  - (a) review all the information that may be relevant to the case for or against the accused of which the prosecutor is aware, and
  - (b) disclose to the accused any information to which section 121(3) applies.
- (5) In this section, “relevant period”, in relation to the accused, is the period—
  - (a) beginning with the recording of the accused's plea of not guilty, and
  - (b) ending with the conclusion of the proceedings to which the plea relates.
- (6) For the purposes of subsection (5), proceedings are to be taken to be concluded if—
  - (a) a plea of guilty is recorded against the accused,
  - (b) the accused is acquitted,
  - (c) the proceedings against the accused are deserted simpliciter,
  - (d) the accused is convicted and does not appeal against the conviction before the expiry of the time allowed for such an appeal,
  - (e) the accused is convicted and appeals against the conviction before the expiry of the time allowed for such an appeal,
  - (f) the proceedings are deserted *pro loco et tempore* for any reason and no further trial diet is appointed, or
  - (g) the complaint falls or is for any other reason not brought to trial, the diet is not continued, adjourned or postponed and no further proceedings are in contemplation.

- (7) In section 149B of the 1995 Act (notice of defences), after subsection (2) insert—
- “(2A) Subsection (1) does not apply where—
- (a) the accused lodges a defence statement under section 125 of the Criminal Justice and Licensing (Scotland) Act 2010 (asp 13),
  - (b) the statement is lodged—
    - (i) where an intermediate diet is to be held, at or before the diet, or
    - (ii) where such a diet is not to be held, no later than 10 clear days before the trial diet, and
  - (c) the accused’s defence consists of or includes a defence to which that subsection applies.”.

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

- (1) This section applies where the accused lodges a defence statement under section 125 at least 14 days before the trial diet.
- (2) At least 7 days before the trial diet the accused must—
  - (a) where there has been no material change in circumstances in relation to the accused’s defence since the defence statement was lodged, lodge a statement stating that fact,
  - (b) where there has been a material change in circumstances in relation to the accused’s defence since the defence statement was lodged, lodge a defence statement.
- (3) If after lodging a statement under subsection (2) there is a material change in circumstances in relation to the accused’s defence, the accused must lodge a defence statement.
- (4) Where subsection (3) requires a defence statement to be lodged, it must be lodged before the trial diet begins unless on cause shown the court allows it to be lodged during the trial diet.
- (5) As soon as practicable after lodging a statement under subsection (2)(a) or a defence statement under subsection (2)(b) or (3), the accused must send a copy of the statement concerned to the prosecutor and any co-accused.
- (6) As soon as practicable after receiving a copy of a defence statement lodged under subsection (2)(b) or (3) the prosecutor must—
  - (a) review all the information that may be relevant to the case for or against the accused of which the prosecutor is aware, and
  - (b) disclose to the accused any information to which section 121(3) applies.
- (7) In this section, “defence statement” is to be construed in accordance with section 125(2).



*Sections 121 to 126: general*

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

- (1) Subsection (2) applies where the prosecutor is required by section 121(2)(b), 122(2), 123(2)(b) or (3), 124(2)(b), 125(4)(b) or 126(6)(b) to disclose information to an accused.
- (2) The prosecutor need not disclose anything that the prosecutor has already disclosed to the accused in relation to the same matter (whether because the same matter has been the subject of an earlier petition, indictment or complaint or otherwise).

*Court rulings on disclosure*

**128 Application by accused for ruling on disclosure**

- (1) This section applies where the accused—
  - (a) has lodged a defence statement under section 70A of the 1995 Act or section 125 or 126 of this Act, and
  - (b) considers that the prosecutor has failed, in responding to the statement, to disclose to the accused an item of information to which section 121(3) applies (the “information in question”).
- (2) The accused may apply to the court for a ruling on whether section 121(3) applies to the information in question.
- (3) An application under subsection (2) is to be made in writing and must set out—
  - (a) where the accused is charged with more than one offence, the charge or charges to which the application relates,
  - (b) a description of the information in question, and
  - (c) the accused’s grounds for considering that section 121(3) applies to the information in question.
- (4) On receiving an application under subsection (2), the court must appoint a hearing at which the application is to be considered and determined.
- (5) However, the court may dispose of the application without appointing a hearing if the court considers that the application does not—
  - (a) comply with subsection (3), or
  - (b) otherwise disclose any reasonable grounds for considering that section 121(3) applies to the information in question.
- (6) At a hearing appointed under subsection (4), the court must give the prosecutor and the accused an opportunity to be heard before determining the application.
- (7) On determining the application, the court must—
  - (a) make a ruling on whether section 121(3) applies to the information in question or to any part of the information in question, and
  - (b) where the accused is charged with more than one offence, specify the charge or charges to which the ruling relates.
- (8) Except where it is impracticable to do so, the application is to be assigned to the justice of the peace, sheriff or judge who is presiding, or is to preside, at the accused’s trial.

**129 Review of ruling under section 128**

- (1) This section applies where—
  - (a) the court has made a ruling under section 128 that section 121(3) does not apply to an item of information (the “information in question”), and
  - (b) during the relevant period—
    - (i) the accused becomes aware of information (the “secondary information”) that was unavailable to the court at the time it made its ruling, and
    - (ii) the accused considers that, had the secondary information been available to the court at that time, it would have made a ruling that section 121(3) does apply to the information in question.
- (2) The accused may apply to the court which made the ruling for a review of the ruling.
- (3) An application under subsection (2) is to be made in writing and must set out—
  - (a) where the accused is charged with more than one offence, the charge or charges to which the application relates,
  - (b) a description of the information in question and the secondary information, and
  - (c) the accused’s grounds for considering that section 121(3) applies to the information in question.
- (4) On receiving an application under subsection (2), the court must appoint a hearing at which the application is to be considered and determined.
- (5) However, the court may dispose of the application without appointing a hearing if the court considers that the application does not—
  - (a) comply with subsection (3), or
  - (b) otherwise disclose any reasonable grounds for considering that section 121(3) applies to the information in question.
- (6) At a hearing appointed under subsection (4), the court must give the prosecutor and the accused an opportunity to be heard before determining the application.
- (7) On determining the application, the court may—
  - (a) affirm the ruling being reviewed, or
  - (b) recall that ruling and—
    - (i) make a ruling that section 121(3) applies to the information in question or to any part of the information in question, and
    - (ii) where the accused is charged with more than one offence, specify the charge or charges to which the ruling relates.
- (8) Except where it is impracticable to do so, the application is to be assigned to the justice of the peace, sheriff or judge who dealt with the application for the ruling that is being reviewed.
- (9) Nothing in this section affects any right of appeal in relation to the ruling being reviewed.
- (10) In this section, “relevant period”, in relation to an accused, means the period—
  - (a) beginning with the making of the ruling being reviewed, and
  - (b) ending with the conclusion of proceedings against the accused.

- (11) For the purposes of subsection (10), proceedings against the accused are taken to be concluded if—
- (a) a plea of guilty is recorded against the accused,
  - (b) the accused is acquitted,
  - (c) the proceedings against the accused are deserted simpliciter,
  - (d) the accused is convicted and does not appeal against the conviction before expiry of the time allowed for such an appeal,
  - (e) the accused is convicted and appeals against the conviction before the expiry of the time allowed for such an appeal,
  - (f) the proceedings are deserted *pro loco et tempore* for any reason and no further trial diet is appointed, or
  - (g) the indictment or complaint falls or is for any other reason not brought to trial, the diet is not continued, adjourned or postponed and no further proceedings are in contemplation.

### **130 Appeals against rulings under section 128**

- (1) The prosecutor or the accused may, within the period of 7 days beginning with the day on which a ruling is made under section 128, appeal to the High Court against the ruling.
- (2) Where an appeal is brought under subsection (1), the court of first instance or the High Court may—
- (a) postpone any trial diet that has been appointed for such period as it thinks appropriate,
  - (b) adjourn or further adjourn any hearing for such period as it thinks appropriate,
  - (c) direct that any period of postponement or adjournment under paragraph (a) or (b) or any part of such period is not to count toward any time limit applying in the case.
- (3) In disposing of an appeal under subsection (1), the High Court may—
- (a) affirm the ruling, or
  - (b) remit the case back to the court of first instance with such directions as the High Court thinks appropriate.
- (4) This section does not affect any other right of appeal which any party may have in relation to a ruling under section 128.

#### *Effect of guilty plea*

### **131 Effect of guilty plea**

- (1) This section applies where—
- (a) by virtue of section 121(2)(b), 123(2)(b), 124(2)(b), 125(4)(b) or 126(6)(b) the prosecutor is required to disclose information to an accused, but
  - (b) before the prosecutor does so, a plea of guilty is recorded against the accused.
- (2) The prosecutor need not comply with the requirement in so far as it relates to the disclosure of information which but for that plea would have been likely to have

formed part of the evidence to be led by the prosecutor in the proceedings against the accused.

- (3) Subsections (1) and (2) cease to apply if the accused withdraws the plea of guilty.

*Disclosure after conclusion of proceedings at first instance*

**132 Sections 133 to 140: interpretation**

In sections 133 to 140—

“appellant”, in relation to appellate proceedings, includes a person authorised by an order under section 303A(4) of the 1995 Act to institute or continue the proceedings,

“appellate proceedings” means—

- (a) an appeal under section 106(1)(a) or (f) of the 1995 Act which brings under review an alleged miscarriage of justice,
- (b) an appeal under paragraph (b), (ba), (bb), (c), (d), (db) or (dc) of subsection (1) of section 106 of the 1995 Act which brings under review in accordance with subsection (3)(a) of that section an alleged miscarriage of justice,
- (c) an appeal under section 175(2)(a) or (d) of the 1995 Act which brings under review an alleged miscarriage of justice,
- (d) an appeal under paragraph (b), (c) or (cb) of subsection (2) of section 175 of the 1995 Act which brings under review an alleged miscarriage of justice which is based on the type of miscarriage described in subsection (5) of that section,
- (e) an appeal to the Supreme Court against a determination by the High Court of Justiciary of a devolution issue,
- (f) an appeal against conviction by bill of suspension under section 191(1) of the 1995 Act,
- (g) an appeal against conviction by bill of advocacy,
- (h) a petition to the *nobile officium* in respect of a matter arising out of criminal proceedings which brings under review an alleged miscarriage of justice which is based on the existence and significance of new evidence,
- (i) an appeal under section 62(1)(b) of the 1995 Act against a finding under section 55(2) of that Act,
- (j) the referral to the High Court of Justiciary under section 194B of the 1995 Act of—
  - (i) a conviction, or
  - (ii) a finding under section 55(2) of that Act.

**133 Duty to disclose after conclusion of proceedings at first instance**

- (1) This section applies where appellate proceedings are instituted in relation to an appellant.
- (2) As soon as practicable after the relevant act the prosecutor must—
- (a) review all information of which the prosecutor is aware that relates to the grounds of appeal in the appellate proceedings, and
  - (b) disclose to the appellant any information that falls within subsection (3).

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*Status: This is the original version (as it was originally enacted).*

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- (3) Information falls within this subsection if it is—
- (a) information that the prosecutor was required by virtue of section 121(2)(b) or 123(2)(b) to disclose in the earlier proceedings but did not disclose,
  - (b) information to which, during the earlier proceedings, the prosecutor considered paragraph (a) or (b) of section 121(3) did not apply but to which the prosecutor now considers one or both of those paragraphs would apply, or
  - (c) information of which the prosecutor has become aware since the disposal of the earlier proceedings that, had the prosecutor been aware of it during those proceedings, the prosecutor would have been required to disclose by virtue of section 121(2)(b) or 123(2)(b).
- (4) The prosecutor need not disclose under subsection (2) anything that the prosecutor has already disclosed to the appellant.
- (5) In this section—
- “earlier proceedings”, in relation to appellate proceedings, means the proceedings to which the appellate proceedings relate,
- “relevant act” means—
- (a) in relation to proceedings of the type mentioned in paragraph (a) or (b) of the relevant definition, the granting under section 107(1)(a) of the 1995 Act of leave to appeal,
  - (b) in relation to proceedings of the type mentioned in paragraph (c) or (d) of the relevant definition, the granting under section 180(1)(a) or, as the case may be, 187(1)(a) of that Act of leave to appeal,
  - (c) in relation to proceedings of the type mentioned in paragraph (e) of the relevant definition, the granting of leave to appeal by the High Court of Justiciary or, as the case may be, the Supreme Court,
  - (d) in relation to proceedings of the type mentioned in paragraph (f) of the relevant definition—
    - (i) if leave to appeal is required, the granting under section 191(2) of that Act of leave to appeal,
    - (ii) if leave to appeal is not required, service on the prosecutor under the relevant rule of a certified copy of the bill of suspension and the interlocutor granting first order for service,
  - (e) in relation to proceedings of the type mentioned in paragraph (g) of the relevant definition, service on the prosecutor under the relevant rule of a certified copy of the bill of advocation and the interlocutor granting first order for service,
  - (f) in relation to proceedings of the type mentioned in paragraph (h) of the relevant definition, service on the prosecutor under the relevant rule of a certified copy of the petition and the interlocutor granting first order for service,
  - (g) in relation to proceedings of the type mentioned in paragraph (i) of the relevant definition, the lodging of the appeal,
  - (h) in relation to proceedings of the type mentioned in paragraph (j) of the relevant definition, the lodging of the grounds of appeal by the person to whom the referral relates,
- “relevant definition” means the definition of appellate proceedings in section 132,

“relevant rule” means rule 29A.1(3) of the Criminal Procedure Rules 1996 ([S.I. 1996/513](#)).

### **134 Continuing duty of prosecutor**

- (1) This section applies where the prosecutor has complied with section 133(2) in relation to an appellant.
- (2) During the relevant period, the prosecutor must—
  - (a) from time to time review all information of which the prosecutor is aware that relates to the grounds of appeal in the appellate proceedings which relate to the appellant, and
  - (b) disclose to the appellant any information that falls within section 133(3).
- (3) The prosecutor need not disclose under subsection (2) anything that the prosecutor has already disclosed to the appellant.
- (4) In subsection (2), “relevant period” means the period—
  - (a) beginning with the prosecutor’s compliance with section 133(2), and
  - (b) ending with the relevant conclusion.
- (5) In subsection (4), “relevant conclusion” means—
  - (a) in relation to proceedings of the type mentioned in paragraph (a) or (b) of the relevant definition—
    - (i) the lodging under section 116(1) of the 1995 Act of a notice of abandonment, or
    - (ii) the disposal of the appeal under section 118 of that Act,
  - (b) in relation to proceedings of the type mentioned in paragraph (c) or (d) of the relevant definition—
    - (i) the disposal of the appeal under section 183(1)(b) to (d) of that Act,
    - (ii) the abandonment of the appeal under section 184(1) of that Act,
    - (iii) the setting aside of the conviction or sentence or, as the case may be, conviction and sentence under section 188(1) of that Act, or
    - (iv) the disposal of the appeal under section 190(1) of that Act,
  - (c) in relation to proceedings of the type mentioned in paragraph (e), (f), (g) or (h) of the relevant definition, the disposal or abandonment of the appeal,
  - (d) in relation to proceedings of the type mentioned in paragraph (i) of the relevant definition, the disposal of the appeal under section 62(6) of that Act or the abandonment of the appeal,
  - (e) in relation to proceedings of the type mentioned in paragraph (j) of the relevant definition—
    - (i) if the referral or finding is being treated as if it were an appeal under Part 8 of that Act, the conclusion mentioned in paragraph (a) above,
    - (ii) if the referral or finding is being treated as if it were an appeal under Part 10 of that Act, the conclusion mentioned in paragraph (b) above or, where the referral or finding proceeds by way of bill of suspension, bill of advocacy or petition to the *nobile officium*, paragraph (c) above.
- (6) In this section, “relevant definition” has the meaning given by section 133(5).

### **135 Application to prosecutor for further disclosure**

- (1) This section applies where—
  - (a) the prosecutor has complied with section 133(2) in relation to an appellant, and
  - (b) the appellant lodges a further disclosure request—
    - (i) during the preliminary period, or
    - (ii) if the court on cause shown allows it, after the preliminary period but before the relevant conclusion.
- (2) A further disclosure request must set out—
  - (a) by reference to the grounds of appeal, the nature of the information that the appellant wishes the prosecutor to disclose, and
  - (b) the reasons why the appellant considers that disclosure by the prosecutor of any such information is necessary.
- (3) As soon as practicable after receiving a copy of the further disclosure request the prosecutor must—
  - (a) review any information of which the prosecutor is aware that relates to the request, and
  - (b) disclose to the appellant any of that information that falls within section 133(3).
- (4) The prosecutor need not disclose under subsection (3)(b) anything that the prosecutor has already disclosed to the appellant.
- (5) In this section—

“preliminary period”, in relation to the appellate proceedings concerned, means the period beginning with the relevant act and ending with the beginning of the hearing of the appellate proceedings,

“relevant act” has the meaning given by section 133(5),

“relevant conclusion” has the meaning given by section 134(5).

### **136 Further duty of prosecutor: conviction upheld on appeal**

- (1) This section applies where—
  - (a) in an appeal to the High Court of Justiciary, the High Court upholds the conviction of a person, and
  - (b) after the conclusion of the appeal the prosecutor becomes aware of—
    - (i) information that the prosecutor was required by virtue of section 121(2)(b) or 123(2)(b) to disclose in the earlier proceedings but did not disclose, or
    - (ii) information that falls within section 133(3) which would have related to the grounds of appeal but was not disclosed.
- (2) As soon as practicable after becoming aware of the information the prosecutor must disclose it to the person.
- (3) The prosecutor need not disclose under subsection (2) anything that the prosecutor has already disclosed to the person.
- (4) Nothing in this section requires the prosecutor to carry out a review of information of which the prosecutor is aware.

- (5) In this section, “earlier proceedings” has the meaning given by section 133(5).

**137 Further duty of prosecutor: convicted persons**

- (1) This section applies where—
- (a) a person has been convicted,
  - (b) after conviction the prosecutor becomes aware of information that the prosecutor was required by virtue of section 121(2)(b) or 123(2)(b) to disclose in the proceedings in which the person was convicted but did not disclose, and
  - (c) section 136 does not apply.
- (2) As soon as practicable after becoming aware of the information the prosecutor must disclose it to the person.
- (3) If the person institutes appellate proceedings in relation to the conviction, the prosecutor need not comply with the duty imposed by subsection (2) during the appropriate period.
- (4) The prosecutor need not disclose under subsection (2) anything that the prosecutor has already disclosed to the person.
- (5) Nothing in this section requires the prosecutor to carry out a review of information of which the prosecutor is aware.
- (6) In this section—
- “appropriate period”, in relation to appellate proceedings, means the period beginning with the relevant act and ending with the relevant conclusion,
  - “relevant act” has the meaning given by section 133(5),
  - “relevant conclusion” has the meaning given by section 134(5).

**138 Further duty of prosecutor: appeal against acquittal**

- (1) This section applies where—
- (a) the prosecutor appeals against the acquittal of a person, and
  - (b) after lodging the appeal the prosecutor becomes aware of information which relates to the appeal and falls within section 133(3).
- (2) As soon as practicable after becoming aware of the information the prosecutor must disclose it to the person.
- (3) The prosecutor need not disclose under subsection (2) anything that the prosecutor has already disclosed to the person.
- (4) The prosecutor ceases to be subject to the duty imposed by subsection (2) on the disposal of the appeal by the High Court of Justiciary.
- (5) Nothing in this section requires the prosecutor to carry out a review of information of which the prosecutor is aware.



*Court rulings on disclosure: appellate proceedings*

**139 Application by appellant for ruling on disclosure**

- (1) This section applies where the appellant—
  - (a) has made a further disclosure request under section 135, and
  - (b) considers that the prosecutor has failed, in responding to the request, to disclose to the appellant an item of information falling within section 133(3) (the “information in question”).
- (2) The appellant may apply to the court for a ruling on whether the information in question falls within section 133(3).
- (3) An application under subsection (2) is to be made in writing and must set out—
  - (a) where the appellant is or was charged with more than one offence, the charge or charges to which the application relates,
  - (b) a description of the information in question, and
  - (c) the appellant’s grounds for considering that the information in question falls within section 133(3).
- (4) On receiving an application under subsection (2), the court must appoint a hearing at which the application is to be considered and determined.
- (5) However, the court may dispose of the application without appointing a hearing if the court considers that the application does not—
  - (a) comply with subsection (3), or
  - (b) otherwise disclose any reasonable grounds for considering that the information in question falls within section 133(3).
- (6) At a hearing appointed under subsection (4), the court must give the prosecutor and the appellant an opportunity to be heard before determining the application.
- (7) On determining the application, the court must—
  - (a) make a ruling on whether the information in question, or any part of the information in question, falls within section 133(3), and
  - (b) where the appellant is or was charged with more than one offence, specify the charge or charges to which the ruling relates.
- (8) In this section, “the court” means the court before which the appellant’s appeal is brought.
- (9) Except where it is impracticable to do so, the application is to be assigned to the judges who are to hear the appellant’s appeal.

**140 Review of ruling under section 139**

- (1) This section applies where—
  - (a) the court has made a ruling under section 139 that an item of information (the “information in question”) does not fall within section 133(3), and
  - (b) during the relevant period—
    - (i) the appellant becomes aware of information (“secondary information”) that was unavailable to the court at the time it made its ruling, and

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*Status: This is the original version (as it was originally enacted).*

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- (ii) the appellant considers that, had the secondary information been available to the court at that time, it would have made a ruling that the information in question does fall within section 133(3).
- (2) The appellant may apply to the court which made the ruling for a review of the ruling.
- (3) An application under subsection (2) is to be made in writing and must set out—
  - (a) where the appellant is or was charged with more than one offence, the charge or charges to which the application relates,
  - (b) a description of the information in question and the secondary information, and
  - (c) the appellant’s grounds for considering that the information in question falls within section 133(3).
- (4) On receiving an application under subsection (2), the court must appoint a hearing at which the application is to be considered and determined.
- (5) However, the court may dispose of the application without appointing a hearing if the court considers that the application does not—
  - (a) comply with subsection (3), or
  - (b) otherwise disclose any reasonable grounds for considering that the information in question falls within section 133(3).
- (6) At a hearing appointed under subsection (4), the court must give the prosecutor and the appellant an opportunity to be heard before determining the application.
- (7) On determining the application, the court may—
  - (a) affirm the ruling being reviewed, or
  - (b) recall that ruling and—
    - (i) make a ruling that the information in question, or any part of the information in question, falls within section 133(3), and
    - (ii) where the appellant is or was charged with more than one offence, specify the charge or charges to which the ruling relates.
- (8) Except where it is impracticable to do so, the application is to be assigned to the judges who dealt with the application for the ruling that is being reviewed.
- (9) Nothing in this section affects any right of appeal in relation to the ruling being reviewed.
- (10) In this section, “relevant period”, in relation to an appellant, means the period—
  - (a) beginning with the making of the ruling being reviewed, and
  - (b) ending with the relevant conclusion.
- (11) In subsection (10), “relevant conclusion” has the meaning given by section 134(5).

*Applications to court: orders preventing or restricting disclosure*

**141 Application for section 145 order**

- (1) This section applies where the conditions in subsection (2) or (3) are met.
- (2) The conditions are that—

- (a) by virtue of section 121(2)(b), 123(2)(b), 124(2)(b), 125(4)(b) or 126(6)(b) the prosecutor is required to disclose an item of information to an accused,
  - (b) section 121(3)(a) or (b) applies to the information, and
  - (c) the prosecutor considers that subsection (4) applies.
- (3) The conditions are that—
- (a) by virtue of section 133(2)(b), 134(2)(b), 135(3)(b), 136(2), 137(2) or 138(2) the prosecutor is required to disclose an item of information to an appellant or, as the case may be, a person,
  - (b) where there are proceedings, the information is not likely to form part of the evidence to be led by the prosecutor in the proceedings, and
  - (c) the prosecutor considers that subsection (4) applies.
- (4) This subsection applies if disclosure of the item of information would be likely to cause a real risk of substantial harm or damage to the public interest.
- (5) The prosecutor must apply to the court for an order under section 145 (a “section 145 order”).

#### **142 Application for non-notification order or exclusion order**

- (1) This section applies where the prosecutor is required by section 141(5) to apply to the court for a section 145 order.
- (2) If the application for a section 145 order relates to solemn proceedings (whether continuing or concluded), the prosecutor may also apply to the court for—
- (a) a non-notification order and an exclusion order, or
  - (b) an exclusion order (but not a non-notification order).
- (3) If the application for a section 145 order relates to summary proceedings (whether continuing or concluded), the prosecutor may also apply to the court for an exclusion order.
- (4) A non-notification order is an order under section 143 prohibiting notice being given to the accused of—
- (a) the making of an application for—
    - (i) the section 145 order to which the non-notification order relates,
    - (ii) the non-notification order, and
    - (iii) an exclusion order, and
  - (b) the determination of those applications.
- (5) An exclusion order is an order under section 143 or 144 prohibiting the accused from attending or making representations in proceedings for the determination of the application for a section 145 order to which the exclusion order relates.
- (6) Subsection (7) applies where the prosecutor applies—
- (a) by virtue of subsection (2)(a) for a non-notification order and an exclusion order, or
  - (b) by virtue of subsection (2)(a) or (b) for an exclusion order.
- (7) Before determining in accordance with section 145 the application for the section 145 order, the court must—

- (a) in accordance with section 143, determine any applications for a non-notification order and an exclusion order,
  - (b) in accordance with section 144, determine any application for an exclusion order.
- (8) In this section and sections 143 to 145—
- “accused” includes, where subsection (5) of section 141 applies by virtue of the conditions in subsection (3) of that section being met, the appellant or other person to whom the prosecutor is required to disclose the item of information,
- “appellant” has the meaning given by section 132.

### **143 Application for non-notification order and exclusion order**

- (1) This section applies where the prosecutor applies for a non-notification order and an exclusion order.
- (2) On receiving the application, the court must appoint a hearing to determine whether a non-notification order should be made.
- (3) The accused is not to be notified of—
  - (a) the applications for the section 145 order, non-notification order and exclusion order, or
  - (b) the hearing appointed under subsection (2).
- (4) The accused is not to be given the opportunity to be heard or be represented at the hearing.
- (5) If, after giving the prosecutor an opportunity to be heard, the court is satisfied that the conditions in subsection (6) are met, the court may make a non-notification order.
- (6) Those conditions are—
  - (a) that disclosure to the accused of the making of the application for the section 145 order would be likely to cause a real risk of substantial harm or damage to the public interest, and
  - (b) that, having regard to all the circumstances, the making of a non-notification order would be consistent with the accused’s receiving a fair trial.
- (7) If the court makes a non-notification order it must also make an exclusion order.
- (8) If the court refuses to make a non-notification order the court must appoint a hearing to determine the application for an exclusion order.
- (9) If after giving the prosecutor and, subject to subsection (10), the accused an opportunity to be heard, the court is satisfied that the conditions in subsection (5) of section 144 are met, the court may make an exclusion order under subsection (4) of that section.
- (10) On the application of the prosecutor the court may exclude the accused from the hearing appointed under subsection (8).
- (11) In this section and sections 144 and 145, references to the accused’s receiving a fair trial include, where subsection (5) of section 141 applies by virtue of the conditions in subsection (3) of that section being met, references to the appellant or other person to whom the prosecutor is required to disclose the item of information having received a fair trial.

#### **144 Application for exclusion order**

- (1) This section applies where by virtue of section 142(2)(b) or (3) the prosecutor applies for an exclusion order (but not a non-notification order).
- (2) On receiving the application the court must appoint a hearing.
- (3) On the application of the prosecutor the court may exclude the accused from the hearing.
- (4) If after giving the prosecutor and, subject to subsection (3), the accused an opportunity to be heard on the applications for the exclusion order and the section 145 order to which it relates the court is satisfied that the conditions in subsection (5) are met, the court may make an exclusion order.
- (5) Those conditions are—
  - (a) that disclosure to the accused of the nature of the information to which the application for the section 145 order relates would be likely to cause a real risk of substantial harm or damage to the public interest, and
  - (b) that, having regard to all the circumstances, the making of an exclusion order would be consistent with the accused's receiving a fair trial.

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

- (1) This section applies where—
  - (a) the prosecutor applies for a section 145 order, and
  - (b) any application for a non-notification order or an exclusion order has been determined by the court.
- (2) The court must—
  - (a) consider the item of information to which the application for a section 145 order relates,
  - (b) give the prosecutor and (if the court has not made an exclusion order) the accused the opportunity to be heard, and
  - (c) determine—
    - (i) where the application for the section 145 order is made by virtue of section 141(2), whether the conditions in subsection (3) apply, or
    - (ii) where the application for the section 145 order is made by virtue of section 141(3), whether the conditions in subsection (4) apply, and
  - (d) if the court determines that the conditions in subsection (3) or, as the case may be, (4) apply, determine whether subsection (5) applies.
- (3) The conditions are—
  - (a) that by virtue of section 121(2)(b), 123(2)(b), 124(2)(b), 125(4)(b) or 126(6) (b) the prosecutor is required to disclose the item of information,
  - (b) that section 121(3)(a) or (b) applies to the information,
  - (c) that if the item of information were to be disclosed there would be a real risk of substantial harm or damage to the public interest,
  - (d) that withholding the item of information would be consistent with the accused's receiving a fair trial, and
  - (e) that the public interest would be protected only if a section 145 order were to be made.

- (4) The conditions are—
- (a) that by virtue of section 133(2)(b), 134(2)(b), 135(3)(b), 136(2), 137(2) or 138(2) the prosecutor is required to disclose an item of information to an appellant or, as the case may be, a person,
  - (b) where there are proceedings, the information is not likely to form part of the evidence to be led by the prosecutor in the proceedings,
  - (c) that if the item of information were to be disclosed there would be a real risk of substantial harm or damage to the public interest,
  - (d) that withholding the item of information is not inconsistent with the person's having received a fair trial in the proceedings to which the item relates, and
  - (e) that the public interest would be protected only if a section 145 order were to be made.
- (5) This subsection applies if the court considers that the item of information could be disclosed or partly disclosed in such a way that—
- (a) the condition in paragraph (c) of subsection (3) or, as the case may be, paragraph (c) of subsection (4) would not be met, and
  - (b) the disclosure (or partial disclosure) would be consistent with the accused's receiving a fair trial.
- (6) If the court considers that subsection (3) or, as the case may be, (4) (but not subsection (5)) applies, it may make a section 145 order preventing disclosure of the information.
- (7) If the court considers that subsection (5) applies, it may make a section 145 order requiring the information to be disclosed or partly disclosed to the accused in the manner specified in the order.
- (8) For the purposes of subsection (5) the ways in which the item of information might be disclosed or partly disclosed include in particular—
- (a) providing the information after (whether by redaction or otherwise) removing or obscuring parts of it,
  - (b) providing extracts or summaries of the information or part of it.

*Orders preventing or restricting disclosure: Secretary of State*

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

- (1) Where the condition in subsection (2), (3) or (4) is met in relation to an item of information that the prosecutor proposes to disclose, the Secretary of State may apply to the court for an order under this section (a “section 146 order”) in relation to the item of information.
- (2) The condition is that the prosecutor proposes to disclose to the accused information which the prosecutor is required to disclose by virtue of section 121(2)(b), 123(2)(b), 124(2)(b), 125(4)(b) or 126(6)(b).
- (3) The condition is that the prosecutor proposes to disclose to an appellant or, as the case may be, a person information which the prosecutor is required to disclose by virtue of section 133(2)(b), 134(2)(b), 135(3)(b), 136(2), 137(2) or 138(2).

- (4) The condition is that the prosecutor proposes to disclose to an accused, appellant or person to whom section 136, 137 or 138 applies information which the prosecutor is not required to disclose by virtue of this Part.
- (5) If the Secretary of State also makes an application in accordance with subsection (2) or (3) of section 147, the court must comply with subsections (6) and (7) of that section.
- (6) Where an application is made under subsection (1), the court must—
- (a) consider the item of information to which the application relates,
  - (b) give the Secretary of State and the prosecutor the opportunity to be heard,
  - (c) if the application relates to information which the prosecutor is required to disclose by virtue of subsection (2) or (3) and a non-attendance order has not been made, give the accused the opportunity to be heard,
  - (d) determine—
    - (i) where the application for the section 146 order is made by virtue of subsection (2), whether the conditions in subsection (7) apply, or
    - (ii) where the application for the section 146 order is made by virtue of subsection (3) or (4), whether the conditions in subsection (8) apply, and
  - (e) if the court determines that the conditions in subsection (7) or, as the case may be, (8) apply, determine whether subsection (9) applies.
- (7) The conditions are—
- (a) that if the item of information were to be disclosed there would be a real risk of substantial harm or damage to the public interest,
  - (b) that withholding the item of information would be consistent with the accused's receiving a fair trial, and
  - (c) that the public interest would be protected only if a section 146 order of the type mentioned in subsection (10) were to be made.
- (8) The conditions are—
- (a) in the case of an application made by virtue of subsection (3), that by virtue of section 133(2)(b), 134(2)(b), 135(3)(b), 136(2), 137(2) or 138(2) the prosecutor is required to disclose an item of information to an appellant or, as the case may be, a person,
  - (b) that if the item of information were to be disclosed there would be a real risk of substantial harm or damage to the public interest,
  - (c) that withholding the item of information is not inconsistent with the person's having received a fair trial in the proceedings to which the item relates, and
  - (d) that the public interest would be protected only if a section 146 order of the type mentioned in subsection (10) were to be made.
- (9) This subsection applies if the court considers that the item of information could be disclosed or partly disclosed in such a way that—
- (a) the condition in paragraph (a) of subsection (7) or, as the case may be, paragraph (b) of subsection (8) would not be met, and
  - (b) the disclosure (or partial disclosure) would be consistent with the accused's receiving a fair trial.

- (10) If the court considers that subsection (7) or, as the case may be, (8) (but not subsection (9)) applies, it may make a section 146 order preventing disclosure of the information.
- (11) If the court considers that subsection (9) applies, it may make a section 146 order requiring the information to be disclosed or partly disclosed to the accused in the manner specified in the order.
- (12) For the purposes of subsection (11) the order may in particular specify that—
- (a) the item of information be disclosed after removing or obscuring parts of it (whether by redaction or otherwise),
  - (b) extracts or summaries of the item of information (or part of it) be disclosed instead of the item of information.
- (13) In this section and sections 147 to 149—
- “accused” includes, where subsection (3) or (4) applies, the appellant or other person to whom the prosecutor is required to disclose the item of information,
- “appellant” has the meaning given by section 132.
- (14) In this section and sections 147 to 149, references to the accused’s receiving a fair trial include, where subsection (3) or (other than in relation to an accused) (4) applies, references to the appellant or other person to whom the prosecutor is required to disclose the item of information having received a fair trial.

#### **147 Application for ancillary orders: Secretary of State**

- (1) This section applies where the Secretary of State applies for a section 146 order.
- (2) If the application under section 146 relates to solemn proceedings (whether continuing or concluded), the Secretary of State may also apply to the court for—
- (a) a restricted notification order and a non-attendance order, or
  - (b) a non-attendance order (but not a restricted notification order).
- (3) If the application under section 146 relates to summary proceedings (whether continuing or concluded), the Secretary of State may also apply to the court for a non-attendance order.
- (4) A restricted notification order is an order under section 148 prohibiting notice being given to the accused of—
- (a) the making of an application for—
    - (i) the section 146 order to which the restricted notification order relates,
    - (ii) the restricted notification order, and
    - (iii) a non-attendance order, and
  - (b) the determination of those applications.
- (5) A non-attendance order is an order under section 148(7) or 149 prohibiting the accused from attending or making representations in proceedings for the determination of the application for the section 146 order to which the non-attendance order relates.
- (6) Subsection (7) applies where the Secretary of State applies—
- (a) by virtue of subsection (2)(a) for a restricted notification order and a non-attendance order, or
  - (b) by virtue of subsection (2)(a) or (b) for a non-attendance order.



- (7) Before determining the application for the section 146 order, the court must—
  - (a) in accordance with section 148, determine any application for a restricted notification order and a non-attendance order,
  - (b) in accordance with section 149, determine any application for a non-attendance order.

#### **148 Application for restricted notification order and non-attendance order**

- (1) This section applies where by virtue of section 147(2)(a) the Secretary of State applies for a restricted notification order and a non-attendance order.
- (2) On receiving the application, the court must appoint a hearing to determine whether a restricted notification order should be made.
- (3) The accused is not to be notified of—
  - (a) the applications for the section 146 order, the restricted notification order and the non-attendance order, or
  - (b) the hearing appointed under subsection (2).
- (4) The accused is not to be given the opportunity to be heard or be represented at the hearing.
- (5) If, after giving the Secretary of State and the prosecutor an opportunity to be heard, the court is satisfied that the conditions in subsection (6) are met, the court may make a restricted notification order.
- (6) Those conditions are—
  - (a) that disclosure to the accused of the making of the application for the section 146 order would be likely to cause a real risk of substantial harm or damage to the public interest, and
  - (b) that, having regard to all the circumstances, the making of a restricted notification order would be consistent with the accused's receiving a fair trial.
- (7) If the court makes a restricted notification order, it must also make a non-attendance order.
- (8) If the court refuses to make a restricted notification order, the court must appoint a hearing to determine the application for a non-attendance order.
- (9) If after giving the Secretary of State, the prosecutor and, subject to subsection (10), the accused an opportunity to be heard, the court is satisfied that the conditions in subsection (5) of section 149 are met, the court may make a non-attendance order under subsection (4) of that section.
- (10) On the application of the Secretary of State the court may exclude the accused from the hearing appointed under subsection (8).

#### **149 Application for non-attendance order**

- (1) This section applies where by virtue of section 147(2)(b) the Secretary of State applies for a non-attendance order (but not a restricted notification order).
- (2) On receiving the application, the court must appoint a hearing.

- (3) On the application of the Secretary of State the court may exclude the accused from the hearing.
- (4) If after giving the Secretary of State, the prosecutor and, if not excluded under subsection (3), the accused an opportunity to be heard the court is satisfied that the conditions in subsection (5) are met, the court may make a non-attendance order.
- (5) Those conditions are—
  - (a) that disclosure to the accused of the nature of the information to which the application for the section 146 order relates would be likely to cause a real risk of substantial harm or damage to the public interest, and
  - (b) that, having regard to all the circumstances, the making of a non-attendance order would be consistent with the accused’s receiving a fair trial.

### *Special counsel*

## **150 Special counsel**

- (1) This section applies where the court is determining—
  - (a) an application for a non-notification order,
  - (b) an application for an exclusion order,
  - (c) an application for a section 145 order,
  - (d) an application for a restricted notification order,
  - (e) an application for a non-attendance order,
  - (f) an application for a section 146 order,
  - (g) an application for review of the grant or refusal of any of those orders,
  - (h) an appeal relating to any of those orders.
- (2) If the condition in subsection (3) is met, the court may appoint a person (“special counsel”) to represent the interests of the accused in relation to the determination of the application, review or appeal.
- (3) The condition is that the court considers that the appointment of special counsel is necessary to ensure that the accused receives a fair trial.
- (4) Before deciding whether to appoint special counsel in a non-notification case, the court—
  - (a) must give the prosecutor an opportunity to be heard, but
  - (b) must not give the accused an opportunity to be heard.
- (5) Before deciding whether to appoint special counsel in a restricted notification case, the court—
  - (a) must give the prosecutor and the Secretary of State an opportunity to be heard,
  - (b) must not give the accused an opportunity to be heard.
- (6) Before deciding whether to appoint special counsel in any case other than a non-notification case or a restricted notification case, the court must give all the parties an opportunity to be heard.
- (7) The prosecutor may appeal to the High Court against a decision of the court not to appoint special counsel in any case.

- (8) The Secretary of State may appeal to the High Court against a decision of the court not to appoint special counsel in a restricted notification case.
- (9) The accused may appeal to the High Court against a decision not to appoint special counsel in any case other than a non-notification case or a restricted notification case.
- (10) In this section and section 152—
- “accused” includes appellant or, where the order relates to section 136(2), 137(2) or 138(2), other person to whom the section concerned applies,
  - “appellant” has the meaning given by section 132,
  - “non-notification case” means a case where the court is determining—
    - (a) an application for a non-notification order,
    - (b) an application for review of the grant or refusal of a non-notification order,
    - (c) an appeal relating to such an order,
  - “restricted notification case” means a case where the court is determining—
    - (a) an application for a restricted notification order,
    - (b) an application for review of the grant or refusal of a restricted notification order,
    - (c) an appeal relating to such an order.

### **151 Persons eligible for appointment as special counsel**

The court may appoint a person as special counsel under section 150(2) only if the person is a solicitor or advocate.

### **152 Role of special counsel**

- (1) Special counsel’s duty is, in relation to the determination of the relevant application or appeal, to act in the best interests of the accused with a view only to ensuring that the accused receives a fair trial.
- (2) Special counsel—
- (a) is entitled to see the confidential information, but
  - (b) must not disclose any of the confidential information to the accused or the accused’s representative (if any).
- (3) Special counsel appointed in a non-notification case or a restricted notification case must not—
- (a) disclose to the accused or the accused’s representative (if any) the making of the relevant application or appeal, or
  - (b) otherwise communicate with the accused or the accused’s representative (if any) about the relevant application or appeal.
- (4) Special counsel appointed in any case other than a non-notification case or a restricted notification case must not communicate with the accused or the accused’s representative (if any) about the relevant application or appeal except—
- (a) with the permission of the court, and
  - (b) where permission is given, in accordance with such conditions as the court may impose.

- (5) Before deciding whether to grant permission, the court must give—
- (a) the prosecutor, and
  - (b) in the case of an application for a section 146 order or a non-attendance order, the Secretary of State,
- an opportunity to be heard.
- (6) In this section—
- “the confidential information” means—
- (a) the information to which the relevant application or appeal relates, and
  - (b) a copy of the relevant application or appeal,
- “relevant application or appeal” means the application or appeal referred to in section 150(1) in respect of which special counsel is appointed.

### *Appeals*

## **153 Appeals**

- (1) The prosecutor may appeal to the High Court against—
- (a) the making of a section 145 order under section 145(7),
  - (b) the making of a section 146 order,
  - (c) the making of a restricted notification order,
  - (d) the making of a non-attendance order,
  - (e) the refusal of an application for a non-notification order,
  - (f) the refusal of an application for an exclusion order, or
  - (g) the refusal of an application for a section 145 order.
- (2) The accused may appeal to the High Court against the making of—
- (a) an exclusion order under section 144(4),
  - (b) a section 145 order,
  - (c) a section 146 order, or
  - (d) a non-attendance order.
- (3) The Secretary of State may appeal to the High Court against—
- (a) the making of a section 146 order under section 146(11),
  - (b) the refusal of an application for a restricted notification order,
  - (c) the refusal of an application for a non-attendance order, or
  - (d) the refusal of an application for a section 146 order.
- (4) If special counsel was appointed in relation to an application for a non-notification order, special counsel may appeal to the High Court against the making of—
- (a) the non-notification order, or
  - (b) a section 145 order in relation to the same item of information.
- (5) If special counsel was appointed in relation to an application for a restricted notification order, special counsel may appeal to the High Court against the making of—
- (a) the restricted notification order, or
  - (b) a section 146 order in relation to the same item of information.

- (6) An appeal must be lodged not later than 7 days after the decision appealed against.
- (7) The prosecutor is entitled to be heard in any appeal under this section.
- (8) The accused is entitled to be heard in an appeal under—
  - (a) subsection (1)(a) or (g) or (2)(b) unless—
    - (i) a non-notification order has been made, or
    - (ii) an exclusion order has been made,
  - (b) subsection (1)(b), (2)(c) or (3)(a) or (d) unless—
    - (i) a restricted notification order has been made, or
    - (ii) a non-attendance order has been made,
  - (c) subsection (1)(d), (2)(d) or (3)(c) unless the court, on the application of the Secretary of State, excludes the accused from the hearing,
  - (d) subsection (1)(f) or (2)(a) unless the court, on the application of the prosecutor excludes the accused from the hearing.
- (9) The Secretary of State is entitled to be heard in an appeal under subsection (1)(b), (c) or (d), (2)(c) or (d) or (5).
- (10) In this section—
  - “accused” includes appellant or, where the order relates to section 136(2), 137(2) or 138(2), other person to whom the section concerned applies,
  - “appellant” has the meaning given by section 132.

#### **154 Prohibition on disclosure pending determination of certain appeals**

- (1) Subsection (2) applies where—
  - (a) the prosecutor appeals to the High Court under subsection (1)(a), (b) or (g) of section 153, or
  - (b) the Secretary of State appeals to the High Court under subsection (3)(a) or (d) of that section.
- (2) Pending the determination or abandonment of the appeal, the prosecutor must not disclose the item of information to which the appeal relates.

#### *Review of section 145 and 146 orders*

#### **155 Review of section 145 order**

- (1) This section applies where—
  - (a) the court makes a section 145 order, and
  - (b) during the relevant period the prosecutor or the accused becomes aware of information that was unavailable to the court at the time when the order was made.
- (2) The prosecutor or, as the case may be, special counsel or the accused may apply to the court to review the section 145 order.
- (3) Except in the case mentioned in subsection (4), the same persons are entitled to be heard on the application for review as were entitled to be heard on the application for the section 145 order.

- (4) If—
- (a) a non-notification order was granted in relation to the section 145 order which is under review, and
  - (b) the court is satisfied that the conditions in section 143(6) are met,
- the court may, where the prosecutor or, as the case may be, special counsel applies for the review, make an order prohibiting notification being given to the accused of the application for review.
- (5) If—
- (a) an exclusion order was granted in relation to the section 145 order which is under review, and
  - (b) the court is satisfied that the conditions in section 144(5) are met,
- the court may, where the prosecutor or, as the case may be, special counsel or the accused applies for the review, exclude the accused from the review.
- (6) If the court is not satisfied that the conditions mentioned in section 145(3) are met, the court may—
- (a) recall the section 145 order, or
  - (b) recall the section 145 order and make an order requiring disclosure to the specified extent.
- (7) Nothing in this section affects any right of appeal in relation to the section 145 order.
- (8) In this section—
- “accused” includes appellant or, where the order relates to section 136(2), 137(2) or 138(2), other person to whom the section concerned applies,
- “appellant” has the meaning given by section 132,
- “relevant period”, in relation to an accused, means the period—
- (a) beginning with the making of the section 145 order, and
  - (b) ending with the conclusion of the proceedings against the accused,
- “specified” means specified in the order of the court.
- (9) For the purposes of this section, proceedings against an accused are to be taken to be concluded if—
- (a) a plea of guilty is recorded against the accused,
  - (b) the accused is acquitted,
  - (c) the proceedings against the accused are deserted simpliciter,
  - (d) the accused is convicted and does not appeal against the conviction before the expiry of the time allowed for such an appeal,
  - (e) the proceedings are deserted *pro loco et tempore* for any reason and no further trial diet is appointed,
  - (f) the indictment falls or is for any other reason not brought to trial, the diet is not continued, adjourned or postponed and no further proceedings are in contemplation,
  - (g) any appeal by the prosecutor is determined or abandoned, or
  - (h) the accused is convicted and any appeal is determined or abandoned.
- (10) In its application to proceedings against an appellant or other person, subsection (9) is to be read as if paragraphs (a) to (f) were omitted.

## **156 Review of section 146 order**

- (1) This section applies where—
  - (a) the court makes a section 146 order, and
  - (b) during the relevant period the Secretary of State, the prosecutor, special counsel or the accused becomes aware of information that was unavailable to the court at the time when the order was made.
- (2) The Secretary of State or, as the case may be, the prosecutor, special counsel or the accused may apply to the court to review the order.
- (3) Except in the case mentioned in subsection (4), the same persons are entitled to be heard on the application for review as were entitled to be heard on the application for the order.
- (4) If—
  - (a) a restricted notification order was granted in relation to the order which is under review, and
  - (b) the court is satisfied that the conditions in section 148(6) are met,the court may, where the Secretary of State or, as the case may be, the prosecutor or special counsel applies for the review, make an order prohibiting notification of the application for review being given to the accused.
- (5) If—
  - (a) a non-attendance order was granted in relation to the order which is under review, and
  - (b) the court is satisfied that the conditions in section 149(5) are met,the court may, where the Secretary of State or, as the case may be, the prosecutor, special counsel or the accused applies for the review, exclude the accused from the review.
- (6) If the court is not satisfied that the conditions mentioned in section 146(7) are met, the court may—
  - (a) recall the order which is under review, or
  - (b) recall the order which is under review and make an order requiring the information to be disclosed or partly disclosed to the accused in the specified manner.
- (7) Nothing in this section affects any right of appeal in relation to the order which is under review.
- (8) In this section—

“accused” includes appellant or, where the order relates to section 136(2), 137(2) or 138(2), other person to whom the section concerned applies,

“appellant” has the meaning given by section 132,

“relevant period”, in relation to an accused, means the period—
  - (a) beginning with the making of the section 146 order, and
  - (b) ending with the conclusion of the proceedings against the accused,

“specified” means specified in the order of the court.
- (9) For the purposes of this section, proceedings against an accused are to be taken to be concluded if—
  - (a) a plea of guilty is recorded against the accused,

- (b) the accused is acquitted,
  - (c) the proceedings against the accused are deserted simpliciter,
  - (d) the accused is convicted and does not appeal against the conviction before the expiry of the time allowed for such an appeal,
  - (e) the proceedings are deserted *pro loco et tempore* for any reason and no further trial diet is appointed,
  - (f) the indictment falls or is for any other reason not brought to trial, the diet is not continued, adjourned or postponed and no further proceedings are in contemplation,
  - (g) any appeal by the prosecutor is determined or abandoned, or
  - (h) the accused is convicted and any appeal is determined or abandoned.
- (10) In its application to proceedings against an appellant or other person, subsection (9) is to be read as if paragraphs (a) to (f) were omitted.

### **157 Review by court of section 145 and 146 orders**

- (1) This section applies where the court makes a section 145 order or a section 146 order.
- (2) During the relevant period, the court must from time to time consider in relation to each order whether, having regard to the information of which the court is aware, the order concerned continues to be appropriate.
- (3) If the court considers that the order concerned might no longer be appropriate, the court must appoint a hearing to review the matter.
- (4) In this section, “relevant period” has the same meaning as in section 155(8).

#### *Applications and reviews: general*

### **158 Applications and reviews: general provisions**

- (1) Subsection (3) applies in relation to—
  - (a) an application for an order mentioned in subsection (2), and
  - (b) a review relating to such an order.
- (2) The orders are—
  - (a) a non-notification order,
  - (b) an exclusion order,
  - (c) a section 145 order,
  - (d) a restricted notification order,
  - (e) a non-attendance order,
  - (f) a section 146 order.
- (3) Except where it is impracticable to do so, the application or review is to be assigned in accordance with subsection (4).
- (4) The application or, as the case may be, review is to be assigned—
  - (a) if the proceedings against the accused to which the application or review relates are continuing (or have concluded and there are no appellate proceedings), to the same justice of the peace, sheriff or, as the case may



- be, judge as has been (or is to be or was) assigned to the trial diet in those proceedings,
- (b) if the appellate proceedings to which the application or review relates are continuing, to the same judge as has been (or is to be) assigned to those proceedings.
- (5) The accused, appellant or, as the case may be, other person to whom the order relates is not entitled to see or be made aware of the contents of an application for—
- (a) an order mentioned in subsection (2),
- (b) a review relating to such an order made by the prosecutor, the Secretary of State or special counsel.
- (6) In this section, “appellant” and “appellate proceedings” have the meanings given by section 132.
- (7) The reference in subsection (4)(a) to proceedings against the accused includes a reference to an appeal by the prosecutor against an acquittal.

### *General*

#### **159 Exemptions from disclosure**

Information must not be disclosed by virtue of this Part to the extent that it is material the disclosure of which is prohibited by section 17 of the Regulation of Investigatory Powers Act 2000 (c.23).

#### **160 Means of disclosure**

- (1) This section applies where by virtue of this Part the prosecutor is required to disclose information to an accused.
- (2) The prosecutor may disclose the information by any means.
- (3) In particular, the prosecutor may disclose the information by enabling the accused to inspect it at a reasonable time and in a reasonable place.
- (4) Subsection (5) applies if the information is contained in—
- (a) a precognition,
- (b) a victim statement,
- (c) a statement given by a person whom the prosecutor does not intend to call to give evidence in the proceedings, or
- (d) where the proceedings relating to the accused are summary proceedings, a statement given by a person whom the prosecutor intends to call to give evidence in the proceedings.
- (5) In complying with the requirement, the prosecutor need not disclose the precognition or, as the case may be, statement.
- (6) Subsection (7) applies where the proceedings relating to the accused are solemn proceedings and—
- (a) the information is contained in a statement given by a person whom the prosecutor intends to call to give evidence in the proceedings, or

- (b) the information is contained in a statement and the prosecutor intends to apply under section 259 of the 1995 Act to have evidence of the statement admitted in the proceedings.
- (7) In complying with the requirement, the prosecutor must disclose a copy of the statement (but subsections (2) and (3) continue to apply).
- (8) This section is subject to any provision made by an order under section 145(7), 146(11), 155(6) or 156(6).
- (9) In this section—
  - “accused” includes appellant or, in any case relating to section 136(2), 137(2) or 138(2), other person to whom the section concerned applies,
  - “appellant” has the meaning given by section 132.

## **161 Redaction of non-disclosable information by prosecutor**

- (1) Subsection (2) applies where—
  - (a) by virtue of this Part the prosecutor is required to disclose an item of information (the “disclosable information”), and
  - (b) the disclosable information forms part of, or contains, other information (the “non-disclosable information”) which the prosecutor is not required to disclose by virtue of this Part.
- (2) Before disclosing the disclosable information, the prosecutor may (whether by redaction or otherwise) remove or obscure the non-disclosable information.

## **162 Confidentiality of disclosed information**

- (1) This section applies where by virtue of this Part the prosecutor discloses information to an accused.
- (2) The accused must not use or disclose the information or anything recorded in it other than in accordance with subsection (3).
- (3) The accused may use or disclose the information—
  - (a) for the purposes of the proper preparation and presentation of the accused’s case in the proceedings in relation to which the information was disclosed (“the original proceedings”),
  - (b) with a view to the taking of an appeal in relation to the matter giving rise to the original proceedings,
  - (c) for the purposes of the proper preparation and presentation of the accused’s case in any such appeal.
- (4) A person to whom information is disclosed by virtue of subsection (3) must not use or disclose the information or anything recorded in it other than for the purpose for which it was disclosed.
- (5) If despite subsection (2) the accused discloses the information or anything recorded in it other than in accordance with subsection (3), a person to whom information is disclosed must not use or disclose the information or anything recorded in it.
- (6) Subsections (2), (4) and (5) do not apply in relation to the use or disclosure of information which is in the public domain at the time of the use or disclosure.

- (7) In subsection (3) “appeal” includes—
- (a) the reference of a case to the High Court of Justiciary by the Scottish Criminal Cases Review Commission under section 194B of the 1995 Act,
  - (b) a petition to the *nobile officium*,
  - (c) proceedings in the European Court of Human Rights.
- (8) In this section, “accused” includes, where information is disclosed by virtue of section 133(2)(b), 134(2)(b), 135(3)(b), 136(2), 137(2) or 138(2), the appellant or, as the case may be, person to whom the prosecutor is required to disclose the information.
- (9) Nothing in this section affects any other restriction or prohibition on the use or disclosure of information, whether the restriction or prohibition arises by virtue of an enactment (whenever passed or made) or otherwise.

### **163      Contravention of section 162**

- (1) A person who knowingly uses or discloses information in contravention of section 162 commits an offence.
- (2) A person guilty of an offence under subsection (1) is liable—
- (a) on summary conviction to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum or to both,
  - (b) on conviction on indictment to imprisonment for a term not exceeding 2 years or to a fine or to both.

### **164      Code of practice**

- (1) The Lord Advocate—
- (a) must issue a code of practice providing guidance about this Part, and
  - (b) may from time to time revise the code for the time being in force.
- (2) The persons mentioned in subsection (3) must have regard to the code of practice for the time being in force in carrying out their functions in relation to the investigation and reporting of crime and sudden deaths.
- (3) Those persons are—
- (a) police forces,
  - (b) prosecutors,
  - (c) such other persons who—
    - (i) engage (to any extent) in the investigation of crime or sudden deaths, and
    - (ii) submit reports relating to those investigations to the procurator fiscal, as the Scottish Ministers may prescribe by regulations.
- (4) The Lord Advocate must lay before the Scottish Parliament any code or revised code issued under this section.

**165 Acts of Adjournal**

The High Court may by Act of Adjournal make such rules as it considers necessary or expedient for the purposes of, in consequence of, or for giving full effect to, any provision of this Part.

**166 Abolition of common law rules about disclosure**

- (1) The provisions of this Part replace any equivalent common law rules about disclosure of information by the prosecutor in connection with criminal proceedings.
- (2) The common law rules about disclosure of information by the prosecutor in connection with criminal proceedings are abolished in so far as they are replaced by or are inconsistent with the provisions of this Part.
- (3) Sections 128 and 139 do not affect any right under the common law of an accused or appellant to seek disclosure or recovery of information by or from the prosecutor by means of a procedure other than an application under one or other of those sections.
- (4) Subsection (5) applies where, following an application (the “earlier disclosure application”) by the accused or the appellant under section 128 or 139, the court has made a ruling that (as the case may be)—
  - (a) section 121(3) does not apply to information, or
  - (b) information does not fall within section 133(3).
- (5) The accused or, as the case may be, the appellant, is not entitled to seek the disclosure or recovery of the same information by or from the prosecutor by means of any other procedure at common law on grounds that are substantially the same as any of those on which the earlier disclosure application was made.
- (6) Subsection (7) applies where, following an application (the “earlier common law application”) by the accused under a procedure other than an application under section 128 or 139, the court has decided not to make an order for the recovery or disclosure of information by or from the prosecutor.
- (7) The accused or, as the case may be, the appellant is not entitled to make an application under section 128 or 139 in relation to the same information on grounds that are substantially the same as any of those on which the earlier common law application was made.
- (8) In this section, “appellant” has the meaning given by section 132.

*Interpretation of Part 6***167 Interpretation of Part 6**

- (1) In this Part—
  - “investigating agency” has the meaning given by section 117(4),
  - “procurator fiscal” and “prosecutor” have the meanings given by section 307(1) of the 1995 Act.
- (2) References in the following sections to the accused include references to a solicitor or advocate acting on behalf of the accused—
  - (a) section 121(2)(b),

- (b) section 122(2),
  - (c) section 123(2)(b) and (3),
  - (d) section 124(2)(b),
  - (e) section 125(4)(b),
  - (f) section 126(6)(b),
  - (g) section 127(2),
  - (h) section 128(1)(b),
  - (i) section 129(6).
- (3) References in the following sections to the accused or the appellant or other person include references to a solicitor or advocate acting on behalf of the accused or, as the case may be, the appellant or other person—
- (a) section 141,
  - (b) section 142,
  - (c) section 143,
  - (d) section 144 (other than subsection (5)(b)),
  - (e) section 145(4)(a) and (7),
  - (f) section 146 (other than subsections (7)(b), (8)(c) and (9)(b)),
  - (g) section 147,
  - (h) section 148 (other than subsection (6)(b)),
  - (i) section 149 (other than subsection (5)(b)),
  - (j) section 153(8)(c) and (d),
  - (k) section 155(1) and (4),
  - (l) section 156(1)(b), (4), (5) (in the second place where it occurs) and (6),
  - (m) section 158(5),
  - (n) section 160,
  - (o) section 162(1), (2), (3) (where it first occurs) and (5).
- (4) References in the following sections to an appellant include references to a solicitor or advocate acting on behalf of the appellant—
- (a) section 133(2)(b) and (4),
  - (b) section 134(1), (2)(b) and (3),
  - (c) section 135(1), (2), (3)(b) and (4).
- (5) References in the following sections to a person include references to a solicitor or advocate acting on behalf of the person or, as the case may be, to a solicitor or advocate who acted on behalf of the person in the proceedings to which the information relates—
- (a) section 136(2) and (3),
  - (b) section 137(2) and (4),
  - (c) section 138(2) and (3).