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The Connarty Stable

Briefing Paper for Members

in respect of the new provisions for the lodging of
Defence Statements and related issues in terms of the

Criminal Justice and Licensing (Scotland) Act 2010

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1. This paper is intended only as a briefing document to remind members of the Connarty Stable of the newly enacted provisions in relation to the lodging of defence statements and related procedures in proceedings of first instance in solemn courts in terms of the Criminal Justice and Licensing (Scotland) Act 2010 (hereinafter referred to as “The Act”). It is not intended as a definitive, nor authoritative statement of the law and practice.
2. Counsel will be aware that these provisions form a small part of the Act which comprises a wide ranging miscellany of important changes which fall outwith the scope of this briefing paper.
3. This document is intended to deal with the compliance of the mandatory provisions in the solemn courts, the forum where Counsel practise most. However, Counsel are reminded of the corresponding provisions in relation to summary proceedings to be found in sections 125 and 126 of the Act. There are, however, practical issues which Counsel will encounter in certain jurisdictions in relation to late disclosure which will render compliance with, or use of, any provisions in relation to summary procedure impractical.
4. Section 166 the Act provides that :-

(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.

5. **Commencement date.** The new provisions relate to proceedings in which the Accused appeared on petition after **6th June 2011**. Therefore, for custody cases, the new provisions could relate to cases being indicted as early as September 2011. By summer of 2012, it is likely that it shall apply to all cases.
6. There are no provisions to deal with an accused who does not appear on petition but is indicted to a Preliminary Hearing or First Diet and Trial Diet. Presumably in

such circumstances, it is for Counsel's discretion whether to lodge a defence statement.

7. There do not appear to be any sanctions for non compliance. Non compliance may result in certain practical difficulties which are mentioned in paragraph 23 of this briefing note.
8. **Identifying cases to which provisions apply – Obligation on Instructing Solicitor.** Counsel have no way of knowing the date an accused appeared on petition unless advised by the instructing agents, by the Crown or through the Sheriff Clerk (if the Sheriff Clerk is satisfied Counsel has sufficient professional interest to allow disclosure of such information). Counsel have no way of monitoring which cases fall within the ambit of these proceedings. The provisions do not impose any corresponding obligation upon the Crown. Any obligation upon the Crown is reactionary to the Defence statement being lodged. Therefore, there is no incentive or reason for the Crown to develop a system which identifies or earmarks cases to which the provisions apply. Accordingly, it will be necessary for instructing Solicitors to develop a system for earmarking the appropriate cases at an early stage. Earlier instruction of Counsel with a complete set of papers (in so far as disclosed by the Crown) will be necessary to enable compliance with the provisions dealt with later in this briefing note. Solicitors will have to be made aware of this requirement and encouraged to instruct Counsel early. It should be anticipated that the Court will not find favour with arguments that Counsel has just been instructed and, consequently, there results a failure to comply with the provisions.
9. **Defence Statements.** Section 124 of the Act inserts the following section 70A into the Criminal Procedure (Scotland) Act 1995 (hereinafter referred to as "The 1995 Act") (only subsections (1) to (3) reproduced) :-

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.

10. The obligation is mandatory. In practice, the form will require to be lodged in court only two, at most three, weeks after service of an indictment which is a short period within which to complete all the information required in the statutory form. Counsel can only hope that either the indictment has been served upon the instructing Solicitor or they have at least been given a courtesy copy. If the indictment has been served upon the Accused with no courtesy copy having been given to the instructing agent, it is unlikely that the Accused will be aware of the statutory requirements incumbent upon Counsel and the time limits pertaining thereto.

11. **The information required.** Subsection (9) of the said section 70A provides as follows :-

(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.

12. **The form** is prescribed by the Act of Adjournal (Criminal Procedure Rules Amendment No. 4) (Disclosure) 2011 which provides (7A.2.) that the defence statement lodged under section 70A shall be in Form 7A.2-A (which is reproduced here at Appendix A.). It is not yet known whether Justiciary Office will issue this form as a Microsoft Word document for digital completion in appropriate fields and transmission by Counsel, as they did with the forms such as the Written

Record following the “Bonomy Reforms”. No doubt if they do not do so, the stable can consider doing so.

13. Clearly there is an obligation upon Counsel to include a great deal of information, in particular, any matters of fact with which the accused takes issue in the prosecution case and the reason for doing so (para b) and particulars of the matters of fact on which the accused intends to rely for the purposes of his or her defence (para c). The form requires to be served upon the Crown and any co-accused.

14. Historically Counsel may, for tactical reasons not have wanted to alert the Crown to a dispute about an essential Crown fact which Counsel believed the Crown could not prove. Secondly, for tactical reasons, the defence might not have wanted to alert a co-accused to certain facts relied upon in support of a Special Defence of Incrimination. Counsel will, no doubt, have to consider carefully his or her duty to the court in compliance of these provisions whilst still trying to consider the tactics of defending a particular case.

15. Counsel will also note that any Special Defence requires to be lodged with this form 14 days before a Preliminary Hearing in the High Court or First Diet in the Sheriff Court.

16. **The obligation on the Crown** – section 124(2) of the Act provides

(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.

17. The said subsection 121 (3) applies to information if -

121 (3)

(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.

18. Accordingly, the lodging of the defence statement triggers the obligation upon the Crown to 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. This is a duty of disclosure now embodied in statute.

19. This provision would not affect the position whereby tactically an accused wished to emit a Judicial Declaration at an early stage in proceedings either when appearing on petition or by subsequent application to a Sheriff. Such procedure is rarely invoked. In the event of such a judicial declaration being made at that early stage, the Crown would still be obliged to investigate any apparent defence then disclosed. A Sheriff will still be bound to advise an accused of the Crown's duty to investigate such an apparent or "ostensible" defence disclosed in a judicial declaration.

20. In both High Court and Sheriff Court proceedings if a case has been continued to a trial Diet, there is still an ongoing obligation incumbent upon both Crown and Defence Counsel to keep the case under review and to deal with any change in circumstances as provided for by the Act. If there is no change in circumstances prior to trial diet, section 70A (4) provides :-

(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.

Accordingly, it is no longer possible to have a case continued to the trial diet and forget about it until a few days before a forthcoming trial diet. Even in the event of

there being no change in circumstances, a statutory form requires to be lodged. The form is prescribed by the said Act of Adjournal which provides (7-A2) that the defence statement lodged under section 70A4 shall be in Form 7A.2-B (which is reproduced here at Appendix B.).

21. The newly inserted Section 70A (5) imposes the obligation upon Counsel and instructing Solicitors to keep a case under review for any material change in circumstances. In the event of such, Counsel must be proactive and take steps to lodge a further defence statement (presumably in the same form as stipulated earlier in the section). The said subsection and subsequent subsections are in the following terms.

(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.

22. From the above, Counsel will see that the obligation on the Defence is ongoing even after the commencement of the trial. However, the Act is silent about what should happen in the event of the defence lodging a further defence statement. If such a form is lodged prior to trial or the defence statement lodged 7 days before a trial alerts parties as to a material change in circumstances, is it open to the trial Judge to fix some form of hearing? It would be open to the parties to bring the matter back for a hearing in terms of section 75A of the 1995 Act. What happens if there is a material change in circumstances during the leading of evidence in chief? Do Counsel require to ask for an adjournment to draft another defence statement? In considering whether to allow it, presumably the Court has to balance the interests of all parties in ensuring a fair trial. What happens if the Court disallows it? Is Counsel bound in the conduct of the defence by the previously

lodged defence statement? If such a material change in circumstances then results in one party having to call a witness who previously wasn't thought to be necessary but that witness is available at the trial diet, no one could seriously suggest that the trial Judge wouldn't allow it.

23. Paragraph 7 above points out that the Act does not make any provision for any sanction in the event of non compliance. However, if Counsel finds himself or herself having to make a submission or motion later in proceedings which is in conflict with a stated position contained in a defence statement, such a position might not easily find favour with the Court. For example, in HMA –v- Dickson (reported briefly at 1980 SLT (News) 265) the Court of Appeal held that “..the defence are entitled to assume that all of the witnesses on the Crown list attached to an indictment are to be in attendance at the trial....”. However, following the Bonomy reforms which post date Dickson (*supra*), Defence Counsel now require to state in the Written Record which of the Crown witnesses are required by the defence. The newly introduced provisions now impose on Counsel the obligation to state which facts are relied upon. If a later defence motion were to be made to adjourn a trial due to unavailability of a witness not stated to be essential to the defence or whose evidence did not contain facts which had not been included in the defence statement as being relied upon, the Court might be slow to grant the adjournment. Whilst refusal of a motion in these circumstances to adjourn might not be seen as sanction, it might be the practical result of non compliance. Preliminary Hearing Court Judges are likely to scrutinise the statutory Defence Statement and Written Record – perhaps some Judges more than others.

24. There are a number of other provisions which fall outwith the scope of this briefing note of which Counsel are reminded :-

ss 117- 118	Provision of a continuing duty upon investigative authority to provide information to the Prosecutor in solemn cases;
ss121-123	Duty of Prosecutor to disclose and continuing nature thereof.
S 128	Application by an accused for a ruling re disclosure
S 132 et seq	Continuing duty of disclosure on Prosecutor after conclusion of proceedings at first instance.
S 139	Application by an Appellant for ruling on disclosure.

- S 146 et seq Applications by the Prosecutor for an order preventing or restricting disclosure and the appointment of Special Counsel.
- S 153 et seq Appeals and Reviews.

25. Section 164 of the Act is in the following terms:-

164 Code of practice

(1) The Lord Advocate—

(a) must issue a code of practice providing guidance about this Part,

26. The Lord Advocate has complied with the said section and the appropriate Code of Practice in relation to Disclosure has been laid before the Scottish Parliament. The Code of Practice, which “came into force” (*sic*), is not annexed to this briefing note
27. This briefing note will be circulated to members of the Connarty Stable by e-mail together with copies of Part 6 of the Act, the Act of Adjournal and the Code of Practice (all in pdf format).

The Connarty Stable,
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Edinburgh
August 2011

APPENDIX A

SCHEDULE

Paragraph 2(3)

Form 7A.2-A

Rule 7A.2(1)

Form of defence statement under section 70A of the Criminal Procedure (Scotland) Act 1995 [*or* section 125 [*or* 126] of the Criminal Justice and Licensing (Scotland) Act 2010]

Prosecution reference:

Court reference:

When lodged: (state stage in proceedings when lodged)

Defence statement:

(State, in succinct and articulate terms, the information required in terms of section 70A(9) of the Act of 1995 or section 125(2) of the 2010 Act, namely:-

(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.)

Special defence:

(State any special defence that has been or is to be raised).

(Note: This is the special defence that shall be read to the jury.)

(Signed)

Accused

[*or* legal representative of the accused]

(address, email address and telephone number)

APPENDIX B

Form 7A.2-B

Rule 7A.2(2)

Form of statement under section 70A(4)(a) of the Criminal Procedure (Scotland) Act 1995 [*or* section 126(2)(a) of the Criminal Justice and Licensing (Scotland) Act 2010]

Prosecution reference:

Court reference:

TAKE NOTICE:

That there has been no material change in relation to the accused's defence since the last defence statement was lodged on (*specify date*).

(*Signed*)

Accused
[*or* legal representative of the accused]
(address, email address and telephone
number)

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