

# **Practice Direction 34**

## **Disclosure of Evidence by Reporters in Children's Hearing Proof Proceedings**

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Practice Direction 34 - Disclosure of Evidence In Children's Hearing Proof  
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## Summary

In children's hearing proof proceedings, there is no statutory obligation on the reporter to disclose information to parties to legal proceedings in the way there are statutory obligations on the Crown in criminal proceedings<sup>1</sup>.

However, in children's hearings proof proceedings, whatever the section 67 ground, natural justice considerations apply and the child and relevant persons have rights under Article 6<sup>2</sup> to a fair hearing. Therefore reporters are under a duty to act fairly, including by the disclosure of certain information to ensure a fair hearing.

- In investigating a referral or preparing for proof, the reporter is to seek only information that is necessary for these purposes and is to be guided by a case analysis approach.
- In recognition of the Article 6 rights of children and relevant persons, there is a presumption in proof proceedings that the reporter is to disclose information to children, relevant persons and safeguarders<sup>3</sup> that:
  - is likely to form part of the evidence to be led by the reporter in the proceedings;
  - would weaken or undermine the evidence that is likely to be led by the reporter in the proceedings; or
  - would strengthen the case of another party.
- In considering questions of disclosure of information, these Article 6 rights have to be balanced with other rights and interests, including the rights of individuals under Article 8 to respect for their private and family life. The balancing of these rights may result in some information not being disclosed, and some information being redacted before disclosure.
- The reporter is to reflect a presumption in favour of disclosing certain information within police prosecution reports or police concern reports.
- There is no obligation to disclose precognitions that form part of a reporter's preparation. However, precognitions can be shared if it will expedite proceedings or is in the interests of a child or vulnerable witness.
- Where the material to be disclosed is sensitive e.g. JIIs, intimate images or some precognitions then particular considerations will apply regarding the security of the information and the manner of disclosure.

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<sup>1</sup> Now governed by sections 116 – 167 of the Criminal Justice and Licensing (Scotland) Act 2010

<sup>2</sup> Of the [European Convention for the Protection of Human Rights](#)

<sup>3</sup> In this Practice Direction, a "party" to the proof proceedings means any child or relevant person who is formally notified of the proceedings, as well as any appointed safeguarder involved in the proceedings

- In most cases disclosure will be to a solicitor representing a party to the case and will be achieved by proactively providing a copy of the information to be disclosed. Where a party is not legally represented but is actively involved in the proof proceedings, the reporter is to inform the party that if they wish disclosure to take place they should contact the reporter. Generally the reporter is not to provide a copy of the information but is to offer sight of the material. Where a party is not actively involved in the proceedings, the reporter is not to disclose information to them or offer access to it.
- The reporter's duty to proactively disclose information to other parties to a proof commences when the children's hearing directs the reporter to make an application to the sheriff. However, if requested for information after a decision to arrange a children's hearing but prior to the hearing taking place, the reporter is to disclose information in terms of this Practice Direction.

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## **1. Introduction**

- 1.1 In conducting children's hearings proof proceedings, reporters require to disclose certain information to the child, relevant persons and safeguarder to ensure that the proceedings are fair. This Practice Direction states what is required of reporters in order to ensure this, whilst balancing the other rights and interests involved.
- 1.2 As reporters only have a duty to disclose information held by them, the Practice Direction considers the approach reporters should adopt when deciding what information to obtain in advance of proof proceedings.<sup>4</sup>
- 1.3 In addition to deciding what information must be disclosed to other parties, the reporter must decide at an appropriate point during the preparation for proof whether to lodge any material as a production.
- 1.4 Other related materials include:
  - Practice Direction 29 on Recovery of Evidence
  - Practice Note on Obtaining Information from the Police

## **2. Obtaining Information in Preparation for Proof Proceedings**

- 2.1 When the reporter obtains information about an individual – whether a child, a member of their family, or a third party - when investigating a referral or preparing for a proof, the reporter is interfering with the Article 8 rights of that individual. Therefore the reporter is only to seek to obtain relevant and proportionate information - the more significant the interference with the Article 8 rights, the more significant the justification required for the reporter to seek the information. For example, more justification is required to support decisions (i) to seek a child's complete hospital or other medical records as opposed to just seeking relevant excerpts from those records, or (ii) to seek complete medical practice records rather than a particular category of record such as the child's health visitor records.
- 2.2 Before requesting information reporters should ask the critical questions as part of case analysis:
  - What information is required to assess the evidence in the case and to draft any statement of grounds?
  - What evidence is required to establish the statement of grounds?
- 2.3 Reporters must not adopt a blanket approach to obtaining information, such as always requesting a child's medical and social work records. Recovery of such records must be informed by case analysis. If

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<sup>4</sup> Practice Direction 29 on Recovery of Evidence provides information on formal routes to recover evidence once the reporter has decided the information is necessary.

requesting records at all, consideration should always be given to requesting only those parts of records that are relevant to the reporter's investigation or preparation for proof (see paragraph 2.1).

- 2.4 Without a court order, there is no obligation on other public authorities (for example, health or the social work department) to provide us with records. However, public authorities may decide that they have authority to provide requested information. Therefore the reporter should request particular information if the reporter has assessed that this information is necessary. The reporter must set out what information is being requested, and why it is necessary. This will include a brief explanation of the reporter's function. Full records may on occasion be necessary but will require an adequate explanation. The public authority may decide to provide the information but if not the reporter is to consider applying for a court order using the recovery of evidence procedure. If this is required, reference should be made to Practice Direction 29 on the Recovery of Evidence.<sup>5</sup>
- 2.5 When requesting information from the police, the reporter is to refer to the Practice Note on Requesting Information from Police Scotland.<sup>6</sup>
- 2.6 Reporters should not obtain information because they anticipate that another party is likely to wish to have sight of it as part of their preparation. This is entirely a matter for that party who can seek recovery through formal or informal means.

### **3. Applicable law re Disclosure of Information**

- 3.1 In summary, the reporter's duty to disclose information derives from the obligation on the reporter to act in accordance with natural justice and Article 6 of the European Convention on Human Rights. Article 6 requires that individuals have a fair hearing in any proceedings that may determine their civil rights and obligations (as well as in criminal proceedings).
- 3.2 In its effect, Article 6 does not represent an absolute right for children and relevant persons to receive full disclosure of any and all material in the reporter's possession concerning legal proceedings, only that there is fair disclosure. The obligation to disclose must be considered in light of potentially conflicting rights and interests. Key among these may be the Article 8 right of others to respect for their private and family life which may be engaged where the material under consideration contains their personal information.

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<sup>5</sup> Practice Direction 29 on the Recovery of Evidence

<sup>6</sup> Practice Note on Requesting Information from Police Scotland

- 3.3 In criminal cases in Scotland prosecutors are subject to a statutory obligation of disclosure<sup>7</sup>. Reporters are subject to no such statutory duty, the obligation coming solely from the need to act in a way that is compliant with natural justice and the ECHR.
- 3.4 The reporter has the same duties of disclosure towards a safeguarder who is a party to the proceedings. The safeguarder represents the interests of the child and in this respect the child's Article 6 and 8 rights are engaged. Furthermore, the safeguarder has the powers and duties at common law of a curator ad litem.
- 3.5 It is unlikely that the issue of disclosure by the reporter will require to be considered by the sheriff in court proceedings. However if it is to be considered, the Appendix to this Practice Direction provides more detailed information on the applicable law and should form the basis of submissions that reporters make to the sheriff.

#### **4. What to disclose**

- 4.1 In proof proceedings<sup>8</sup>, as a starting point, there is a presumption that the reporter is to disclose information that could be considered relevant evidence and which falls into any of the categories set out below:
- i Information that is likely to form part of the evidence to be led by the reporter in the proceedings<sup>9</sup>;
  - ii Information that would weaken or undermine the evidence that is likely to be led by the reporter in the proceedings; or
  - iii Information that would strengthen the case of another party.

This approach reflects not only the applicable law, but also the role of the reporter in court applications<sup>10</sup>.

Note that there is no obligation on the reporter to disclose precognitions, although in certain circumstances it may be appropriate to provide a copy of a precognition to another party. (See paragraphs 4.14 to 4.16 below,)

##### **i. Information likely to form part of the evidence to be led by the reporter in the proceedings**

- 4.2 Information likely to form part of the evidence to be led by the reporter in the proceedings is likely to be the list of witnesses, any productions, any documents or other material likely to be lodged as productions, and any statements that are available.

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<sup>7</sup> Sections 116 – 167 of the Criminal Justice and Licensing (Scotland) Act 2010

<sup>8</sup> See paragraph 6.1 for when the duty to disclose commences.

<sup>9</sup> Note that the obligation to disclose such material is in addition to the need to provide full copies to parties of any inventory of productions lodged.

<sup>10</sup> See paragraph 1.3 of Practice Direction 23 on Court Applications.

## **ii. Information that would weaken or undermine the evidence that is likely to be led by the reporter in the proceedings**

- 4.3 Information that would weaken or undermine the evidence that is likely to be led by the reporter in the proceedings includes information obtained at precognition, either additional information or information which demonstrates a material discrepancy between the witness's statement to the police and their position at precognition.

## **iii. Information that would strengthen the case of another party**

- 4.4 Information that would strengthen the case of another party includes information that the reporter does not intend to lead but which the reporter is aware would be likely to strengthen the case of another party.

## **Balancing of rights and interests by the reporter**

- 4.5 Although there is a presumption that the reporter will disclose the information described in paragraphs 4.1 to 4.4, there will be circumstances where respect for other rights and interests will override the presumption. These include the ECHR Article 8 rights of others, the Article 2 and 3 rights of others and public interest. In balancing such interests it may be appropriate to withhold some or all of the information, or to disclose it by providing a party with access to the information.

In deciding the extent of the information to be disclosed (and the manner of disclosure – see Part 5 below) the reporter is to balance the importance of the information to ensuring a fair hearing under Article 6 with these other rights and interests. Therefore, the more significant the information is in ensuring a fair hearing, the greater the justification required to withhold or redact the information, or to disclose by access only. The fairness or otherwise of withholding or redacting information<sup>11</sup>, or limiting the means of disclosure, may have to be justified to the sheriff during the proceedings.

- 4.6 When considering Article 8 rights to respect for private and family life, the reporter is to consider the Article 8 rights of:
- each party to the proof; and
  - third parties whose information we hold e.g. a witness in the case.

There will be occasions when the disclosure will have significant consequences for someone's Article 8 rights to privacy (for example,

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<sup>11</sup> See paragraph 4.17 below



some medical information<sup>12</sup>), such that the reporter may be justified in not disclosing the information.

- 4.7 In very exceptional circumstances, the disclosure of information about an individual may engage their rights under:
- Article 2 (the right to life): for example where the disclosure of information about an individual may place their life at risk; and/or
  - Article 3 (the prohibition of torture): for example where the disclosure of information about an individual may result in them suffering torture, inhuman or degrading treatment or punishment<sup>13</sup>.

The rights under Articles 2 and 3 are absolute and do not allow for any interference with them. Therefore, if the disclosure of information engages an individual's rights under Article 2 or 3, the reporter is not to disclose the information.

- 4.8 In addition to having to balance a party's Article 6 rights with the rights of others, there may be situations where information should be withheld in the public interest. Such situations are likely to be rare, most likely arising where disclosure of information would be contrary to the public interest or the interests of justice, for e.g. where disclosure may prejudice an ongoing investigation by the police or other agency (see paragraph 4.19).
- 4.9 If exceptionally the reporter decides not to disclose relevant information as a result of considering other rights and interests, a party can seek to recover the information by lodging a motion and specification of documents. The reporter is to inform parties of the general nature of the relevant information that is not being disclosed. This will enable parties to decide whether to seek to recover the information. If a party does so, it will be for the sheriff to carry out the balancing exercise.
- 4.10 It is inappropriate for the sheriff to order the reporter to disclose material without such a motion being made, or to order the reporter to obtain material not in the reporter's possession.<sup>14</sup>

### **Information from the police: "summary of evidence" from the standard prosecution report, concern reports and police witness statements**

- 4.11 Where the proof is in relation to offence grounds, there is a strong presumption that the reporter will disclose the following information to parties:
- (i) the "Event Description" from the offence report on CSAS;

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<sup>12</sup> Medical records are recognised in European jurisprudence as requiring a particular level of confidentiality to be attached. This is seen as crucial in order to maintain public confidence in the health services. See for e.g. *Biriuk v Lithuania* [2008] ECHR 23373/03 at paragraph 43.

<sup>13</sup> However, the European Court has set a high threshold before Articles 2 and 3 are engaged. In relation to Article 3, see for example *In re A (A Child)* [2012] UKSC 60 [2012] 3 WLR 1484.

<sup>14</sup> See PD 29 on Recovery of Evidence, Appendix 3.

(ii) the police witness statements from witnesses on the reporter's list of witnesses, if obtained by the reporter.

In addition, and in order to fully comply with the obligation to disclose, the reporter must disclose any other information contained within the police report, whether in the "Analysis of Evidence" section or elsewhere, which is not already included in the summary of evidence and/or any police statements and which falls into any of the categories of information set out in 4.1 (i) to (iii).

However, in doing so the reporter is to balance the rights and interests of others in deciding whether to redact any information before disclosing

- 4.12 Where the proof is in relation to non-offence grounds, the police may have provided the reporter with a standard prosecution report concerning an offence against a child or concerning an offence by the child and where the reporter has drafted (m) grounds, a concern report<sup>15</sup>, or police witness statements. As with offence referrals, there is a strong presumption that the reporter will disclose the "summary of evidence" from any standard prosecution report and any police witness statements. Where a concern report is provided, there is a strong presumption that the reporter will provide those parts of the report that set out the details of any incident or other current concerns that led to the report being submitted. The considerations set out at 4.5 to 4.8 concerning the rights and interests of others apply.
- 4.13 Disclosure in line with 4.11 and 4.12 is subject to the agreement referred to in paragraph 4.19 which identifies circumstances where certain information may not be disclosed for reasons to do with an ongoing investigation.

## **Precognitions**

- 4.14 There is no obligation to disclose precognitions that have been taken and/or written up as part of the reporter's preparation for any proof. The general rule is that a precognition is not admissible in evidence.<sup>16</sup>
- 4.15 Although there is no obligation to disclose precognitions, the reporter may share a copy of their precognition with another party if that would expedite proceedings or it would be in the interests of a child or vulnerable witness. Witnesses should be advised when being precognosed that, for those reasons, the reporter may share the precognition at a later date.

The circumstances where sharing might be appropriate include:

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<sup>15</sup> Often referred to as a VPD report.

<sup>16</sup> See Walker & Walker: The Law of Evidence in Scotland, 5<sup>th</sup> ed., paragraph 9.1.3

- Where a party is not prepared for proof and the sharing of precognitions will reduce the likelihood of a case being adjourned.
- To prevent a child witness or other vulnerable witness from being repeatedly precognosed.

4.16 In deciding whether to share a precognition the reporter should consider the same restrictions set out above concerning the rights and interests of others. Consideration should include whether there needs to be redaction of third party, sensitive or irrelevant information. Consideration must also be given to how to share the precognition.

## **Redaction**

4.17 Reference is made at various points in this Practice Direction to information being redacted from material to be disclosed where this is considered necessary for reasons to do with the Article 8 rights of others or because it is in the public interest.

4.18 If information is being redacted, the redaction is to be carried out electronically wherever possible. Whatever means is used the redacted content must not be visible or capable of being made visible to the recipient. The nature of any redaction and the reasons for it should be recorded on CSAS.<sup>17</sup>

## **Information from Crown Office and Procurator Fiscal Service or the police: Agreement on the Sharing of Evidence and Information between SCRA, COPFS and Police Scotland**

4.19 SCRA has an agreement with COPFS and Police Scotland in relation to the sharing of evidence and information. In part this agreement relates to requests by the reporter to COPFS or the police. At paragraphs 50 – 51 and 84 – 86, the agreement addresses matters relating to the disclosure of material obtained by the reporter. In terms of those paragraphs:

- The question of whether (and how) to disclose material obtained by the reporter from COPFS or the police will normally be a matter for the reporter with reference to this Practice Direction. However, there may be exceptional circumstances (for example, where the police or COPFS have indicated there is the possibility that disclosure may prejudice an ongoing investigation or prosecution), where the agreement says the prosecutor, police and reporter are to meet at an operational level to agree the approach to be taken. If this appears to apply, the reporter is to contact the Practice Team.
- Although the reporter may provide copies of items obtained from COPFS in terms of the disclosure requirements in this Practice

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<sup>17</sup> Currently redaction outside of a non-disclosure case is not possible on CSAS. If redaction of a document is necessary it will have to be carried out in another way. It is suggested that details of any redaction and reasons therefor are recorded as a case note on the additional information tab of the child's record.

Direction, if COPFS have provided the reporter with the principal evidence (i.e. not a copy), the reporter must not provide the item to any party or their representative or to any expert instructed by the reporter or any party. The reporter may only disclose such evidence, and may only provide it to any expert, by providing access to it whilst retaining it in the reporter's possession.

## **5. How to Disclose**

- 5.1 In deciding *how* to disclose the information identified in line with Part 4 above, the reporter may require to balance the same rights and interests as considered when deciding *what* to disclose.
- 5.2 The manner of disclosure will depend in part on to whom disclosure is to be made. In most cases disclosure will be to a solicitor representing a party to the case. Paragraphs 5.10 – 5.11 and 6.1 – 6.2 provide direction where a party is not represented.
- 5.3 Whatever the means of disclosure it must be compliant with SCRA's information security requirements.
- 5.4 Where the information to be disclosed includes a JII or other visually-recorded interview (VRI) of a child, a copy should be provided to parties' solicitors. Such material is highly sensitive and must be disclosed securely and in line with the relevant Operational Instruction.<sup>18</sup> Disclosure to solicitors is on the basis that it will not be copied and will be handled in line with data protection legislation.
- 5.5 Where productions include intimate images of a medical examination of a child, there may well be situations where, in order to protect the rights and interests of the child, the images should not be disclosed by the reporter (see paragraph 4.5 and 4.6 above), or disclosure should be by providing access only<sup>19</sup>. It is unlikely to be appropriate to disclose by providing copies of the images unless this is necessary to facilitate a party obtaining an opinion from a skilled witness and providing access only is not appropriate for this purpose. If disclosing by providing copies, hard copies are not to be provided. The images are to be provided in a similar manner to disclosure of JIIs or VRIs i.e. by using an encrypted memory stick or other equally secure method and ensuring an appropriate undertaking is provided.

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<sup>18</sup> Operational Instruction for SCRA Staff Handling Visually Recorded Interviews including Joint Investigative Interviews

<sup>19</sup> Note that it is likely that the reporter will have obtained the images either through consent being given by the child or by court order. If they were obtained on the basis of consent, the reporter will require to have regard to the extent of consent given. If they were obtained by court order, disclosure to other parties may have been addressed at the same time.

- 5.6 In deciding how to share a precognition, the more sensitive the material in the precognition, the more difficult it will be to justify providing a hard copy. Precognitions containing particularly sensitive material, including the precognition of a child, are to be shared only by providing access or by providing in a similar manner to JIIs or VRIs i.e. by using an encrypted memory stick or other equally secure method and ensuring an appropriate undertaking is provided.
- 5.7 In addition to JIIs, VRIs, intimate images and some precognitions, there may be other types of material that are of a sensitive nature. Reporters are to consider on a case-by-case basis the manner in which such material is to be disclosed.
- 5.8 Where the reporter has obtained the principle evidence (i.e. not a copy) from COPFS disclosure can only be given by providing access to it but with the reporter retaining possession. (See 4.19 above.)
- 5.9 A range of other material may be provided to the reporter in a digital format – CCTV footage, medical records, etc.. In most cases the reporter will be able to make digital copies for disclosure purposes. If that is not permitted by the person or agency from whom the material was received they should, in the first instance, be asked to make additional digital copies. In some cases this may not be possible or may be likely to cause delay. Depending on the nature of the material it may be more appropriate to offer access to the material on SCRA premises. For example, allowing a solicitor and the party to view CCTV footage on SCRA premises.
- 5.10 Where a party is not represented, it is unlikely to be appropriate to provide them with a copy of any of the material which would otherwise be provided to a solicitor. The reporter is to provide access to the material, unless providing access would be an undue interference with another person's Article 8 or other rights. In most cases access will be given by allowing the party to view the information on SCRA premises. In exceptional circumstances this may take place elsewhere. In providing access the reporter must take steps to ensure the security of the information being viewed. In practice this will involve ensuring that no material can be removed by the party or photographed or otherwise copied while access is being provided. The party should be advised of these restrictions in advance of their attendance at SCRA premises (or elsewhere).
- 5.11 If exceptionally the reporter considers that providing a copy of any material to an unrepresented party is appropriate, the reporter must consult with their Senior Practitioner and the Practice Team.

## **6. When to Disclose**

- 6.1 The reporter's duty to proactively disclose information to other parties to a proof commences when the children's hearing directs the reporter to make an application to the sheriff. Therefore, immediately on being directed to make a proof application, the reporter should review the information held as soon as possible, to determine (i) the information which falls to be disclosed and (ii) details of the nature or type of information held which the reporter considers should not be disclosed. The reporter should not wait to receive a request for the information and should proactively disclose to a party's solicitor when their identity is known. As soon as it becomes apparent that a party who is actively involved in the proceedings is not legally represented, the reporter is to inform them that if they wish disclosure to take place they should contact the reporter.
- 6.2 Where a party is not actively involved in the proceedings, the reporter is not to contact them about disclosure.
- 6.3 A party may request information prior to the reporter being directed by the children's hearing to make an application to the sheriff. If a party requests information after a decision to arrange a children's hearing but prior to the hearing taking place, the reporter is to disclose information to the party in line with this Practice Direction.
- 6.4 If a party requests information prior to a decision to arrange a children's hearing, or after the conclusion of the proof, the request must be responded to as a Subject Access Request in terms of the Data Protection Act 2018.

## APPENDIX

NOTE: This Appendix provides further detail on the legal basis for SCRA's position on disclosure of evidence. It is to assist reporters in the event that the issue of disclosure is raised by any party or the sheriff in proof proceedings.

### Applicable law – Disclosure by Reporter

- In children's hearing proof proceedings, the reporter's duty to disclose information derives from the obligation to act in accordance with natural justice and the rights that the child and relevant persons have to a fair hearing in terms of Article 6 of the European Convention on Human Rights. Disclosure by the reporter of relevant information plays an important part in ensuring that the proceedings are fair. However, any right the child or relevant persons have to disclosure of information requires to be balanced against any competing rights and interests.
- Personal information that a party seeks to be disclosed engages the Article 8 rights of the person to whom the information relates. The disclosure of the information will be incompatible with those Article 8 rights unless it is justified in terms of Article 8(2): it is in accordance with the law, is necessary in a democratic society for, amongst other things, the protection of the rights and interests of others. Therefore a balance must be struck between the party's right to have the information disclosed and the person's Article 8 rights.<sup>20</sup> (*HMA v Murtagh 2009 SLT 1060* per Lord Hope at paragraph 29.)
- In very exceptional circumstances, the disclosure of information about an individual may also engage their rights under:
  - Article 2 (the right to life): for example where the disclosure of information about an individual may place their life at risk; and/or
  - Article 3 (the prohibition of torture): for example where the disclosure of information about an individual may result in them suffering torture, inhuman or degrading treatment or punishment<sup>21</sup>.

The rights under Articles 2 and 3 are absolute and do not allow for any interference with them. Therefore, if the disclosure of information engages an individual's rights under Article 2 or 3, the information should not be disclosed.

- The position of the reporter in children's hearing proceedings cannot be equated with that of the Crown in criminal prosecutions. However, even in criminal proceedings, the right to disclosure of information is only a qualified one. It may be necessary for the Crown to withhold certain

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<sup>20</sup> *HMA v Murtagh 2009 SLT 1060* per Lord Hope at paragraph 29.

<sup>21</sup> However, the European Court has set a high threshold before Articles 2 and 3 are engaged. In relation to Article 3, see for example *In re A (A Child)* [2012] UKSC 60 [2012] 3 WLR 1484.

information from the defence so as to preserve the fundamental right of another person or to safeguard an important public interest.<sup>22</sup> The statutory scheme for disclosure in criminal proceedings under Sections 116 – 167 of the Criminal Justice and Licensing (Scotland) Act 2010 does not apply to the reporter in children’s hearing proof proceedings. However, these provisions illustrate the kind of balancing of the various rights and interests involved which is required. Section 121 places a duty on the Crown to disclose information that meets a materiality test unless there are any reasons in the public interest why that information should not be disclosed. If there are such reasons, the Crown can apply to the court for various orders to restrict disclosure. This enables the court to carry out the balancing exercise in relation to the various rights and interests that are engaged. The reporter cannot apply to court for any similar orders that prevent or restrict disclosure. Therefore the approach that SCRA adopts is that reporters may decide not to disclose information, or to restrict its disclosure, but another party can apply to court through the specification of documents procedure for the information to be disclosed. Through that procedure the sheriff will carrying out the balancing exercise in relation to the various rights and interests that are engaged.

- Whilst the criminal provisions referred to above do not apply in children’s hearing proceedings, the reporter is under a duty to act fairly in the handling of cases referred to the children’s hearing (*C v Miller 2003 SLT 1379 at paragraph 76* - although there have been a number of cases that have addressed the issue of disclosure in criminal trials, *C v Miller* is the only case in which the Court of Session has considered the issue in children’s hearings court proceedings.).
- In deciding whether information should be disclosed, the extent of disclosure, and the manner of disclosure, the reporter is to balance the Article 6 and Article 8 rights which are engaged.
- If required to make submissions to the sheriff, the reporter is to outline the factors that were considered in that balancing exercise:
  - What were the factors considered in assessing the significance of the information in ensuring a fair hearing for the party?
  - What were the factors considered relating to the person’s right to privacy in relation to the information sought?
- In deciding whether to order recovery of the information sought by the party, the sheriff should carry out the same balancing exercise.
- As noted above, if the reporter has decided that in the very exceptional circumstances of the case Article 2 or 3 is engaged, these rights are absolute and there is no balancing of rights. Therefore if the reporter has decided that Article 2 or 3 is engaged:
  - The reporter must not disclose the information sought;

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<sup>22</sup> *HMA v Murtagh 2009 SLT 1060* per Lord Hope at paragraph 18.



- The reporter's submissions must explain why the reporter reached that conclusion; and
- The sheriff will require to decide whether he agrees that Article 2 or 3 is engaged. If the sheriff agrees, he should not order disclosure. If the sheriff does not agree, he will require to balance the Article 6 and 8 rights involved.