

Provisional Submission to the Consultation on Disclosure in Summary Cases on Behalf of Trident Ploughshares

(Concerning Particularly the Rights of Self-Represented Accused)

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1 Introduction

1.1 Background and Context

Trident Ploughshares is a non-violent, peaceful and accountable direct action campaign against Britain's Trident nuclear weapons system. We believe that our actions are justified in law and that we are acting to uphold international law. However, this is a view with which the authorities often disagree. TP Pledgers therefore have considerable experience — with mixed results — of the Scottish Court system.

TP Pledgers often choose to represent themselves in court and have done so at all levels, from the District Court through to the High Court. The authors of this submission have represented themselves on many occasions in summary cases, both at the District and Sheriff Court levels and have been actively involved in supporting a great many other Pledgers and supporters through their court cases. We have also raised issues around disclosure on previous occasions with both the Crown and the Court. In writing this submission we have drawn on our own experiences in court and on others experiences which have been observed by or directly reported to us.

We recently became aware that there were plans to update the guidance on disclosure in summary cases, along the lines of the recently updated guidance for High Court jury cases, and that a consultation on this matter was being carried out. We understand that the Law Society of Scotland is being consulted on behalf of solicitors. However, two recent experiences¹, in particular when taken together, have left us concerned that the position of accused who represent themselves could be overlooked, and so inadvertently disadvantaged, in this process. We have therefore put together this submission, which we hope will be taken into account when drawing up the new guidance. We do this in the spirit of co-operation, recognising a shared interest in ensuring justice is administered fairly and efficiently, and in the knowledge that the perspective of an accused who is representing themselves is difficult to obtain through more conventional legal channels. We hope that by contributing to the discussion at this stage we are able to avoid needing to take up any of these issues in more time consuming and costly proceedings later.

1.2 Status of This Submission

Since we became aware that this consultation was happening we have made some attempts to ascertain the nature, remit and time-scale of this consultation with so far very limited success. We therefore felt it important to get this submission in quickly, before the consultation ended, despite not having seen either the terms of reference of the consultation or the recently updated guidance for High Court cases on which we understand this guidance will be based. We hope to obtain this information soon and may, when we do so, wish to update or supplement this submission. For this reason, and this reason only, we

¹ In the first the Edinburgh Procurator Fiscal initially refused to provide witness statements at all on the grounds that *"it is the policy of the Crown Office and Procurator Fiscal Service not to disclose witness statements to accused persons who are representing themselves"*. This was raised by the accused at the Intermediate Diet relying on essentially the same arguments and precedents as those on which this submission is based. It was treated as a plea in bar of trial and a Diet of Debate was fixed. Before this could be heard the Crown conceded the debate and provided the witness statements. However, we are concerned that accused should have to argue for such information at all.

In the second, a request from an accused representing themselves to the Dumbarton PF received a response asking them to sign a form before statements were provided. The form, among other things, required them to agree not to give the statements to the accused — slightly difficult when one is the accused!

have headlined this as a “Provisional” submission. Should it be necessary to close the consultation before we are able to do this we would still like this submission to be considered.

For the reasons outlined above we have started very much from first principles and built up our position from the ground up rather than answering any particular questions which may have been posed by those carrying out the consultation. We would, however, be very happy to answer any further questions, or, especially, to comment on any drafts which have been or will be produced.

2 Basic Rights and Duties Concerning Disclosure

The right of the defence to disclosure of information, including but not limited to witness statements, which is necessary to prepare a defence (the first step to which must be knowing the case against you) stems from Article 6^[A] of the European Convention on Human Rights¹ (ECvHR). In particular the fairness requirement of Article 6(1) and the right to have “adequate facilities” to prepare a defence in Article 6(3)(b) mean that “*the prosecution is under a duty to disclose to the defence all material evidence in its possession for or against the accused*”².

2.1 The Accused Has a Right to Disclosure of the Evidence to be Used Against Her

This is a right which attaches to the accused, by the fact of them being an accused, under Article 6. It must therefore attach to accused who have chosen, for whatever reason, to represent themselves. It is worth noting that the right to represent oneself is also a Convention Right under Article 6(3)(c).

The ECvHR makes no mention of different rights accruing at different levels of seriousness within the Criminal Justice System. The right exists because one has been charged with a “*criminal offence*”, any criminal offence, even a minor one. Thus the fact that this is now, as we understand it, standard procedure in High Court cases means it should also be standard procedure in District Court cases. The extra workload involved for the Crown Office is not as much as that statement might seem at first glance as the volume of evidence in District Court cases will usually be substantially below that in High Court cases. We would note in passing that this would accord also with the situation in England where one gets disclosure automatically in even the most minor cases^[F].

We are aware that this right is not entirely absolute and discuss the possible limitations on it below.

2.1.1 Material that Should be Disclosed Includes Both Used and Unused Material

In our view material evidence, which should be disclosed, would include (as a minimum):

1. evidence that the prosecution intends to use at trial (typically copies of statements from all witnesses who are to be called and any photographs or video of the incident which is likely to be introduced during the case);
2. material that is held by or available to the prosecution which will not be used but is directly relevant to the case (such as unused video or photographic evidence, first versions of witness statements, any unused identification evidence, etc.);

1 We are aware that many of these rights also exist in the common law. However, the Convention Rights provide a clearer, more succinct and in many ways stronger statement of these rights so we shall argue mainly on the basis of the ECvHR

2 Sinclair^[B] para 33

3. material that might reasonably be believed to be capable of undermining the prosecution case;
4. material that might reasonably be believed to be capable of assisting the defence case (in as far as it is known to the prosecution).

2.1.2 Material to be Disclosed May Include Evidence Held by a Third Party

Evidence belonging to a third party that has come to light during the investigation of the offence, or that the investigation ought reasonably to be expected to have inspected, may be included in the material that should be disclosed to the defence, especially if it is capable of undermining the prosecution case or assisting the defence case. Reasonable enquiries should be made of third parties, if there is good reason to believe that they may hold relevant material, but speculative enquiries are not required. This is in line with good practice elsewhere (see, for example, paragraphs 51-54 of the The Attorney General's Guidelines on Disclosure^[F])

2.2 The Duty is On the Crown to Disclose Evidence, Not On the Accused to Request It.

While the right attaches to the accused, under the Convention, the duty lies on the Crown under the Scotland Act and the Human Rights Act to act in a way which is compatible with that right. As the Privy Council held last year in *Sinclair*^[B], that means that the duty, and the onus, is on the Crown to provide this material to the defence, not on the defence to ask for it. This is especially important in cases where the accused is representing themselves and may be less aware of their rights than a solicitor would be.

2.3 Disclosure Should Be Made Within Reasonable Time Limits

We would also point out that Article 6(3)(b) gives the accused the right “*to have adequate time and facilities for the preparation of his defence*”. Thus the material must not only be provided to the defence, it must be done so in a timely fashion, allowing them adequate time to study it and prepare their defence. This is especially important when the accused is representing themselves, in which case they are usually less familiar with the law, less able to easily look up precedents, etc. and so will usually require longer to research and prepare a defence. A solicitor **may** (we leave submissions on this point to the Law Society) be able to look at the statements when they arrive at court that morning and work out a defence 'on the hoof'. A self-representing accused will usually **not** be able to work in that fashion and must be provided with the material well in advance. It is our submission that the material should be provided to the defence at the earliest opportunity and certainly well in advance of the Intermediate Diet, so that the accused is able to study the evidence prior to the Intermediate Diet and so know at that Diet if they genuinely are able to go ahead as scheduled (in particular so that they can work out what defence witnesses they wish to call and check their availability prior to the Intermediate).

We notice from the limited passages from the High Court guidance quoted in *Sinclair* that there are time limits built in based on the time from first appearance. While this seems a sensible approach the sometimes swifter pace of proceedings in the lower courts should be taken into account. We would suggest supplementing these time limits with minimum times from the other end, for example full disclosure not less than 2 weeks before the Intermediate Diet (or before the Trial Diet, in cases where there is no Intermediate Diet). Fiscals should be encouraged to provide disclosure at the earliest possible opportunity; in simple cases where the investigation is complete prior to the file being sent to the Fiscal who then issues a

citation it should be possible to provide disclosure at the time of plea or even citation. This could have advantages from the point of view of court time in that knowledge of the quality of the evidence at that stage could influence the plea.

The Fiscal should notify the accused in writing (see section 4.1) once there is no further material to disclose (so that the accused is not surprised by 'late' disclosure, and can take timely steps to challenge disclosure if she wishes to).

That said, the Fiscal should keep disclosure under review, right up to and including during the trial. In particular, Fiscal should review whether there is any unused material that might assist the defence case if aspects of this case are notified to the Fiscal, or become apparent during pre-trial legal argument.

We would also like to address here a response we have received on several occasions in the past when requesting disclosure from the Crown: that the Fiscal has no evidence, at all, to disclose (in particular no witness statements)¹. We do not believe this is an acceptable situation and believe that the guidance should reflect this. The fact that the Crown is happy to go into the case totally unprepared should not prevent the accused from being able to prepare and the duty on the Crown is to ensure that they have adequate time and facilities to prepare, in line with their Convention Rights. Furthermore, while a Fiscal, as a trained and experienced lawyer, may be able to adjust on the spot to the evidence, self-represent accused in particular will require time to prepare. There may, in a small number of cases, be exceptional circumstances which make it impossible to obtain a statement in advance from a particular witness. However, there remains a duty on the Crown to ensure that the accused's Article 6 rights are respected. We would submit that it should, anyway, be the duty of the Fiscal to ensure that he has witness statements from all witnesses for his own preparation. We would suggest that the guidance on disclosure should re-iterate this and should also point out that the Accused still has the right to adequate time and facilities to prepare their defence, even if the Fiscal chooses not to prepare the prosecution, and that the Crown has a duty to assist this. This would also, independently, be covered by section 2.1.2.

3 Limitations on These Rights

3.1 Evidence Should Only be Withheld From the Defence to the Minimum Extent Strictly Necessary

The right to disclosure outlined above is not entirely absolute. It has been recognised by both domestic and European courts that *“there may be competing interests which it is in the public interest to protect”*². However, while the right to full disclosure may not be absolute, *“the right to a fair trial is an absolute right which cannot be compromised”*³. Thus the starting point must be the need to ensure a fair trial. As the European Court of Human Rights (EcrHR) has said:

“The entitlement to disclosure of relevant evidence is not, however, an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at

1 We have even received this response in cases where the Fiscal has made the decision to initiate the prosecution and has framed the charge and in which all the witnesses are police officers (from whom it should be relatively easy to obtain witness statements)

2 Sinclair^[B] para 33

3 Sinclair^[B] para 37

risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. None the less, only such measures restricting the rights of the defence which are strictly necessary are permissible under article 6(1). Furthermore, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities”¹

Thus it follows that any withholding of information from the defence must be **only as much as is “strictly necessary”**. This is strong wording and implies that it must be judged on the particular circumstances of the individual case. Furthermore the least restrictive means of proceeding must be found. The most common cause for concern, we would imagine, at the summary level would be ensuring that witnesses are not intimidated. To take this as an example, to restrict or reduce disclosure in any way for this reason the Crown must first show that there is a significant likelihood that it will happen, or that the witness will be less likely to give evidence for fear it might, if no steps are taken. They must then show that the steps they propose to take are the least restrictive. In many cases simply redacting the home addresses of witnesses from the statement will be sufficient. Other ways of proceeding which allow disclosure (such as special bail conditions²) should also be considered.

3.2 Any Redaction or Non-Disclosure to be Notified to the Accused and Subject to Judicial Scrutiny

Two related important points appear here. First, if the Crown withholds or redacts any information they must inform the court and the defence of the fact that they have done so. While we have not yet had the opportunity to read the Crown Practice Statement for High Court cases, the passages quoted in Sinclair^[B] indicate this is unlikely to be controversial. For example:

“In any case where witness statements are provided to the defence it shall be open to the Crown to redact the statement to obscure information of a confidential nature contained within the statement, the disclosure of which the Crown considers not to be necessary for the preparation of the defence (e.g. information tending to identify the home address of a witness who fears intimidation), but any redaction shall be obvious on the face of the statement.”³

Secondly we would draw attention to the following passage from Lord Hope's judgment in Sinclair:

“But decisions as to whether the withholding of relevant information is in the public interest cannot be left exclusively to the Crown. There must be sufficient judicial safeguards in place to ensure that information is not withheld on the grounds of public interest unless this is strictly necessary.”⁴

1 Edwards^[D] para 53 quoted in Sinclair^[B] at para 32

2 Accepting that such conditions in themselves tend to interfere with other convention rights and that the court must sometimes strike a balance between competing rights.

3 Paragraph 10 of the High Court guidance quoted in Sinclair^[B] at paragraph 26

This is not something over which the Crown Office or the Lord Advocate have exclusive or absolute control. It is especially important in the case of self represented accused that they do not claim to, but take the initiative, should any restrictions on disclosure be necessary, in involving the court in the process. This should be spelled out clearly in the guidance. In particular, the objective reasonableness of any decisions about what to disclose or withhold/redact should be open to challenge by the accused and subject to judicial scrutiny

We would note that the option offered to us recently by the Edinburgh Fiscal, when refusing to disclose witness statements, of a summary of the evidence to be led, prepared by the Crown, is totally inadequate. For a start it is of no help in a situation such as the one in Sinclair^[B], where the whole point was that both sides knew the witness had changed her evidence but because they did not have her statement with which to confront her were unable to establish the fact effectively. Secondly, in an adversarial process, for the defence to have to rely totally on the prosecutions version of events when preparing their case could, with the best and most honest will in the world, create the appearance of bias. Paragraphs 47-50 of Bulut v Austria^[E] are perhaps relevant:

“The Court recalls that under the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent ... In this context, importance is attached to appearances as well as to the increased sensitivity to the fair administration of justice.”

Referring to other cases involving actions of public prosecutors the Court in Bulut^[E] said:

“while their objectivity could not be questioned, from the moment they recommended that an appeal be allowed or dismissed [the issue at stake in that case] their opinion could not be regarded as neutral. In those circumstances, Article 6 para. 1 (art. 6-1) was seen to require that the rights of the defence and the principle of the equality of arms be respected. This applies a fortiori in the present case, where the Attorney-General's Office was the body charged with the prosecution.

... the principle of the equality of arms does not depend on further, quantifiable unfairness flowing from a procedural inequality.

3.3 Accused Not to be Put at a Disadvantage Due to Failures in Crown Disclosure

Courts should ensure that disclosure is made as soon as is reasonably practicable, and in particular that the accused is not disadvantaged by unreasonable delays in disclosure. For instance, an accused who is on bail or otherwise not in custody, should normally be excused attendance if an Intermediate hearing is adjourned due to incomplete disclosure. If this is outside the scope of the current guidelines then the guidelines should at least instruct Fiscals to support a defence motion for the accused to be excused in such circumstances.

Delays in disclosure would not automatically be grounds for deserting a case, but the court should consider desertion if delays are clearly excessive, or are severely disadvantaging the accused (e.g. if she is in custody or subject to bail conditions limiting her freedoms), or if failure to disclose leads to excessive increased costs for the accused (e.g. if the accused or defence witnesses have had to come a long distance to court).

There is a general duty on the court to ensure disclosure requirements are complied with before proceeding to trial, especially for self-representing accused.

4 Sinclair^[B] para 33

4 Self-Representing Accused to Have Equal Rights to Disclosure as those Represented by a Solicitor

It has been suggested — on occasion claimed explicitly — to us in the past by Procurator Fiscals that witness statements are provided only to solicitors and that accused who choose to represent themselves have no right to them.

It is extremely important that the new guidelines state clearly and explicitly that this is not the case and that disclosure should be provided to accused even if they choose to represent themselves.

We understand that where an accused is represented and statements are given to their solicitor that the solicitor is bound by professional ethics not to give the accused a copy although they are allowed to show them their copy. (Or so we were informed recently by a Sheriff.) We would point out that in most cases where the accused does wish to intimidate witnesses this will be scant safeguard. A solicitor would usually have to show the accused the contents of such statements and get the accused's opinion on them in order to properly prepare their case. The differences between providing copies to a solicitor who shows them to the accused and providing copies to the accused are minimal and must not be overplayed.

While the issue of self-represented accused was not considered in Sinclair, the principles it lays down are based on Convention Rights, in particular Article 6 which attaches to the accused, by their fact of being an accused, and not to their solicitor. We have said above that any restrictions on disclosure should be considered on a case by case basis on the circumstances of the individual case. We stand by that. One of the relevant circumstances **might** be that that the accused is representing themselves. We do not believe it should automatically, by itself, be enough to justify any restrictions — the Crown should always have to show some likelihood of harm of some sort — but it could be a contributing factor. However, any safeguards necessary in the case of a self-represented accused will usually be necessary even if the accused is represent by a solicitor. If, in any individual case, the Crown wish to rely in part on the fact that an accused is conducting their own defence in justifying any restrictions on disclosure then they should explain clearly why that factor is relevant. It is certainly not enough, by itself, to justify an automatic total refusal to disclose basic material evidence such as witnesses statements and photographs.

Should you remain in any doubt on this point, we would remind you once again of Lord Hope's statement that *"the right to a fair trial is an absolute right which cannot be compromised"*¹ and refer you to the judgment of the European Court of Human Rights in the case of Foucher v France^[C]. This case deals explicitly with this issue since the applicant had chosen to defend himself in criminal proceedings against him and had been refused access to the case file, *"stating merely that no copy document could be released to an individual except through a lawyer or an insurance company"*². Paragraphs 34-36 of Foucher are quite explicit:

34. The Court reiterates in this connection that according to the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case in conditions that do not place him at a disadvantage vis-à-vis his opponent (see, in particular, the Bulut v. Austria judgment of 22 February 1996, Reports 1996-II, pp. 380-81, para. 47).

1 Sinclair^[B] para 37

2 Foucher^[C] paragraph 47

35. *In the instant case, three considerations are of crucial importance.*

*Firstly, Mr Foucher chose to conduct his own case, which he was entitled to do both under the express terms of the Convention and under domestic law (see paragraph 17 above). **The Court's reasoning in the cases of Kamasinski and Kremzow to the effect that it is not incompatible with the rights of the defence to restrict the right to inspect the court file to an accused's lawyer does not therefore apply** (see the *Kamasinski v. Austria* judgment of 19 December 1989, Series A no. 168, p. 39, para. 88, and the *Kremzow v. Austria* judgment of 21 September 1993, Series A no. 268-B, p. 42, para. 52).*

Secondly, as the applicant had been committed directly for trial in the police court without a preliminary investigation, the question of ensuring the confidentiality of the investigation did not arise.

Lastly, the applicant's conviction by the Caen Court of Appeal was based solely on the game wardens' official report, which, under Article 537 of the Code of Criminal Procedure (see paragraph 16 above), was good evidence in the absence of proof to the contrary.

36. *The Court, like the Commission, therefore considers that it was important for the applicant to have access to his case file and to obtain a copy of the documents it contained in order to be able to challenge the official report concerning him.*

*As the Argentan Police Court rightly said, **"the defendants should have been allowed access to their case file in order to prepare their defence [as] the value of such access is sufficiently demonstrated by the use legal representatives make of it ..."** (see paragraph 10 above).*

As he had not had such access, the applicant had been unable to prepare an adequate defence and had not been afforded equality of arms, contrary to the requirements of Article 6 para. 1 of the Convention taken together with Article 6 para. 3 (art. 6-3+6-1).

The emphasis in both cases is ours rather than the Court's. Those passages quite clearly establish that there is no legal basis to prevent an accused from having material evidence disclosed to him or herself because they are conducting their own defence.

4.1 Communications About Disclosure with the Accused to be Clearly Worded

Standard letters should be recommended to be adopted by the Pfs in communicating with accused about disclosure, which would set out for the accused in plain language:

- What is being disclosed
- Categories of material that are to be disclosed (see section 2.1.1 above)
- Whether the Fiscal believes that its disclosure requirements are now completed
- What procedure is available to the accused to challenge the extent or details of the disclosure (or any redactions or non-disclosure)

These letters should not assume significant knowledge of legal terms or procedures.

5 Summary of Proposals

- The presumption should be that all material evidence, for or against the accused, should be disclosed in a timely fashion to the defence.
- The responsibility for ensuring that disclosure happens rests on the Crown; there is no requirement on the defence to request it.
- It should be clearly and explicitly stated in the guidance that this applies in cases where the accused is representing themselves, just as it does to cases where the accused has professional representation.
- The presumption should be that the Fiscal will obtain statements from all the witnesses he intends to call, unless exceptional circumstances prevent it.
- Time limits should be double-ended to ensure that disclosure is received a minimum time before the Intermediate or Trial Diet.
- Where delays in disclosure cause delays proceedings this should not disadvantage the accused.
- The guidance should remind Fiscals that self-represented accused may need longer to study the evidence than solicitors would.
- Where there is need to restrict disclosure in any way:
 - It should be to the minimum extent strictly necessary in the circumstances of the individual case, taking into account all options and circumstances including relevant bail conditions
 - The Crown should disclose explicitly what has been withheld or redacted and why
 - The Crown should take the lead (especially where the accused are self-represented) in involving the court in the process of determining what should and should not be disclosed.
- Fiscals should be reminded of the need for clear, plain English to be used in all communications with accused. The Crown Office should produce standard template letters for use in communicating with the accused on common disclosure issues. These should use clear language, understandable to laymen, and should contain the information specified in section 4.1 above.

6 References and Cases Cited

A) *European Convention on Human Rights*

ARTICLE 6: RIGHT TO A FAIR TRIAL

1. *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*

2. *Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*

3. *Everyone charged with a criminal offence has the following minimum rights:*

(a) *to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*

(b) *to have adequate time and facilities for the preparation of his defence;*

(c) *to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*

(d) *to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*

(e) *to have the free assistance of an interpreter if he cannot understand or speak the language used in court.*

B) *Sinclair v HM Advocate ([2005] H.R.L.R. 26 and 2005 S.L.T. 553)*

See in particular paragraph 33 of Lord Hope's (unanimously approved of) judgment.

C) *Foucher v France (25 EHRR 234)*

See in particular paragraphs 34-36.

D) *Edwards and Another v United Kingdom, application nos 39647/98 and 40461/98 (2003), 15 BHRC 189*

E) *Bulut v Austria 1996, Reports of Judgments and Decisions 1996*

F) *The Attorney General's Guidelines on Disclosure*

(Taken from <http://www.lso.gov.uk/pdf/disclosure.doc>)

See in particular paragraph 57:

"The prosecutor should, in addition to complying with the obligations under the Act, provide to the defence all evidence upon which the

Crown proposes to rely in a summary trial. Such provision should allow the accused and their legal advisers sufficient time properly to consider the evidence before it is called.”

See also paragraphs 51-54.