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Dear Professor Jamieson

Thank you for your letter of 11 March 2011.

In 2010 the Scottish Parliament passed the Criminal Justice and Licensing (Scotland) Act 2010. Part 6 of this Act introduces a statutory scheme to regulate the disclosure of evidence to an accused in criminal cases. These provisions, which take effect from 06 June 2011, were subject to extensive scrutiny involving lengthy consultation and debate and followed the publication of the independent review of the law and practice of disclosure in 2007 by the Rt Hon Lord Coulsfield.

At the heart of the provisions in Part 6 is the principle that an accused is entitled to have fair notice of the case against him. This means disclosure of not only the evidence the Crown intends to bring against him but crucially disclosure also of the information which materially strengthens his case or materially weakens the prosecution case. The issue of what should and should not be disclosed to an accused has been the subject of frequent consideration by the courts, including the Privy Council and the Supreme Court. The focus of these cases has been whether in terms of article 6 of the European Convention of Human Rights the accused has been afforded a fair trial. Part 6 of the 2010 Act is based upon the common law principles as interpreted by the courts and is due to be commenced in June of this year. I am confident that when properly applied Part 6 of the Act will effectively safeguard the accused's right to a fair trial.

It is for the Crown and SPSA to interpret their duties of disclosure in light of Part 6 and to act accordingly. The Lord Advocate is to lay before Parliament a Code of Practice providing practical guidance to reporting agencies and prosecutors alike in their application of their duties in relation to disclosure and it is ultimately for the courts to determine whether they have carried out their duties in accordance with the 2010 Act.

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The common law does not and has never required the Crown to disclose all the information in its possession. The duty of disclosure contained within the 2010 Act reflects the common law position and the extent to which the duty of disclosure applies can be found within Section 121 of the Act. Importantly, the Act allows the accused to apply to the court for further disclosure if he considers that material information has been withheld. This provides an appropriate safeguard to ensure that the accused receives the information necessary for a fair trial.

I believe that the 2010 Act provides a comprehensive system of disclosure of evidence which ensures justice and fairness to the accused and follows the common law principles as interpreted by the courts.

Trial rights
Kenny Macaskill

KENNY MACASKILL