

# **CRIMINAL JUSTICE AND LICENSING (SCOTLAND) ACT 2010**

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

#### **Part 6 - Disclosure**

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

633. This section applies where the prosecutor has made an application for both a non-notification order and an exclusion order. An application for both orders can only be made in solemn cases, s.142(2).
634. Subsection (2) requires the court, first, to fix a hearing to determine whether a “non-notification” order should be made.
635. Subsections (3) and (4) provide that, where an application is made for “non notification” and exclusion orders the accused will not be notified of either the making of such applications or of the hearing appointed to consider the applications. The accused will not be present nor represented at the hearing. (Although his interests may be represented by Special Counsel if one is appointed by the court, s.150 refers).
636. Subsection (5) provides that the court may make a “non-notification” order if the requirements set out in subsection (6) are met. The court has to consider whether knowledge of the very existence of the application for a s.145 order would be likely to cause a real risk of substantial harm or damage to the public interest.
637. Subsection (7) provides that if the court makes a “non-notification” order, the court must also grant the application for an exclusion order.
638. Subsection (8) provides that, if the court refuses to make a “non-notification” order, the court will then appoint a hearing to determine the application for an exclusion order. Subsection (10) allows the prosecutor to apply to the court to exclude the accused from the hearing on the exclusion order. As there is no longer a “non notification” order in operation it is not possible to make this application in advance of the hearing. Such a motion requires to be made to the court on the day the exclusion order calls in the presence of the accused, rather than in advance of the hearing on the exclusion order. If the court agrees to the motion at that stage the accused can then be excluded by the court.
639. Subsection (9) provides that the prosecutor and if not excluded the accused, have the opportunity to be heard on the application for the exclusion order. The court may make the order if satisfied that the requirements set out in s.144 are met.
640. Subsection (11) makes provision in relation to the interpretation in sections 143-145 of references to the consideration of the accused receiving a ‘fair trial’. Where the trial is ongoing the reference relates to that trial. In the case of appellate proceedings however the reference relates to the original trial which is now the subject of the appeal. The

*These notes relate to the Criminal Justice and Licensing (Scotland)  
Act 2010 (asp 13) which received Royal Assent on 6 August 2010*

court therefore has to consider whether the accused would have received a fair trial at the time of the original trial if the information had not been disclosed.