



## Position Paper

### Disclosure

## Introduction

1. Scots law of criminal procedure proceeds on the basis that, as required by article 6(1) of the European Convention on Human Rights and Part 6 of the Criminal Justice and Licensing (Scotland) Act 2010, the Crown has a duty to disclose all material information it holds to the defence.
2. The basic parameters of the Crown's common law duty of disclosure to the defence were set down, in 1998, by the High Court in *McLeod v HMA (No 2)*.<sup>1</sup> The law was then clarified in a series of decisions by the Judicial Committee of the Privy Council<sup>2</sup> and the Supreme Court.<sup>3</sup> However, following the implementation of the 2010 Act,<sup>4</sup> the Crown's duty of disclosure has been placed on a statutory footing: the provisions of the 2010 Act replace any equivalent common law rules about disclosure of information;<sup>5</sup> the common law rules are abolished insofar as they are replaced by or are inconsistent with the 2010 Act.<sup>6</sup>
3. A convicted person may appeal his conviction on the grounds that the rights conferred by article 6(1)<sup>7</sup>, on which he was entitled to rely, were infringed by reason of the Crown's failure to disclose material information to his defence team, and that he suffered a miscarriage of justice.
4. The Commission has referred to the High Court for determination several cases in which the non-disclosure of material information formed a referral ground of

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<sup>1</sup> 1998 JC 67.

<sup>2</sup> See, for example, *Holland v HMA* 2005 1 SC (PC) 3, *Sinclair v HMA* 2005 1 SC (PC) 28, *McDonald v HMA* [2008] UKPC 48 and *HMA v Murtagh* [2009] UKPC 35.

<sup>3</sup> See, for example, *McInnes v HMA* [2010] UKSC 7 and *Fraser v HMA* [2011] UKSC 24.

<sup>4</sup> In force on 6 June 2011.

<sup>5</sup> Section 166(1) of the 2010 Act.

<sup>6</sup> Section 166(2).

<sup>7</sup> For the position in cases in which the right of the appellant to raise compatibility issues has been extinguished, see *Docherty v HMA* [2014] HCJAC 94

review. The trial proceedings in all of those cases pre-dated the coming into force of the 2010 Act.<sup>8</sup> In any such cases, it is the common law rules that must be applied.

5. Those cases included Stuart Gair (convicted in 1989 of the murder of a man in Glasgow city centre), Stewart Kidd (convicted in June 1996 of the culpable homicide of a guest at his sister's wedding) and Steven Johnston and William Allison (convicted in March 1996 of the murder of an elderly man in his home), all of whose appeals against conviction were upheld.

## **The Commission's position**

### The Crown's duty of disclosure

6. As soon as practicable after the accused's appearance on petition or the recording of his not guilty plea (in summary cases), the prosecutor must review all the information that may be relevant to the case for or against the accused of which the prosecutor is aware, and disclose to the accused all material information, namely that information which:
  - (a) would materially weaken or undermine the evidence that is likely to be led by the prosecutor in the proceedings against the accused,
  - (b) would materially strengthen the accused's case, or
  - (c) is likely to form part of the evidence to be led by the prosecutor in the proceedings against the accused.<sup>9</sup>
7. Those statutory provisions reflect the common law position. Put shortly, the Crown must disclose any information in its possession of which it is aware if that information materially weakens the Crown case or materially strengthens the

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<sup>8</sup> The statutory duty started in respect of cases in solemn proceedings where the first appearance was on or after 6 June 2011, and in summary proceedings where a plea of not guilty was recorded on or after 6 June 2011.

<sup>9</sup> Section 121.

defence case ('disclosable material').<sup>10</sup> In *McInnes* Lord Hope of Craighead worded the test slightly differently, stating that the test here is whether the material *might have* materially weakened the Crown case or *might have* materially strengthened the defence case (he described that test as the 'materiality' test; he described it in *Fraser* as the 'threshold' part of the *McInnes* test), and that any failure by the Lord Advocate to disclose material that satisfies that test is incompatible with the accused's right to a fair trial.<sup>11</sup>

8. The 2010 Act defines 'information' as material of any kind given to, or obtained by the prosecutor, in connection with the criminal proceedings.<sup>12</sup> However, the Crown's duty to disclose information that is material to the defence does not include any duty 'on the Crown spontaneously to comb through all the material in its possession, on the look-out for anything which might assist the defence and so should be disclosed. Rather, [the representatives of the Crown]... must disclose disclosable material of which they become aware, or to which their attention is drawn, while diligently carrying out their core duties of preparing and prosecuting the case.'<sup>13</sup> The duty does not depend on any defence request to the Crown for such material.<sup>14</sup>
9. While the Crown must consider each piece of information to ascertain whether it requires to be disclosed, it may disclose the information 'by any means';<sup>15</sup> it is the nature of the information itself, not the format in which the information is contained, that is important. Those provisions reflect the position at common law.<sup>16</sup> But the prosecutor must disclose a copy of a statement where the proceedings relating to the accused are solemn proceedings and the information is contained in a statement given by a person whom the prosecutor intends to call to give evidence in the proceedings.<sup>17</sup> It has been held at common law that two

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<sup>10</sup> *McDonald*, para 50, Lord Rodger of Earlsferry. Lord Rodger observed that that test – what Lord Bingham of Cornhill described in *R v H and C* [2004] 2 AC 1324, para 14, as the 'golden rule' – has the advantage of encapsulating both the possible negative effect of the material on the Crown case and the possible positive effect on the defence case.

<sup>11</sup> Para 19.

<sup>12</sup> Section 116.

<sup>13</sup> *McDonald*, para 60.

<sup>14</sup> *McDonald*, para 55; *Sinclair*, para 46.

<sup>15</sup> Section 160(2).

<sup>16</sup> *Fraser v HMA* 2008 SCCR 407 (High Court), paras 189, 226 and 238; see also *Fraser* [SC], para 33, Lord Hope of Craighead.

<sup>17</sup> Section 160(6)(a) and (7). Likewise, the prosecutor must disclose a copy of a statement where the proceedings relating to the accused are solemn proceedings and the information is contained in a

classes of material – the statements of any witnesses on the Crown and the defence lists and the previous convictions and outstanding charges relating to those witnesses – will fall to be disclosed.<sup>18</sup>

10. The duty persists in perpetuity: it continues throughout and to the conclusion of any trial, and any subsequent appeal proceedings, and even after the final disposal of the case.<sup>19</sup>

### The failure to disclose material information

11. The Lord Advocate does not act incompatibly with a person's right to a fair trial by continuing to prosecute after a non-disclosure breach has occurred; the significance and consequences of the non-disclosure must be assessed.<sup>20</sup> The test to be applied post-trial is whether, taking into account all the circumstances of the trial, there is a 'real possibility' that the jury would have arrived at a different verdict if the undisclosed information had been before it<sup>21</sup> (what Lord Hope of Craighead described in *Fraser* as the 'consequences' part of the *McInnes* test).
12. In applying the consequences part of the *McInnes* test, the court must concentrate on the case as it was presented at the trial, rather than on the case as it might have been presented: it is not for the court (or the Commission) to speculate about what the case might have been, much less how the jury would have reacted to it.<sup>22</sup>
13. The ultimate question for the court (and the Commission) is whether the trial as a whole was fair, and that question can be decided only by the court's considering all its relevant strengths and weaknesses, including any breaches of specific safeguards in article 6, together.<sup>23</sup>

### **Specific Considerations**

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statement and the prosecutor intends to apply under section 259 of the 1995 Act to have evidence of the statement admitted in the proceedings (section 160(6)(b) and (7)).

<sup>18</sup> *McDonald*, para 51; *Holland*, paras 72–75; *Sinclair*, paras 48 and 49.

<sup>19</sup> Sections 132 - 138

<sup>20</sup> *McInnes*, paras 20 and 24.

<sup>21</sup> *Ibid.* See also *McDonald*, para 77, Lord Rodger of Earlsferry; *McInnes v HMA* 2009 JC 6 (High Court), paras 17–20, the Lord Justice General (Hamilton); and *Kelly v HMA* 2006 SCCR 9, paras 33 and 34.

<sup>22</sup> *Fraser* [SC], para 38.

<sup>23</sup> *Holland*, para 43.

14. As a matter of course, the Commission will not entertain applications grounded on a “disclosure” point that is entirely speculative. The Commission is likely to refuse such an application at stage 1 for want of a statable ground<sup>24</sup>. It follows from this that, in order to have the matter progressed to stage 2, an applicant must explain to the Commission the basis for his belief that the Crown may have failed to discharge its disclosure obligation.
15. The starting point for the Commission, in addressing a non-disclosure ground of review at stage 2, is for it to ask Crown Office whether it disclosed the information in question to the defence.
16. Where the Crown confirms that the information was not disclosed to the defence, or where the Crown is unable to do so and it is reasonable to infer that the information was not disclosed (as has occurred in a number of historical cases), the Commission must first ask itself whether the information ought to have been.<sup>25</sup>
17. Crown Office’s *Disclosure Manual*<sup>26</sup> provides the Crown’s own instructions to their staff. This may be a useful reference tool. The disclosure practice of the Crown, however, is not determinative of the question as to whether or not the law requires that particular material be disclosed<sup>27</sup>.

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<sup>24</sup> See the Commission’s Case Handling Procedures and the “Referrals to the High Court: The Commission’s Statutory Test” position paper.

<sup>25</sup> *McInnes*, para 19.

<sup>26</sup> <http://www.crownoffice.gov.uk/publications/prosecution-policy-and-guidance#DM>

<sup>27</sup> *Macklin v HMA* 2016 SCL 80 *per* Lord Reed at paragraph 19