Chapter 2: Disclosure Duty on the Crown: Overview

2.1 General Principles

2.1.1 Our system of criminal procedure proceeds on the basis, as required by Article 6 of the ECHR and Part 6 of the Criminal Justice and Licensing (Scotland) Act 2010, that the Crown has a duty, which exists in perpetuity, to provide to the defence 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 (s121(3) Criminal Justice and Licensing (Scotland) Act 2010).

This includes information, of which the Crown is aware, which is likely to be of real importance to any undermining of the Crown case, or to any casting of reasonable doubt upon it, or which is of positive assistance to the accused (**McDonald v HMA [AC]** (2008 S.C.C.R. 154)). Put shortly, the Crown must disclose any statement or other material of which it is aware and which materially weakens the Crown case or materially strengthens the defence case (**McDonald v HMA [AC]** at para 50).

2.1.2 This is summarised in the first and second Principles of Disclosure:-

1. The Crown is obliged to disclose <u>*all material information for or against the accused*</u> (subject to any public interest immunity considerations). This relates to statements, but it also relates to <u>*all*</u> information of which the Crown is aware. 'Information' is defined as material of any kind given to or obtained by the prosecutor in connection with the proceedings (s116 Criminal Justice and Licensing (Scotland) Act 2010).

2. "Material" means information which either materially weakens or undermines the evidence that is likely to be led by the prosecutor; materially strengthens the defence case; or is likely to form part of the evidence to be led by the prosecutor in the proceedings against the accused (disclosable information).

2.1.3 The Crown is not obliged to disclose all material information ***against*** the accused, only that information against the accused that forms part of the prosecution case. Neutral information or information damaging to the defence and not part of the prosecution case need not be disclosed and should not be brought to the attention of the court (**R v H & C** 2004 AC 1324**)**, neutral information being information with no evidential significance to any party.

2.1.4 It is the Crown's duty to disclose information that is material to the defence. This duty does not depend on the defence making an application or request to the Crown for disclosure (**McDonald v HMA [PC]** at para 55, **Sinclair** at para 53)

2.1.5 The Crown's duty is a continuing one – it 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 a case. Statute places a continuing duty of review on the prosecutor (Criminal Justice and Licensing (Scotland) Act 2010 s123). The prosecutor must, from time to time, review the information held and disclosed and make further disclosure where appropriate. Where proceedings, at first instance, have concluded there is a continuing statutory duty on the prosecutor to review the information held (Criminal Justice and Licensing (Scotland) Act 2010

s134). The statute provides that there is no requirement to re-disclose information which has previously been disclosed to the defence.

(a) A*ny* new information received by the Crown at *any* stage in the preparation of a case, during trial or any subsequent appeal proceedings, or even after the final disposal of a case must be considered for disclosure and may require previous decisions in relation to disclosure to be reviewed to assess whether further information requires to be disclosed to the defence;

(b) When a defence statement is lodged in a solemn case and if a defence statement is lodged in a summary case, the Crown should consider whether there is information which was not previously considered disclosable which should be disclosed in light of any new line of defence. Previous decisions about disclosure may need to be reviewed and an assessment made whether further information requires to be disclosed to the defence. Where it is decided that information does not require to be disclosed in light of a defence statement, this decision and the reasons for it should be highlighted, in solemn cases, in the Disclosure Page (following the Observations Page) in the precognition, and in summary cases, recorded in the case papers; and

(c) If it becomes apparent that there has been an earlier failure to disclose material information, i.e. information which is likely to be of real importance to any undermining of the Crown case, or to any casting of reasonable doubt on it, and of positive assistance to the accused, that information must be disclosed.

2.1.6 **The Crown's disclosure duty** exists in perpetuity and **extends to all information received and known to the Crown in the course of investigation and criminal proceedings**.

2.1.7 However this does **not** mean that the Crown should disclose **all** information in its possession. It means that the Crown requires to consider all information for disclosure, and disclose any information which meets the ***materiality test***, i.e. all information obtained in the course of the investigation and any criminal proceedings, of which the Crown is aware, which is likely to:

- **materially weaken or undermine the evidence that is likely to be led by the prosecutor;**
- **materially strengthen the defence case; or**
- **to form part of the evidence to be led by the prosecutor in the proceedings against the accused**

2.1.8 While, in terms of the materiality test outlined above the Crown must consider each piece of information to ascertain whether it requires to be disclosed, the **Holland** and **Sinclair** decisions made it clear that, in certain circumstances, certain *classes* of information will always fall to be disclosed: *"the police statements (as opposed to precognitions) of any witnesses on the Crown list and – subject to the Crown argument on article 8…- the previous convictions and outstanding charges relating to those witnesses"* (**McDonald [PC]** para 51). The information to be considered for disclosure includes not only documents, but also other types and formats of information which come into the Crown's possession. The information need not be in written form. It would, for example, include:-

(i) video/audio evidence;

(ii) information which has been provided orally, such as a negative result of a forensic analysis which has been reported to the Crown by telephone; and

(iii) information contained in emails or text messages.

This list is not exhaustive and it is essential to always remember that it is not the format in which the information is held that is important, it is the nature of the information itself. Information that meets the disclosure test, for example, could even be contained within a complaint made to COPFS.

2.1.9 The prosecutor may disclose information "*by any means*." (Criminal Justice and Licensing (Scotland) Act s160(2)). It is the content of the information and not the format it is contained in which is important. The Crown will satisfy its disclosure obligation by providing the *information* as opposed to the document/ item in which the information is held, e.g. where something is elicited at precognition which is disclosable, the obligation is to disclose that piece of information and not the precognition itself. The only exception to this is where the form is considered to be a class of information that is always disclosable, e.g. witness statements, as stated in **Sinclair**.

2.1.10 Information falling within the materiality test is disclosable even if it would not be, or is in a form which would not be, admissible at trial. For example, information contained within a standard precognition which is likely to **materially weaken or undermine the evidence that is likely to be led by the prosecutor; materially strengthen the defence case; or to form part of the evidence to be led by the prosecutor in the proceedings against the accused** is disclosable even though that information is contained in a document which would not itself be admissible at trial.

2.1.11 The Courts have identified certain information which **must** be disclosed **in all cases** (subject to any claim to public interest immunity as mentioned in paras. 2.1.13-15 below). In particular:-

(a) statements for all witnesses on the Crown and defence lists; and

(b) *material* criminal history information for all witnesses on the Crown lists (e.g. previous convictions and outstanding charges) (**Holland** and **HMA v Murtagh** [2009] UKPC 32).

2.1.12 There is further detailed guidance about disclosure of statements and criminal history information in Chapters 13 - 20 of this Manual. **Remember**, the duty to disclose these particular items does not exhaust the duty of disclosure. The Crown's disclosure duty extends to *all* information which falls within the ***materiality*** test.

2.1.13 In exceptional circumstances, **there may be good reason for seeking to withhold information which is normally disclosable in terms of the *materiality* test** e.g. where disclosure could result in a threat to the life or limb of a witness or other persons[1] (**Swinney v Chief Constable of Northumbria** (1999) 11 Admin L.R.

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[1] See Swinney v Chief Constable of Northumbria, (1999) 11 Admin. L.R. 811, in which the court considered the duty owed by the police to informers, to take reasonable care in preventing confidential information from being disclosed to the public. See also Osman v Ferguson, [1993] 4 All ER 344, in which the court stated that the existence of a general duty on the police to suppress crime did not carry with it liability to individuals for damage caused to them by criminals whom the police had failed to apprehend when it was possible to do so.

811) and **Osman v Ferguson** [1993] 4 All ER 344). However any decision on whether or not the Crown may withhold information which would otherwise be disclosable must be taken by the Court.

2.1.14 In Solemn cases, the prosecutor should not disclose details of sensitive information. 'Sensitive' means that if the information were to be disclosed, there would be a risk of (a) causing serious injury or death to any person, (b) obstructing or preventing the prevention, detection, investigation or prosecution of crime or (c) cause serious prejudice to the public interest (Criminal Justice and Licensing Act 2010 s122(3) and (4)).

2.1.15 Where there is information which in terms of the materiality test *is* disclosable, but which it is considered should not be disclosed in the public interest, the matter should be referred initially to the Federation Head, the functional lead for High Court / Sheriff & Jury / Summary (depending on the forum of the case), or another appropriately vetted member of COPFS staff. Thereafter the matter should be reported, including an appropriate recommendation, by that person to the Director of Serious Casework for the onward attention of Crown Counsel. Crown Counsel will issue a final decision as to how the issue should be addressed.

2.1.15 Further guidance on the handling of sensitive information and related disclosure decisions is included in Chapter 25 of this Manual.

2.1.16 When assessing the materiality of a piece of information, a generous approach should be adopted and where there is a doubt about the materiality of a piece of information, then the Crown must err on the side of disclosure.

2.2. The legal basis of the obligation of disclosure

2.2.1 The Crown's disclosure obligation was formed at common law, and from the European Convention on Human Rights, and is now founded in statute within Part 6 of the Criminal Justice and Licensing (Scotland) Act 2010. The statutory obligations apply 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.

2.2.2 In addition, it is unlawful for the Crown to act incompatibly with Article 6 of the European Convention on Human Rights; the Scotland Act 1998, section 57(2); or the Human Rights Act 1998, section 6(1). In **Rowe and Davis v United Kingdom** [2000] 30 EHRR 1, a Grand Chamber of the European Court of Human Rights articulated the law in the following terms:-

> "It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and the defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given an opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party … In addition Article 6(1) requires, as indeed does English law …, that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused …"

2.2.3 The Crown's disclosure obligation is co-extensive with its obligations under Article 6 of the Convention.

2.3 The Duty of the Defence

2.3.1 It is important to remember that the Crown's duty of disclosure is not its principal duty and *"the Crown's job is to prosecute, not to defend"* (**McDonald [PC]** at para 60). Disclosure is simply one aspect of the overall duty to prosecute the case fairly and the Crown should meet its disclosure obligations while *"diligently carrying out their core duties of preparing and prosecuting cases".*

2.3.2 As recognised by Lord Rodger in **McDonald [PC],** *"the success of our adversarial system of trial depends on both sides duly performing their respective roles".*

2.3.3 In addition to the duty of initial disclosure, the Crown has a continuing duty to keep its disclosure decisions under review and to disclose all "disclosable" information of which the Crown is aware or becomes aware while carrying out that duty.

2.3.4 In **McDonald [PC]**, the Privy Council recognised that the Crown does not have a responsibility to investigate all possible lines of defence and to expect the Crown to set about investigating all the possible lines of defence in the case would take the Crown's work into defence territory which is the role of the accused's representatives. Accordingly, it is not the duty of the Crown *"to spontaneously comb through all the material in its possession, on the look-out for anything which might assist the defence and should be disclosed".* If lines of defence manifest themselves during the Crown investigation these must be disclosed to the defence.

2.4 Requests by the Defence for additional disclosure

2.4.1 The Crown will disclose all relevant information which is likely to:

*** materially weaken or undermine the evidence that is likely to be led by the prosecutor;**
*** materially strengthen the defence case; or**
*** form part of the evidence to be led by the prosecutor in the proceedings against the accused**

2.4.2 Thereafter, if the defence considers that disclosure of further information is required by reference to the accused's defence then the nature of the information and the reasons why disclosure is considered necessary should be set out in a defence statement (Criminal Justice and Licensing (Scotland) Act 2010 s124 (solemn) or s125 (summary)). The lodging of a defence statement is mandatory in all solemn cases and conditional in summary cases. Further guidance on defence statements can be found in **Chapter 42 of this Manual**.

2.4.3 Following receipt of a defence statement the prosecutor must review all the information of which the prosecutor is aware which has previously been revealed as potentially relevant but not considered material to the case for or against the accused and disclose any information which now meets the materiality test. This will require effective communication with the Reviewing Officer to ensure that information which was considered to be manifestly irrelevant is also reviewed in light of the defence statement. Further guidance on disclosure policy following receipt of a defence

statement can be found in Chapter 42 of this Manual and operational process guidance can be found in the Case Processing Manual.

2.4.4 Where the defence considers that the prosecutor has failed, in their response to a defence statement, to disclose an item of information which is disclosable in terms of the materiality test they may apply to the Court for a ruling on whether the information is disclosable (Criminal Justice and Licensing (Scotland) Act 2010 s128). Further guidance on applications for Court rulings on disclosure can be found in **Chapter 39 of this Manual**.

2.5 Failure to disclose material information

2.5.1 **Failure to disclose material information may result in a breach of Article 6 and constitute a miscarriage of justice**. In some cases unfairness occasioned by non-disclosure is capable of being cured by disclosure during an appeal of the information which had not been disclosed at first instance (e.g. **Botmeh and Alami v United Kingdom** (Application no.15187/03, 7 June 2007); **Kelly v HMA** (2006) SCCR 9), but in other cases the effect of non-disclosure at first instance will be irreparable (e.g. **Rowe and Davis v United Kingdom**; **Kidd v HMA** (2005) SCCR 200) and will result in a conviction being quashed.

2.5.2 Article 6 of the Convention is concerned with the right of the accused to a fair trial. In the normal course therefore, such an issue cannot be determined until after a trial has taken place. The courts have made it clear that there is a very high test for looking at the effect of non-disclosure in advance of the trial and have stated that Article 6 issues will only be considered prior to the completion of the trial in the most exceptional and blatant cases (**PF Glasgow v Von and Hume**).

2.5.3 In **McDonald [PC]**, Lord Rodger of Earlsferry stated that:

> *"While a failure by the Crown to disclose material may be incompatible with article 6(1), it by no means necessarily follows that the accused has not had a fair trial in terms of article 6, or that there has been some other miscarriage of justice"*

Thus a failure to disclose a statement may, in itself, not result in an unfair trial if, for example, the witness did not depart from their statement when giving evidence (**Kelly v HMA**). The court must consider the effect of any failure to disclose in the context of the circumstances as a whole (**McDonald [PC]** and **McLellan v HMA** ([2008] HCJAC 66)) and as stated in **McInnes v HMA** (2008 HCJAC 53), it is the significance of the statement that has not been disclosed in the context of the actual trial which is of importance to whether the accused's right to a fair trial has been infringed.

2.5.4 As stated by the Lord Justice General in **McInnes v HMA**:

> *"In the context of determining whether there has been a miscarriage of justice (or, we venture to think, an unfair trial) a robust test is required. The test of a real risk of prejudice to the defence was, rightly in our view, adopted in **Kelly v HMA** at paragraph 33."*

2.5.5 The approach taken by the Appeal Court in **McInnes v HMA** was upheld by the Supreme Court ([2010] UKSC 7), in which Lord Hope stated (para 24):

"The question which lies at the heart of it is one of fairness. The question that the appeal court must ask itself is whether after taking full account of all the circumstances of the trial, including the non-disclosure in breach of the appellant's Convention right, the jury's verdict should be allowed to stand. That question will be answered in the negative if there was a real possibility of a different outcome – if the jury might reasonably have come to a different view on the issue to which it directed its verdict if the withheld material had been disclosed to the defence". (also see **Allison v HMA**, [2010] U.K.S.C. 6)

2.6 Information disclosed by the Crown

2.6.1 Where information is disclosed to the accused's legal representative, the disclosure is governed by Article 11 of the Code of Conduct in Criminal Work. In terms of Article 11, a solicitor should not give the accused, or any other third party, copies of any documents, materials or recordings. In exceptional circumstances, it may be appropriate for the solicitor to refer the matter to the Professional Practice Department of the Law Society of Scotland for guidance and authority to disclose the information to the client or any other 3rd party.

2.6.2 Guidance on disclosure to unrepresented accused can be found in **Chapter 23 of this Manual**.

2.6.3 Section 162 of the Criminal Justice and Licensing (Scotland) Act 2010 provides that information disclosed will not be used or further disclosed other than :-

(a) For the purposes of the proper preparation and presentation of the accused's case in the original proceedings;
(b) With a view to the taking of an appeal in relation to the matter giving rise to the original proceedings;
(c) For the purposes of the proper preparation and presentation of the accused's case in any such appeal

2.6.4 Section 163 confirms that it is a criminal offence for any person to knowingly use or disclose information, or anything recorded in it, for any purpose other than those detailed above.

2.7 Crown Undertakings to the Court regarding the disclosure duty of the prosecutor

2.7.1 **Lord Hope** recognised in **McDonald [PC]**(para 33) that *"an absolute guarantee cannot be given in any case that every single piece of information has been disclosed that ought to have been. The most that can reasonably be expected is (1) that everything that can be done by way of instruction, organisation and training to eliminate the possibility of error has been done, and (2) that an assurance is given in each particular case that to the best of the knowledge and belief of the Lord Advocate or those acting for her there has been full disclosure".*

2.7.2 Procurators Fiscal should never proactively provide such an absolute guarantee or undertaking to the Court regarding the Crown's compliance with its duty of disclosure. If the Crown were to provide such an undertaking, it would leave the person making the undertaking or even the Lord Advocate as the responsible minister, vulnerable to possible contempt of court proceedings if it later transpires

that the Crown had not fully complied with its duty of disclosure (**HMA v GB** (2006 SCCR 692)). Such a situation should be strenuously avoided.

2.7.3 Furthermore, should the Court expressly seek an undertaking from the Crown that all information that meets the disclosure test has been disclosed, Procurators Fiscals should decline to provide such an undertaking. In such circumstances, the Court should be referred to Lord Hope's opinion in **McDonald [PC]** and advised that, on the basis of that opinion, there is no legal basis for requiring such an undertaking.

2.7.4 As recognised by Lord Hope, the most that the Crown can be expected to do is to be able to reassure the Court that the systems and procedures in place to eliminate the possibility of error have been followed and that to the best of the knowledge and belief of the Lord Advocate or the person acting for him that there has been full disclosure. The accuracy of such a reassurance is dependent on the careful diligence of all staff to ensure that the appropriate systems and procedures set out in this Manual are followed in every case. Such reassurances should be given verbally.

2.8 Disclosure and Redaction

2.8.1 All redaction and disclosure of witness statements and criminal history records should be carried out in FOS, unless there are exceptional circumstances to justify redaction and disclosure being carried out by other means.

2.8.2 Accordingly, **all** cases – including solemn cases – should remain in FOS and should not be routed elsewhere. Precognoscers will still be able to access the case through SOS-R and will still be able to create and edit documents in SOS-R.

2.8.3 Keeping a case in FOS and carrying out all redaction and disclosure through FOS allows disclosure binders to be created and printed, negating the need to print off every statement individually. Additionally, PROMIS production records will be automatically updated when statements are disclosed.

2.9 Translation of Productions, Witness Statements & CHRs

2.9.1 Notwithstanding the fact that a SPR may highlight that an accused requires translation of written documentation into a particular language, it is not necessary to routinely commission translation of productions for the defence on the basis that legal aid is available to the accused for interpreting and translation work and an interpreter will be provided for the accused at every court diet.

2.9.2 However, where the accused makes admissions at interview or judicial examination which are considered to be important, or essential, parts of the Crown case, the Crown should arrange for these to be translated and provided to the defence in order to ensure that the prosecution has some control over the choice of translator and the approach taken by the translation service.

2.9.3 Furthermore detailed guidance in relation to the transcription of productions and other information disclosed to the defence is contained in Chapter 8 of the Interpreting and Translating Handbook.