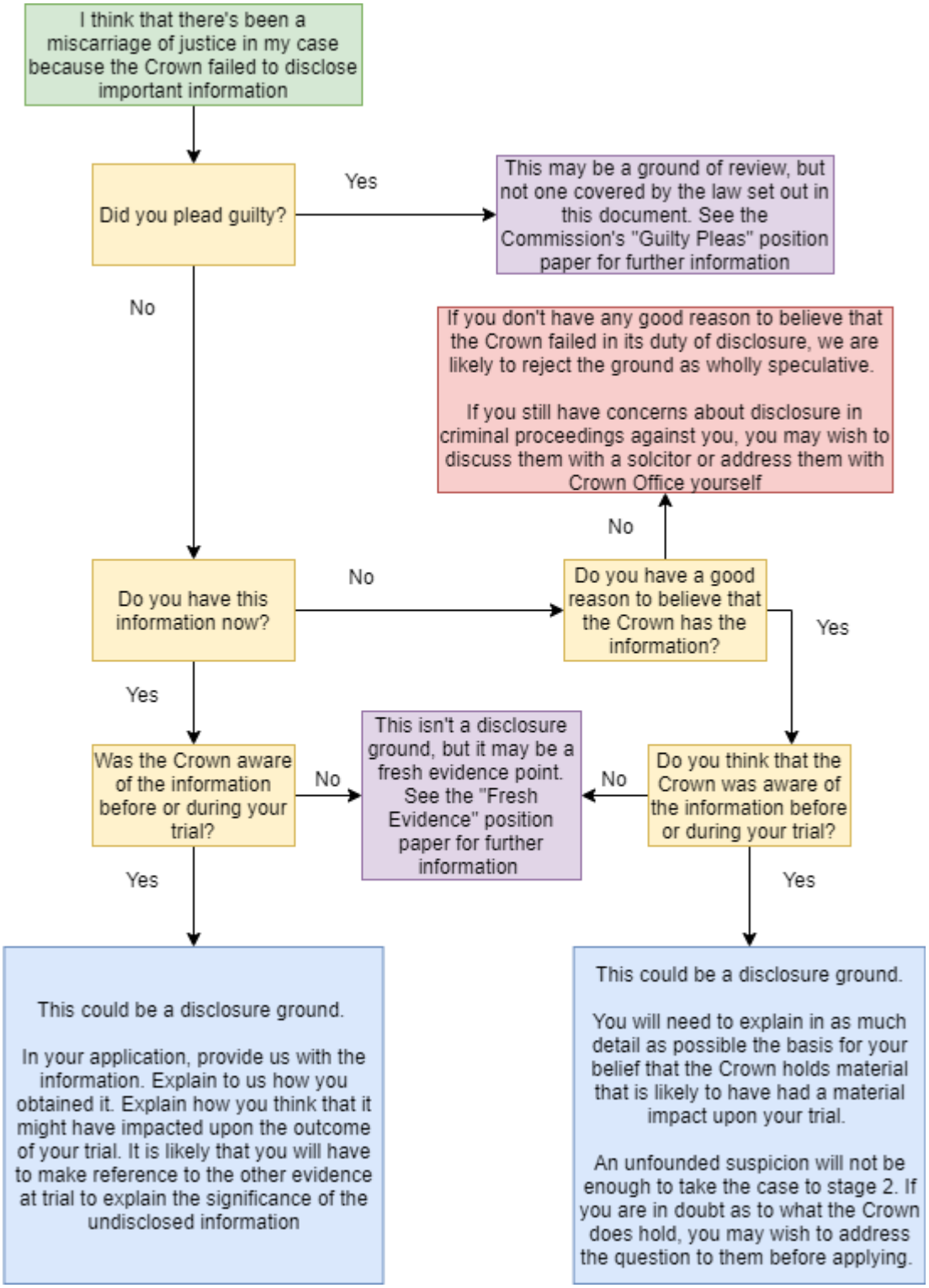
Submission Guidance:

# Disclosure

This paper is intended to provide guidance for those thinking of applying to the Commission on the basis of a failure by the Crown to disclose important information. It sets out, in brief outline, the Commission's understanding of the key principles of law. It then explains the information that the Commission is likely to require in different categories of case. For a fuller explanation of the Commission's understanding of this area of law, see the appended position paper.

**Disclosure – in Brief**

- The Crown must disclose information that it holds to the defence if that information would materially weaken the Crown case or materially strengthen the defence case.
    - This is called the Crown's "duty of disclosure".
    - The duty applies only to information the Crown knows about.
- A failure to meet the duty of disclosure may result in a miscarriage of justice.
- Where there has been a breach of the duty of disclosure, the court will consider whether or not there is a real possibility that the jury would have arrived at a different verdict if it had had the information.
    - If there is such a real possibility, the case will be a miscarriage of justice.
- The Commission does not accept for review cases based on failure to disclose that are purely speculative.
    - In other words, there must be a good reason to believe that the Crown had failed in its duty of disclosure


I think that there's been a miscarriage of justice in my case because the Crown failed to disclose important information
Did you plead guilty?
Yes
This may be a ground of review, but not one covered by the law set out in this document. See the Commission's "Guilty Pleas" position paper for further information
No
If you don't have any good reason to believe that the Crown failed in its duty of disclosure, we are likely to reject the ground as wholly speculative.
If you still have concerns about disclosure in criminal proceedings against you, you may wish to discuss them with a solcitor or address them with Crown Office yourself
No
Do you have this information now?
No
Do you have a good reason to believe that the Crown has the information?
Yes
Yes
Was the Crown aware of the information before or during your trial?
No
This isn't a disclosure ground, but it may be a fresh evidence point. See the "Fresh Evidence" position paper for further information
No
Do you think that the Crown was aware of the information before or during your trial?
Yes
Yes
This could be a disclosure ground.
In your application, provide us with the information. Explain to us how you obtained it. Explain how you think that it might have impacted upon the outcome of your trial. It is likely that you will have to make reference to the other evidence at trial to explain the significance of the undisclosed information
This could be a disclosure ground.
You will need to explain in as much detail as possible the basis for your belief that the Crown holds material that is likely to have had a material impact upon your trial.
An unfounded suspicion will not be enough to take the case to stage 2. If you are in doubt as to what the Crown does hold, you may wish to address the question to them before applying.

Position Paper:

# Disclosure

This paper sets out, the Commission's approach when dealing with this area of law.

## 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)*.[1] The law was then clarified in a series of decisions by the Judicial Committee of the Privy Council[2] and the Supreme Court.[3] However, following the implementation of the 2010 Act,[4] 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.[5] The common law rules are abolished insofar as they are replaced by or are inconsistent with the 2010 Act.[6]

3. A convicted person may appeal his conviction on the grounds that the rights conferred by article 6(1)[7], on which they were entitled to rely, were infringed by reason of the Crown's failure to disclose material information to his defence team, and that they suffered a miscarriage of justice.

[1] 1998 JC 67.
[2] 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.
[3] See, for example, *McInnes v HMA* [2010] UKSC 7 and *Fraser v HMA* [2011] UKSC 24.
[4] In force on 6 June 2011.
[5] Section 166(1) of the 2010 Act.
[6] Section 166(2).
[7] 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

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 review. The trial proceedings in all of those cases pre-dated the coming into force of the 2010 Act.[8] 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 two referrals in the case of Abdel Baset Ali Mohmed al Megrahi were based in part upon disclosure grounds. These arguments were unsuccessful at the 2021 appeal.[9]

## 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 a 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.[10]

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

[8] 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.
[9] *Megrahi's Representative v HMA* [2021] HCJAC 3
[10] Section 121.

materially weakens the Crown case or materially strengthens the defence case ('disclosable material').[11] 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.[12]

8. The 2010 Act defines 'information' as material of any kind given to, or obtained by the prosecutor, in connection with the criminal proceedings.[13] 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.'[14] The duty does not depend on any defence request to the Crown for such material.[15]

9. Where the Crown was not aware of information that was unavailable to the defence, the point will be considered as one of fresh evidence rather than disclosure. The law relating to fresh evidence is addressed in the Commission's position paper on that subject.

10. 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';[16] 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.[17] 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

[11] *McDonald*, paragraph 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.
[12] Paragraph 19.
[13] Section 116.
[14] *McDonald*, para 60.
[15] *McDonald*, para 55; *Sinclair*, para 46.
[16] Section 160(2).
[17] *Fraser v HMA* 2008 SCCR 407 (High Court), paragraphs 189, 226 and 238; see also *Fraser* [SC], paragraph 33, Lord Hope of Craighead.

given by a person whom the prosecutor intends to call to give evidence in the proceedings.[18] It has been held at common law that two 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[19] – will fall to be disclosed.[20]

11. 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.[21]

**The failure to disclose material information**

12. 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.[22] 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[23] (what Lord Hope of Craighead described in *Fraser* as the 'consequences' part of the *McInnes* test).

13. 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.[24]

14. 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.[25]

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[18] 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 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).
[19] Although not an incriminee who is noted cited as a witness – see *MA v HMA* [2022] HCJAC 23
[20] *McDonald*, para 51; *Holland*, paras 72–75; *Sinclair*, paras 48 and 49.
[21] Sections 132 - 138
[22] *McInnes*, paras 20 and 24.
[23] Ibid. See also *McDonald*, para 77, Lord Rodger of Earlsferry; *McInnes v HMA* 2009 JC 6 (High Court), paragraphs 17–20, the Lord Justice General (Hamilton); and *Kelly v HMA* 2006 SCCR 9, paragraphs 33 and 34.
[24] *Fraser* (Supreme Court), paragraph 38.
[25] *Holland*, para 43.

## Specific Considerations

12. As a matter of course, the Commission will not entertain applications grounded on a "disclosure" point that is entirely speculative. An applicant cannot simply "present any complaint or complaint about his conviction, however incoherent or inspecific, and expect the [Commission] to determine for [itself] both what the grounds of appeal should be and to carry out wide ranging investigations of their own volition."[26] The Commission is likely to refuse such an application at stage 1 for want of a statable ground[27]. In order to have the matter progressed to stage 2, an applicant should explain to the Commission the basis for the belief that the Crown may have failed to discharge its disclosure obligation.

13. 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.

14. 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 before considering the consequences test.[28]

15. Crown Office's *Disclosure Manual*[29] 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[30].

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[26] *Sheridan v SCCRC* 2018 SCCR 202
[27] See the Commission's Case Handling Procedures and the "Referrals to the High Court: The Commission's Statutory Test" position paper.
[28] *McInnes*, paragraph 19.
[29] http://www.crownoffice.gov.uk/publications/prosecution-policy-and-guidance#DM
[30] *Macklin v HMA* 2016 SCL 80 *per* Lord Reed at paragraph 19