Prosecution Disclosure (and Non-Disclosure) in Criminal Matters

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Introduction

1. Disclosure in criminal matters is governed largely by well established common law principles. This paper commences by summarising these principles. It is noted in this discussion that the common law 'duty of disclosure' resting on police and prosecutors has particular significance in matters prosecuted summarily in New South Wales because of the limited application of the existing statutory duties of disclosure in such matters.

2. These common law duties are however subject to increasing inroads made by statute. This paper secondly discusses these legislative provisions and their different effects. It is emphasised in this discussion that the existing substantial statutory duties of disclosure apply only in indictable matters prosecuted by the Director of Public Prosecutions.

3. The paper thirdly examines the various sources of policy, practice and procedure that operate in addition to common law and statute and which also work to ensure appropriate disclosure occurs. These include Prosecution Guidelines, Barristers Rules and Practice Directions.

4. Fourthly the paper discusses the various mechanisms available to accused persons to compel disclosure or respond to a failure of disclosure. These include permanent stays, temporary stays and orders made pursuant to the court's power to order disclosure. It is seen that these powers are possessed by courts of both statutory and inherent jurisdiction. The power of a court to order costs following a failure of disclosure, or make a temporary stay conditional upon the payment of costs, is also discussed. Lastly in this section the paper discusses sections 166 to 169 of the *Evidence Act* 1995 (NSW) which allows a court to make orders in certain circumstances for the production of documents and other items.

5. Fifthly the paper examines the approach of appellate courts when a failure of disclosure is raised on an appeal against conviction.

6. Lastly the paper touches on the use of subpoenas as a mechanism to obtain relevant material in criminal proceedings.

One - Common Law

A Duty Owed to the Court

7. There is no duty of disclosure or 'discovery' on the prosecution in criminal matters akin to that which exists in the civil litigation context.

8. It is often said in judicial and academic discussions on disclosure that the accused has no absolute "right" to pre-trial disclosure.

9. The case law suggests strongly that to the extent that the prosecution have a 'legal' obligation of disclosure at common law it is an obligation owed to the Court not to the accused.

10. In *Cannon v Tahche* (2002) 5 VR 317 to the Court stated:

> *"..The prosecutor's "duty of disclosure" has been the subject of much debate in appellate courts over the years. But, as it seems to us, authority suggests that, whatever the nature and extent of the "duty", it is a duty owed to the court and not a duty, enforceable at law at the instance of the accused. This, we think, is made apparent when the so-called "duty" is described (correctly in our view) as a discretionary responsibility exercisable according to the circumstances as the prosecutor perceives them to be. The responsibility is, thus, dependent for its content upon what the prosecutor perceives, in the light of the facts known to him or her, that fairness in the trial process requires".*

11. This passage however should not be interpreted to mean that the accused and the court are impotent to enforce the obligation, whatever its precise legal characterisation is.

12. The common law places high obligations of disclosure on police and prosecuting authorities in respect of disclosure.

13. Just as courts will ensure the fairness of a trial (in the absence of a "right" to a fair trial) so to can courts ensure appropriate disclosure when insistence on it is pressed by the accused.

14. As will be discussed below there are various ways in which the accused can attempt to ensure they do not stand trial or receive sentence until disclosure that is necessary is made.

<u>The Content of the Duty</u>

15. In *Mallard v R* (2005) 224 CLR 125 Kirby J stated:

> *"..The applicable principles: The foregoing review of the approach of courts, in national and international jurisdiction, indicates the growth of the insistence of the law, particularly in countries observing the accusatorial form of criminal trial[83], of the requirement that the prosecution may not suppress evidence in its possession, or available to it, material to the contested issues in the trial. It must ordinarily provide such evidence to the defence. Especially is this so where the material evidence may cast a significant light on the credibility or*

reliability of material prosecution witnesses or the acceptability and truthfulness of exculpatory evidence by or for the accused".

16. The list of what material must be disclosed by the prosecutor cannot be stated exhaustively, but the disclosure obligation would certainly seem to extend to an obligation:

    - To provide statements of witnesses proposed to be called
    - To provide advance notice of discrepancies between a statement and the evidence proposed to be led
    - To provide statements of witnesses not proposed to be called
    - To provide prior convictions of prosecution witnesses and other material relevant to credit
    - To provide other material which could reasonably be seen as capable of assisting the defence case
    - To provide all material relevant to mitigation of sentence

17. This obligation of disclosure should be understood not as a stand alone obligation, but as a particular aspect of the prosecutor's broader obligations as a minister of justice playing a special and refined role in the criminal justice process.

18. In *Boucher v. The Queen* (1955) S.C.R. 16 at 24 Rand J described the role as being:

> *"....not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings".*

19. This subject matter is closely related to the prosecutor's duty to call all relevant witnesses. While outside the scope of this paper useful information and the citations of the leading authorities on that subject can be found in 'Ross on Crime' under the heading "Prosecutor".

20. Of course the principled statements of superior courts are not necessarily determinative of prosecutorial practice and obviously the notional prosecutor described in the above statement is not always to be seen in the court room when criminal matters are heard.

Public Interest Immunity

21. One long standing common law exception to the common law duty of disclosure is the doctrine of public interest immunity, previously known as 'crown privilege'.

22. In *Sankey v Whitlam* (1978) 142 CLR 1 Gibbs ACJ stated at 38-9:

> *"..The general rule is that the court will not order the production of a document, although relevant and otherwise admissible, if it would be injurious to the public interest to disclose it. However the public interest has two aspects which may conflict. These were described by Lord Reid in Conway v. Rimmer (1968) AC, at p 940 , as follows: "There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done."*
> *It is in all cases the duty of the court, and not the privilege of the executive government, to decide whether a document will be produced or may be withheld. The court must decide which aspect of the public interest predominates, or in other words whether the public interest which requires that the document should not be produced outweighs the public interest that a court of justice in performing its functions should not be denied access to relevant evidence. In some cases, therefore, the court must weigh the one competing aspect of the public interest against the other, and decide where the balance lies. In other cases, however, as Lord Reid said in Conway v. Rimmer (1968) AC, at p 940 , "the nature of the injury which would or might be done to the nation or the public service is of so grave a character that no other interest, public or private, can be allowed to prevail over it". In such cases once the court has decided that "to order production of the document in evidence would put the interest of the state in jeopardy", it must decline to order production".*

23. Previously a common law doctrine of long standing, public interest immunity is now codified in section 130 of the *Evidence Act* 1995 (NSW) which states:

> ***130 Exclusion of evidence of matters of state***
>
> *(1) If the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document, the court may direct that the information or document not be adduced as evidence.*

(2) The court may give such a direction either on its own initiative or on the application of any person (whether or not the person is a party).
(3) In deciding whether to give such a direction, the court may inform itself in any way it thinks fit.
(4) Without limiting the circumstances in which information or a document may be taken for the purposes of subsection (1) to relate to matters of state, the information or document is taken for the purposes of that subsection to relate to matters of state if adducing it as evidence would:
(a) prejudice the security, defence or international relations of Australia, or
(b) damage relations between the Commonwealth and a State or between 2 or more States, or
(c) prejudice the prevention, investigation or prosecution of an offence, or
(d) prejudice the prevention or investigation of, or the conduct of proceedings for recovery of civil penalties brought with respect to, other contraventions of the law, or
(e) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information relating to the enforcement or administration of a law of the Commonwealth or a State, or
(f) prejudice the proper functioning of the government of the Commonwealth or a State.
(5) Without limiting the matters that the court may take into account for the purposes of subsection (1), it is to take into account the following matters:
(a) the importance of the information or the document in the proceeding,
(b) if the proceeding is a criminal proceeding—whether the party seeking to adduce evidence of the information or document is a defendant or the prosecutor,
(c) the nature of the offence, cause of action or defence to which the information or document relates, and the nature of the subject matter of the proceeding,
(d) the likely effect of adducing evidence of the information or document, and the means available to limit its publication,
(e) whether the substance of the information or document has already been published,
(f) if the proceeding is a criminal proceeding and the party seeking to adduce evidence of the information or document is a defendant—whether the direction is to be made subject to the condition that the prosecution be stayed.
(6) A reference in this section to a State includes a reference to a Territory.

24. In *R v Reardon (No 2)* [2004] NSWCCA 197 Hodgson JA stated as follows in relation to disclosure and its interaction with public interest immunity:

> *"[46] It has been said that the inequality of resources as between the Crown and the accused 'is ameliorated by the obligation on the part of the prosecution to make available all material which may prove helpful*

to the defence': McIlkenny (1991) 93 Cr App R 287 at 312. The content of that obligation has been considered in a number of English cases.

[47] In R v Ward [1993] 2 All ER 577, the Court of Appeal asserted that, if in a criminal case the prosecution wished to claim public interest immunity for documents helpful to the defence, the prosecution is in law obliged to give notice to the defence of the asserted right so that if necessary the Court can be asked to rule on the legitimacy of this claim. This view was upheld and elaborated by the Court of Appeal in R v Davis [1993] 2 All ER 643, where it was qualified to the extent that it was said that in certain exceptional case an ex parte application could be made by the prosecution to the Court to rule on the question of public interest immunity.

[48] In R v Keane [1994] 2 All ER 478, the Court of Appeal held that, subject to the question of public interest, the prosecution must disclose documents which are material; and it said that documents are material if they can be seen, on a sensible appraisal by the prosecution, (a) to be relevant or possibly relevant to an issue in the case, (b) to raise or possibly raise a new issue the existence of which is not apparent from the prosecution case, or (c) to hold out a real (as opposed to a fanciful) prospect of providing a lead on evidence going to either (a) or (b). This view was approved by the House of Lords in R v Brown (Winston) [1997] UKHL 33; [1998] AC 367 at 376-7, with the comment that 'an issue in the case' must be given a broad interpretation. Category (c) makes it clear that the duty is not limited to matters that would be admissible in evidence"

25. Perhaps the most common way that public interest immunity arises in criminal proceedings is that material caught within the breadth of a subpoena is contended to be non-disclosable because of the operation of section 130.

26. It also commonly arises however when the prosecution or police bring to the court's attention the potential application of the section in relation to material that falls within the common law or statutory duty of disclosure but which police may not have not provided in whole or in part to the prosecutor. In those circumstances no subpoena will be necessary to trigger the determination of the issue.

27. Generally a court will rule on the application of section 130 by viewing the material sought to be protected, generally attached to an affidavit setting out the basis for the claim of public interest immunity.

28. A court can uphold a claim for public interest immunity and thus prevent disclosure occurring. The consequences however may be that a matter is permanently stayed or discontinued if a fair trial cannot occur as a consequence of the claim being upheld. Alternatively the prosecution could discontinue proceedings if they are unwilling to even have the court judge the claim for public interest immunity.

Two - Statutory Provisions Relevant to Disclosure

The DPP Act

29. Section 15A of the *Director of Public Prosecutions Act* 1986 (NSW) states:

> ***15A Disclosures by investigating police officers***
>
> *(1) Police officers investigating alleged indictable offences have a duty to disclose to the Director all relevant information, documents or other things obtained during the investigation that might reasonably be expected to assist the case for the prosecution or the case for the accused person.*
> *(2) The duty of disclosure continues until one of the following happens:*
> *(a) the Director decides that the accused person will not be prosecuted for the alleged offence,*
> *(b) the prosecution is terminated,*
> *(c) the accused person is convicted or acquitted.*
> *(3) Police officers investigating alleged indictable offences also have a duty to retain any such documents or other things for so long as the duty to disclose them continues under this section. This subsection does not affect any other legal obligation with respect to the possession of the documents or other things.*
> *(4) The regulations may make provision for or with respect to the duties of police officers under this section, including for or with respect to:*
> *(a) the recording of any such information, documents or other things, and*
> *(b) verification of compliance with any such duty.*
> *(5) The duty imposed by this section is in addition to any other duties of police officers in connection with the investigation and prosecution of offences.*
> *(6) The duty imposed by this section does not require police officers investigating alleged indictable offences to disclose to the Director any information, documents or other things that are the subject of a bona fide claim of privilege, public interest immunity or statutory immunity. The duty of police officers in such a case is to inform the Director that they have obtained information, documents or other things of that kind.*
> *(7) Subsection (6) ceases to have effect on 1 January 2013.*

30. This section is of central importance in relation to disclosure.

31. Of note is that it does not compel the Director to disclose material once it is received from the police. This obligation however is contained with section 137 of the *Criminal Procedure Act* 1986 (NSW) discussed below.

32. Also of note is that the section applies only in matters where the Director prosecutes and only to indictable matters (defined in the dictionary as offences capable of being prosecuted on indictment).

33. The regulations referred to in sub-section 4 have been promulgated.

34. Regulation 5 of the *Director of Public Prosecutions Regulation* 2010 states:

> ***5 Prescribed form for police officer disclosure***
>
> *For the purposes of section 15A (4) of the Act, disclosures by a police officer to the Director must:*
> *(a) be in the form set out in Schedule 1, and*
> *(b) be completed, signed and dated by the police officer in charge of the investigation, and*
> *(c) be signed and dated by the police officer who holds the position of Brief Manager in the NSW Police Force.*

35. The form referred to in this regulation is the same one that is invariably contained with a brief of evidence in a strictly indictable matter. The statutory form can be viewed at:

- http://www.legislation.nsw.gov.au/maintop/view/inforce/subordleg+390+2010+cd+0+N

36. Section 16 is also of significance and states:

> ***16 Directions to police etc by Director***
>
> *(1) The Director may, by order in writing, give directions referred to in subsection (2) to:*
> *(a) the Commissioner of Police, or*
> *(b) any other person who institutes or conducts prosecutions for offences.*
> *(2) Directions may be given requiring specified information or kinds of information to be referred to the Director for the purpose of enabling the Director to consider:*
> *(a) instituting or carrying on a prosecution or prosecutions for a specified offence or class of offences,*
> *(b) instituting, carrying on or taking over proceedings for a specified offence or class of offences, or*
> *(c) instituting, carrying on or taking over other proceedings in connection with functions conferred on the Director whether under this Act or otherwise.*
> *(3) A person to whom such a direction is given shall comply with the direction.*
> *(4) In this section:*
>
> ***offence** means an indictable offence or a prescribed summary offence.*

37. Section 17 states:

> ***17 Provision of information to Director***

(1) If a prosecution for an offence has been instituted by a person other than the Director and:
(a) the Director informs the person that the Director is considering taking over the prosecution,
(b) the Director takes over the prosecution, or
(c) the person considers that the Director should take over the prosecution,
the person shall furnish to the Director the relevant information or material.
(2) The relevant information or material is:
(a) a full report of the circumstances of the matter,
(b) a copy of the statements of any witnesses,
(c) each material document in the possession of the person, and
(d) such other information or material as the Director requires.

38. *Regina v Richard Lipton* [2011] NSWCCA 247 is essential reading for anyone looking to understand the current disclosure regime in New South Wales.

39. *Lipton* raised an issue as to whether section 15A (prior to the insertion of sub-section 6 in response to the case) obligated police to provide to the Director material that police considered ought be protected from disclosure by the operation of public interest immunity as codified in the Evidence Act 1995 (NSW).

40. The Court of Criminal Appeal held that the section did so obligate the police and the parliament soon after enacted sub-section 6 to obviate the effect of the decision.

The Criminal Procedure Act

41. Section 137 of the *Criminal Procedure Act* 1986 (NSW) requires disclosure in trial matters. It sits within Division 3 of Part 3 of Chapter 3 of the Act which as a whole only applies to trial matters heard before the District Court or Supreme Court. It states:

137 Notice of prosecution case to be given to accused person

(1) The prosecutor is to give to the accused person notice of the prosecution case that includes the following:
(a) a copy of the indictment,
(b) a statement of facts,
(c) a copy of a statement of each witness whose evidence the prosecutor proposes to adduce at the trial,
(d) a copy of each document, evidence of the contents of which the prosecutor proposes to adduce at the trial,
(e) if the prosecutor proposes to adduce evidence at the trial in the form of a summary, a copy of the summary or, where the summary has not yet been prepared, an outline of the summary,
(f) a copy of any exhibit that the prosecutor proposes to adduce at the trial,

(g) a copy of any chart or explanatory material that the prosecutor proposes to adduce at the trial,
(h) if any expert witness is proposed to be called at the trial by the prosecutor, a copy of each report by the witness that is relevant to the case,
(i) a copy of any information, document or other thing provided by police officers to the prosecutor, or otherwise in the possession of the prosecutor, that may reasonably be regarded as relevant to the prosecution case or the defence case, and that has not otherwise been disclosed to the accused person,
(j) a list identifying:
(i) any information, document or other thing of which the prosecutor is aware and that would reasonably be regarded as being of relevance to the case but that is not in the prosecutor's possession and is not in the accused person's possession, and
(ii) the place at which the prosecutor believes the information, document or other thing is situated,
(k) a copy of any information in the possession of the prosecutor that is relevant to the reliability or credibility of a prosecution witness.
(2) The regulations may make provision for or with respect to the form and content of a statement of facts for the purposes of subsection (1) (b).

42. An interesting difference can thus be seen between section 15A (which creates a disclosure obligation on police in respect of the Director) and section 137.

43. Section 15A, as seen above, applies a general disclosure obligation applicable to, "*..all relevant information, documents or other things obtained during the investigation that might reasonably be expected to assist the case for the prosecution or the case for the accused person".*

44. Section 137 however, as seen above, creates a broader corresponding disclosure obligation on the Director in the following terms:

> "*..any information, document or other thing provided by police officers to the prosecutor, or otherwise in the possession of the prosecutor, that may reasonably be regarded as relevant to the prosecution case or the defence case, and that has not otherwise been disclosed to the accused person".*

45. There is an obvious distinction between "relevance" and material that might reasonably be expected to "assist" the case for either of the parties.

46. Presumably this distinction was deliberately cast to prevent police from having to disclose all relevant material to the Director. This legislative choice does however allow decisions to be made by police as to whether material is merely relevant or, on the other hand, capable of being of assistance and in doing so to potentially wrongfully prevent the disclosure of relevant and exculpatory material.

47. An example of material that could be caught by this distinction would be COPS entries. The police may take the view they ought not be disclosed as they will not assist either case. The Director will then not be obligated to disclose them under section 137 because they will not be in the possession of the office of the Director. In that circumstance the defence may be required to subpoena the material. (In practice prosecutors will often obtain these documents at the request of the defence).

48. It can thus be seen that the statutory regime governing disclosure in trial matters places a more onerous standard of disclosure on the Director vis a vis the accused than on police vis a vis the Director.

49. This is perhaps concerning as many of the disclosure authorities are concerned with instances where police have failed in their duty to disclose relevant material which would have been of assistance to the defence. An example is *Mallard* cited above, where police withheld relevant material, including results of scientific experiments exculpatory of the accused, from the Director of Public Prosecutions for Western Australia.

50. Section 138 then creates a much more limited disclosure obligation on the defence. It states:

> ***138 Notice of defence response to be given to prosecutor***
>
> *The accused person is to give the prosecutor notice of the defence response that includes the following:*
> *(a) the name of any Australian legal practitioner proposed to appear on behalf of the accused person at the trial,*
> *(b) notice of any consent that the accused person proposes to give at the trial under section 190 of the Evidence Act 1995 in relation to each of the following:*
> *(i) a statement of a witness that the prosecutor proposes to adduce at the trial,*
> *(ii) a summary of evidence that the prosecutor proposes to adduce at the trial,*
> *(c) a statement as to whether or not the accused person intends to give any notice under section 150 (Notice of alibi),*
> *(d) a statement as to whether or not the accused person intends to give any notice under section 151 (Notice of intention to adduce evidence of substantial mental impairment).*

51. Much of the rest of Division 3 of Part 3 of the Act contains provisions for orders for pre-trial disclosure on the prosecution and defence in matters where the Court has made an order under section 141.

52. This paper will not detail these provisions but it should be noted that among them are sections designed to force the defence to state which evidentiary matters are disputed.

53. These provisions apply to matters commenced after 1 February 2010. Matters commenced prior to that date are still governed by the previous regime (see cl 63(2) Sch 2, *Criminal Procedure Act*).

54. Prior to the enactment of Division 3 of Part 3 there existed a regime for disclosure in what were classified as 'complex criminal trials'. These provisions were superseded by the *Criminal Procedure Amendment (Case Management) Act* 2009 (NSW) which introduced the current Division 3.

55. Of significance is section 146 of the Act, which empowers the court to exclude evidence where that evidence has not previously been disclosed in breach of the requirements of the division. It states:

> ***146 Sanctions for non-compliance with pre-trial disclosure requirements***
>
> *(1)* ***Exclusion of evidence not disclosed***
> *The court may refuse to admit evidence in proceedings that is sought to be adduced by a party who failed to disclose the evidence to the other party in accordance with requirements for pre-trial disclosure imposed by or under this Division.*
>
> *(2)* ***Exclusion of expert evidence where report not provided***
> *The court may refuse to admit evidence from an expert witness in proceedings that is sought to be adduced by a party if the party failed to give the other party a copy of a report by the expert witness in accordance with requirements for pre-trial disclosure imposed by or under this Division.*
>
> *(3)* ***Adjournment***
> *The court may grant an adjournment to a party if the other party seeks to adduce evidence in the proceedings that the other party failed to disclose in accordance with requirements for pre-trial disclosure imposed by or under this Division and that would prejudice the case of the party seeking the adjournment.*
>
> *(4)* ***Application of sanctions***
> *Without limiting the regulations that may be made under subsection (5), the powers of the court may not be exercised under this section to prevent an accused person adducing evidence unless the prosecutor has complied with the requirements for pre-trial disclosure imposed on the prosecution by or under this Division.*
>
> *(5)* ***Regulations***
> *The regulations may make provision for or with respect to the exercise of the powers of a court under this section (including the circumstances in which the powers may not be exercised).*

56. This section appears to apply to evidence not disclosed in breach of section 137 of the Act. Of course this provision does not apply in Local Court proceedings.

57. Chapter 2 of the Act deals with summary procedure and Division 2 of Part places certain obligations on the prosecutor in summary matters.

58. Section 183 states:

> ***183 Brief of evidence to be served on accused person where not guilty plea***
>
> *(1) If an accused person pleads not guilty to an offence, the prosecutor must, subject to section 187, serve or cause to be served on the accused person a copy of the brief of evidence relating to the offence.*
> *(2) The brief of evidence is, unless the regulations otherwise provide, to consist of documents regarding the evidence that the prosecutor intends to adduce in order to prove the commission of the offence and is to include:*
> *(a) written statements taken from the persons the prosecutor intends to call to give evidence in proceedings for the offence, and*
> *(b) copies of any document or any other thing, identified in such a written statement as a proposed exhibit.*
> *(3) The copy of the brief of evidence is to be served at least 14 days before the hearing of the evidence for the prosecution.*
> *(4) The Magistrate may set a later date for service with the consent of the accused person or if of the opinion that the circumstances of the case require it.*

59. The Division does not however create a disclosure obligation akin to section 137.

Alibi and Mental Health Defences

60. Sections 150 and 151 of the Act create specific disclosure obligations in respect of alibi defences and the defence of substantial mental impairment. Again, these obligations only apply to trial matters.

61. There are no equivalent provisions in the Act applicable to matters disposed of summarily.

The *Evidence Act* 1995 (NSW)

62. Various provisions of the Evidence Act require disclosure in advance of an intention to lead certain evidence and the substance of that evidence.

63. These include provisions concerned with tendency evidence, coincidence evidence and various types of hearsay evidence.

Specific Statutorily Authorised Limitations on Disclosure

64. The parliament has seen fit to create certain other limitations on the disclosure of relevant material. These include:

- ‘Sensitive Evidence’ as defined in section Part 2A of Chapter 6 of the *Criminal Procedure Act*
- ‘Sexual Assault Communications’ as defined in Part 5 of Chapter 6 of the *Criminal Procedure Act*
- ‘Pre-recorded interviews’ with vulnerable witnesses as defined in Part 6 of Chapter 6 of the *Criminal Procedure Act*

Three – Guidelines, Policies and Practice Directions

Prosecution Guidelines

65. Pursuant to section 13 of the *Director of Public Prosecutions Act* 1986 (NSW) the Director can promulgate guidelines.

66. The current Guideline 18 concerns disclosure and is attached to this paper.

67. It states in part:

> *“..Prosecutors are under a continuing obligation to make full disclosure to the accused in a timely manner of all material known to the prosecutor which can be seen on a sensible appraisal by the prosecution:*
>
> *• to be relevant or possibly relevant to an issue in the case;*
>
> *• to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use; and/or*
>
> *• to hold out a real as opposed to fanciful prospect of providing a lead to evidence which goes to either of the previous two situations”.*

68. The Guideline lists some categories of material which are not considered as required to be disclosed, including material:

> *“..Relevant only to the credibility of defence (as distinct from prosecution)*
> *witnesses;*
>
> *• relevant only to the credibility of the accused person;*
>
> *• relevant only because it might deter an accused person from giving false evidence or raising an issue of fact which might be shown to be false; or*
>
> *• of which it is aware concerning the accused’s own conduct to prevent an accused from creating a trap for himself or herself, if at the time the prosecution became aware of that material it was not seen as relevant to an issue in the case or otherwise disclosable pursuant to the criteria above.*

69. These exceptions in part reflect one argument commonly raised against broad statutory disclose obligations, that they can work to assist the defence in crafting a false defence or otherwise gaining an unfair advantage.

70. This argument and some others were summarised by the New South Wales Law Reform Commission in Chapter 3 (Pre-Trial Disclosure) of Report 95 of 2000 (Right to Silence) at 3.93:

> *"..One cogent objection to compulsory prosecution pre-trial disclosure is that that it is open to misuse by the defence. It is arguable that early disclosure of the substance of the prosecution case gives the defence an opportunity to tailor its case to meet the disclosed prosecution case, by fabricating evidence, procuring perjured testimony, and intimidating prosecution witnesses.[205] It is also argued that compulsory prosecution pre-trial disclosure rules can be, or are, misused by the defence to force the prosecution to comb through large amounts of material as a tactic to delay trials, or simply in order to conduct a fishing expedition for potential defence evidence or lines of argument".*

Barrister's Rules

71. The New South Wales Barristers Rules, see rules 82-94, place special obligations on barristers appearing as prosecutors.

72. These rules state relevantly to disclosure:

> ***Rule 86.*** *A prosecutor must disclose to the opponent as soon as practicable all material (including the names of and means of finding prospective witnesses in connection with such material) available to the prosecutor or of which the prosecutor becomes aware which could constitute evidence relevant to the guilt or innocence of the accused other than material subject to statutory immunity, unless the prosecutor believes on reasonable grounds that such disclosure, or full disclosure, would seriously threaten the integrity of the administration of justice in those proceedings or the safety of any person.*
>
> ***Rule 87****. A prosecutor who has decided not to disclose material to the opponent under Rule 86 must consider whether:*
>
> *(a) the charge against the accused to which such material is relevant should be withdrawn; and*
>
> *(b) the accused should be faced only with a lesser charge to which such material would not be so relevant.*
>
> ***Rule 88.*** *A prosecutor must call as part of the prosecution's case all witnesses:*

(a) whose testimony is admissible and necessary for the presentation of all of the relevant circumstances; or

(b) whose testimony provides reasonable grounds for the prosecutor to believe that it could provide admissible evidence relevant to any matter in issue;

(c) unless:

(i) the opponent consents to the prosecutor not calling a particular witness;

(ii) the only matter with respect to which the particular witness can give admissible evidence has been dealt with by an admission on behalf of the accused;

(iii) the only matter with respect to which the particular witness can give admissible evidence goes to establishing a particular point already adequately established by another witness or other witnesses; or

(iv) the prosecutor believes on reasonable grounds that the testimony of a particular witness is plainly untruthful or is plainly unreliable; provided that the prosecutor must inform the opponent as soon as practicable of the identity of any witness whom the prosecutor intends not to call on any ground within (ii), (iii) or (iv) together with the grounds on which the prosecutor has reached that decision.

Practice Notes

73. The Supreme Court Practice Note SC CL 2 applies certain requirements to the defence upon the arraignment of the accused which appear to reflect the standard Criminal Procedure Act requirements.

74. The District Court Criminal Practice Note 9 similarly seems to reflect the relevant Criminal Procedure Act provisions.

75. Local Court Practice Note Crim 1 creates an obligation on legal representatives in criminal matters to complete 'Case Listing Advices'.

76. At 5.7 the Practice Note states:

5.1 Matters where accused is legally represented

(a) This paragraph applies only where the accused is represented by a barrister or a solicitor.

(b) To assist in the prompt and effective service of the brief, the legal representative of the accused at the time of the making of the brief service order is to complete, sign and hand to both the

prosecutor and the Court a Notice of Appearance (Attachment A).

(c) Upon the adjourned date, in the event that a plea of not guilty is adhered to, the legal representative of the accused is to hand to the Court and to the prosecutor a completed Court Listing Advice (Attachment B).

(d) The prosecution is required only to call at the hearing those witnesses nominated for cross-examination on the Listing Advice. A notation on the Court Listing Advice by the legal representative of the accused that a witness is not required to be called for cross-examination does not prevent the prosecution calling that witness in the prosecution case if the prosecutor is of the opinion the witness is required. The remainder of the brief of evidence must be tendered by the prosecution in its case.

77. At 10.3 the Practice Note applies modified rules to the hearing of domestic violence offences.

78. It is of course necessary to be aware that these instruments are not law and are incapable of overriding statutory rules of evidence and procedure. Nor can they override the court's fundamental obligations to ensure procedural fairness and a fair trial.

Four – Mechanisms to Compel Disclosure

Permanent Stay

79. One possible response to a serious failure of disclosure is an application for a permanent (or temporary) stay of the charge or indictment. While not strictly speaking a mechanism to compel disclosure the very application for a permanent or temporary stay may facilitate a changed attitude by the prosecutor to the disclosure issue.

80. The categories of abuse of process have not been conclusively judicially stated or defined,[1] but include at least two broad categories. Firstly proceedings that involve vexation, oppression and unfairness to a party. Secondly proceedings which have the effect of bringing the administration of justice into disrepute.[2]

81. The totality of all the factors involved in a case should be considered in determining the question of whether there is an abuse of process.[3]

82. The onus of satisfying the Court that an abuse of process exists lies with the party alleging it.[4]

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1 See R v Carroll (2002) 213 CLR 635 at [47] (Gleeson CJ and Hayne J); and at [73] (Gaudron and Gummow JJ).

2 R v Rogers (1994) 181 CLR 215 at 256 (Mason CJ).

[3] R v Gagliardi & Filippidis 26 A Crim R 391 at 407

83. If a failure (or refusal) to disclose by the prosecution means that a fair trial cannot be held then a court clearly has the power to permanently stay proceedings.[5]

84. It is often said that a stay can only be justified where a fair trial cannot be guaranteed. This is clearly incorrect. The first general limb of the power is generally only to be exercised in those circumstances. The second limb of the power however is exercisable in a much broader and non-strictly defined set of circumstances.

85. This distinction was highlighted in the case of *R v Harker* [6] where Mackenzie J of the Queensland Supreme Court said:

> *"..In Williams v Spautz, Mason CJ, Dawson, Toohey and McHugh JJ explained the need to distinguish between cases where abuse of process was relied on and those where further prosecution would result in a trial which was unfair. Consideration of the present case falls into the first category. Speaking of that category, the judgment proceeds:*
>
> *"... it by no means follows that it is necessary, before granting a stay, for the court to satisfy itself in such a case that an unfair trial will ensue unless the prosecution is stopped. There are some policy considerations which support the view that the court should so satisfy itself. It is of fundamental importance that, unless the interests of justice demand it, courts should exercise, rather than refrain from exercising, their jurisdiction, especially their jurisdiction to try persons charged with criminal offences, and that persons charged with such offences should not obtain an immunity from prosecution."*
>
> *Later the Judges adopted the words of Richardson J in Moevao v Department of Labour (1980) 1 NZLR 464, 482 that the court grants a permanent stay:*
>
> *"... in order to prevent the criminal processes from being used for purposes alien to the administration of criminal justice under law. It may intervene in this way if it concludes ... that the court processes are being employed for ulterior purposes or in such a way ... as to cause improper vexation and oppression."*
>
> *In R v Cooney (1987) 31 ACrimR 256, where the facts were less meritworthy for the prosecution than in the present case, the Court*

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[4] Williams v Spautz (1992) 174 CLR 509 at 529.
[5] *Rona v The District Court of South Australia*(1995) 63 SASR 223 per King CJ at 226, per Olsson J at 230-231 *Jago v The District Court of NSW* (1989) 168 CLR 23 per Brennan J at 46-47 *Walton v Gardiner* [1992-93] 177 CLR 378 per Mason CJ, Dean and Dawson JJ at 392-394, per Brennan J at 411
[6] [2002] QSC 061

of Criminal Appeal refused to stay a second indictment after a nolle prosequi had been entered on an identical indictment in circumstances which "frustrated the method of listing cases". Andrews CJ said the following (264):

"There may be a rare case in which conduct by the prosecuting authority is so blatantly abusive as to call for a gesture on behalf of the court resulting in a stay, the better to ensure that there will be no repetition of such behaviour."

86. It is therefore at least theoretically possible that a failure of disclosure could lead to a permanent stay being granted even when a fair trial can be held, if the conduct of the prosecution were such that public confidence would be jeopardised were the trial to proceed.

87. More likely however a party seeking a stay on the basis of a failure of disclosure would need to point to a failure so grave that a fair trial was seriously jeopardised.

88. This power is exercised sparingly and generally only in exceptional circumstances, but must be exercised where grounds for it are proved.

89. As Gaudron and Gummow JJ stated in Carroll:

> **"..***The power to stay is said to be discretionary. In this context, the word "discretionary" indicates that, although there are some clear categories, the circumstances in which proceedings will constitute an abuse of process cannot be exhaustively defined and, in some cases, minds may differ as to whether they do constitute an abuse. It does not indicate that there is a discretion to refuse a stay if proceedings are an abuse of process or to grant one if they are not".*

Temporary Stay

90. Courts also have a power to stay proceedings on a temporary basis on account of the same considerations discussed above. Such an application can be used explicitly as a mechanism to compel disclosure because the court can make conditional the prosecutor's ability to prosecute the matter on disclosure of material.

91. In *Lipton* cited above the Court of Criminal Appeal upheld a decision of Judge Finnane to temporarily stay a sentence matter until the accused was disclosed relevant material that would potentially assist him to mitigate his sentence.

92. This order was made in circumstances where police had failed to disclose to the Director the relevant material.

93. Judge Finnane stated as follows, see para 48 of *Lipton* :

> *"..Of course, it is for the Director to form an opinion as to whether there should be a disclosure. The notice of motion does not ask for the production of any documents, but asks merely that the Director get documents that obviously exist and form an opinion as to whether they should be disclosed. It is a very unusual application since it is made in circumstances where the offender has pleaded guilty to a serious offence. Nevertheless, there appears to be in existence material that may bear upon a very relevant question as to whether the offender was led into committing an offence or offences by Melanie Brown, either acting on her own behalf or acting as an agent for the Police. The only sanction I can impose, if the Director declines to seek any documents from the Police to enable him to form his view on these issues, is to grant a stay of proceedings and to consider granting bail."*

94. Justice McColl (with whom R.S Hulme and Hislop JJ agreed) stated of the decision to temporarily stay the matter:

> *"..Finally, I would observe that the primary judge did not grant a permanent stay of the proceedings, merely one conditioned on the DPP obtaining the material referred to in the Police Disclosure Certificate, forming the views referred to in his order and communicating that advice to the respondent. It was a matter for the respondent then to determine how to proceed. It was appropriate for his Honour to grant a conditional stay in those circumstances to ensure fairness to the respondent, to maintain public confidence in the administration of justice and to avoid a potential miscarriage of justice".*

Costs

95. In such circumstances there is ample authority for the proposition that a temporary stay can also be made conditional on the prosecution meeting the costs of the accused person thrown away by the failure of disclosure.

96. In *R v Selim* [2007] NSWSC 154, Fullerton J stated:

> *"..I am content to proceed on the basis that there needs to be demonstrated an identifiable injustice for which it can be sensibly said that prosecuting authorities should be held responsible before a temporary stay is ordered, given that the effect of ordering a stay is to impose on them the costs of previous proceedings before they may be permitted to prosecute again".*

97. In *Petroulias v The Queen* (2007) 176 A Crim R 302, the Court of Criminal Appeal stated at 306 (Ipp JA, Latham and Fullerton JJ agreed)

> *"..The authorities to which I have referred establish that the power of the court to grant a stay, permanently or temporarily, stems from the court's power to prevent injustice or unfairness in the trial in a case where a temporary stay is sought, subject to the prosecution paying*

costs. In my opinion, practically speaking, unfairness cannot be established without proof of fault on the part of the prosecution".

Court Order for Disclosure

98. There is ample authority for the proposition that a court may in the exercise of an implied power to safeguard a fair trial, order a prosecutor to disclose documents or other material.[7]

99. In *R v Brown* [1998] AC 367 Lord Hope of Craighead said (at 380):

> *"..If fairness demands disclosure, then a way of ensuring that disclosure will be made must be found".*

100. In *Carter v Hayes* (1994) 61 SASR 451 King CJ stated:

> *"..Disclosure by those conducting a prosecution of material in the possession or power of the prosecution which would tend to assist the defence case, is an important ingredient of a fair trial (Clarkson v DPP [1990] VR 745 at 755), and is an aspect of the prosecution's duty to ensure that the "Crown case is presented with fairness to the accused": Richardson (1974) 131 CLR 116 at 119; Apostilides (1984) 154 CLR 563; 15 A Crim R 88. Moreover the court has power to order the production to the defence of material in the prosecution's possession or power if the interests of justice so require: Clarke (1930) 22 Cr App R 58; Mahadeo [1936] 2 ALL ER 813; Hatt (1958) 43 Cr App R 29; Xinaris (1955) Crim LR 437; Cahrlton [1972] VR 758".*

101. There is authority that a Magistrate possesses the same power. Ross on Crime cites the following authorities for this proposition – *Gaffee v Johnson* (1996) 90 A Crim R 157 and *Rice v Chute* (1995) 119 FLR 181.

102. This power is an important one in a jurisdiction such as NSW, where there is, in matters heard summarily, no statutory obligation of disclosure such as the ones discussed above that apply in indictable matters prosecuted by the Director.

Evidence Act Requests

103. Division 1 of Part 4.6 of Chapter 2 of the Evidence Act 1995 (NSW) contains section 167, which states:

> ***167 Requests may be made about certain matters***

[7] *Noack v General Motors-Holdens Ltd* (1985) 11 FCR 122 at 125 *&* *Sobh v Police Force of Victoria* [1994] VR 41 per Brooking J at 47

A party may make a reasonable request to another party for the purpose of determining a question that relates to:

(a) a previous representation, or

(b) evidence of a conviction of a person for an offence, or

(c) the authenticity, identity or admissibility of a document or thing.

104. Section 166 of the Act defines 'request' and states:

166 Definition of request

In this Division:

***request** means a request that a party ("the **requesting party**") makes to another party to do one or more of the following:*

(a) to produce to the requesting party the whole or a part of a specified document or thing,

(b) to permit the requesting party, adequately and in an appropriate way, to examine, test or copy the whole or a part of a specified document or thing,

(c) to call as a witness a specified person believed to be concerned in the production or maintenance of a specified document or thing,

(d) to call as a witness a specified person in whose possession or under whose control a specified document or thing is believed to be or to have been at any time,

*(e) in relation to a document of the kind referred to in paragraph (b) or (c) of the definition of **document** in the Dictionary—to permit the requesting party, adequately and in an appropriate way, to examine and test the document and the way in which it was produced and has been kept,*

(f) in relation to evidence of a previous representation—to call as a witness the person who made the previous representation,

(g) in relation to evidence that a person has been convicted of an offence, being evidence to which section 92 (2) applies—to call as a witness a person who gave evidence in the proceeding in which the person was so convicted.

105. Section 169 contains provisions relating to the consequences of not complying with a section 167 request, it states:

169 Failure or refusal to comply with requests

(1) If the party has, without reasonable cause, failed or refused to comply with a request, the court may, on application, make one or more of the following orders:

(a) an order directing the party to comply with the request,

(b) an order that the party produce a specified document or thing, or call as a witness a specified person, as mentioned in section 166,

(c) an order that the evidence in relation to which the request was made is not to be admitted in evidence,

(d) such order with respect to adjournment or costs as is just.

(2) If the party had, within a reasonable time after receiving the request, informed the other party that it refuses to comply with the request, any application under subsection (1) by the other party must be made within a reasonable time after being so informed.

(3) The court may, on application, direct that evidence in relation to which a request was made is not to be admitted in evidence if an order made by it under subsection (1) (a) or (b) is not complied with.

(4) Without limiting the circumstances that may constitute reasonable cause for a party to fail to comply with a request, it is reasonable cause to fail to comply with a request if:

(a) the document or thing to be produced is not available to the party, or

(b) the existence and contents of the document are not in issue in the proceeding in which evidence of the document is proposed to be adduced, or

(c) the person to be called as a witness is not available.

(5) Without limiting the matters that the court may take into account in relation to the exercise of a power under subsection (1), it is to take into account:

(a) the importance in the proceeding of the evidence in relation to which the request was made, and

(b) whether there is likely to be a dispute about the matter to which the evidence relates, and

(c) whether there is a reasonable doubt as to the authenticity or accuracy of the evidence that is, or the document the contents of which are, sought to be proved, and

(d) whether there is a reasonable doubt as to the authenticity of the document or thing that is sought to be tendered, and

(e) if the request relates to evidence of a previous representation—whether there is a reasonable doubt as to the accuracy of the representation or of the evidence on which it was based, and

(f) in the case of a request referred to in paragraph (g) of the definition of ***request*** *in section 166—whether another person is available to give evidence about the conviction or the facts that were in issue in the proceeding in which the conviction was obtained, and*

(g) whether compliance with the request would involve undue expense or delay or would not be reasonably practicable, and

(h) the nature of the proceeding.

Note. *Clause 5 of Part 2 of the Dictionary is about the availability of documents and things, and clause 4 of Part 2 of the Dictionary is about the availability of persons.*

106. These provisions can be used as a powerful disclosure tool in matters to which the provisions apply.

107. Odgers 'Uniform Evidence Law'[8] states as follows in relation to the division:

> *"..Division 1 contains provisions setting up a request procedure designed to give procedural protections to parties against whom*

[8] Ninth Edition, pg 894.

evidence may be adduced or admitted as a result of the abolition of the best evidence rule (Pt 2.2), the reduced operation of the hearsay rule (pt 3.2) and the abolition of the rule in Hollington v Hewthorn (Pt 3.5).

Five - Relevance of a Failure of Disclosure on Appeal

108. If on appeal it is demonstrated that a failure of disclosure has led to a miscarriage of justice a verdict of guilty is liable to be set aside.

109. The Supreme Court of Victoria stated in *Re Ratten* [1974] VicRp 26 (at 214):

> *"..Under our law a criminal trial is not, and does not purport to be, an examination and assessment of all the information and evidence that exists, bearing upon the question of guilt or innocence. Even the Crown has some degree of choice as to what witnesses it will call. And the accused is completely free to decide how he will conduct his defence. He has the right to choose what issues he will contest, what facts he will dispute, whether he will give evidence or not, whether he will call witnesses or not, and, if he elects to call witnesses, which ones he will call. All these rights are fundamental to the conception of fair trial under our system of criminal justice.*
>
> *In conformity with this conception of fair trial, if an accused person can show that he has been prevented by surprise, fraud, malpractice or misfortune from presenting at his trial evidence of substantial importance which he desired to present, or which he would have desired to present had he not been prevented by such causes from being aware of its existence or its significance, then ordinarily the fact that he has been tried and convicted without such evidence having been called involves that he has been deprived of his right to a fair trial and that there has, in that respect, been a miscarriage of justice".*

110. In *Mallard v The Queen* (2005) 224 CLR 125 at 133

> *"..At this point it is relevant to note that the recent case of Grey v The Queen in this Court stands as authority for the proposition that the prosecution must at common law also disclose all relevant evidence to an accused, and that a failure to do so may, in some circumstances, require the quashing of a verdict of guilty. As will appear, the evidence which was not produced before or at this trial, was certainly no less cogent than the evidence which was not disclosed in Grey".*

Six - Subpoenas as a Mechanism to Obtain Material

111. Subpoenas can be issued to obtain documents or other material in circumstances where the prosecutor declines to obtain and disclose material or claims to be unable or unwilling to do so.

112. In Local Court proceedings section 122 of the *Criminal Procedure Act* 1986 (NSW) governs the power. It states:

> ***222 Issue of subpoenas***
>
> *(1) A registrar, if requested to do so by a party to proceedings, is, subject to and in accordance with the rules, to issue to the person named any of the following subpoenas:*
> *(a) a subpoena to give evidence,*
> *(b) a subpoena for production,*
> *(c) a subpoena both to give evidence and for production.*
> *(2) If the prosecutor in proceedings is a public officer or a police officer, the officer may, subject to and in accordance with the rules, issue any such subpoena. The subpoena is to be filed and served in accordance with the rules.*
> *(3) A subpoena to give evidence and a subpoena for production may be issued to the same person in the same proceedings.*
> *(4) A party may require a subpoena for production to be returnable:*
> *(a) on any day on which the proceedings are listed before a court, or any day not more than 21 days before any such day, or*
> *(b) with the leave of the court or a registrar, on any other day*

113. A subpoena once issued by the registrar can be set aside by a court. Section 227 of the Act states:

> ***227 Subpoena may be set aside***
>
> *(1) A court may, on application by the person named in a subpoena, set aside the subpoena wholly or in part.*
> *(2) Notice of an application under this section is to be filed and served as prescribed by the rules on the party on whose request, or by whom, the subpoena was issued.*

114. There is ample case law dealing with the various grounds upon which a subpoena is liable to be set aside, whether in whole or part. The doctrine of abuse of process largely governs the circumstances and the doctrine of "oppression" is significant. Disclosure through subpoena will also be subject to the application of public interest immunity.

115. In *Alister v The Queen* (1983) 154 CLR 404 Gibbs CJ stated:

> *"..Although a mere "fishing" expedition can never be allowed, it may be enough that it appears to be "on the cards" that the documents will materially assist the defence".*

116. A leading New South Wales authority is *R v Saleam* [1999] NSWCCA 86 (27 April 1999) where Simpson J stated:

> *"..The principles governing applications of this kind are no different from those governing applications for access to documents produced in answer to a subpoena . Before access is granted (or an order to*

produce made) the applicant must (i) identify a legitimate forensic purpose for which access is sought; and (ii) establish that it is "on the cards" that the documents will materially assist his case. So much was established in earlier proceedings brought by this applicant: R v Saleam (1989) 16 NSWLR 14, per Hunt CJ at CL".

117. As *Saleam* makes clear the law makes access to material under subpoena conditional on a demonstration that the material may materially assist.

118. In this way it can be seen that the law ensures that subpoenas in criminal matters do not become an alternate form of discovery, through which all relevant material that may possible exist is able to be obtained.

119. The law on subpoenas in this sense is entirely consistent with the common law and statute dealing with disclosure.

The author welcomes feedback and comments on this paper.

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