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 matters prosecuted by the Director of Public Prosecutions (whether in the Local Court or on indictment in the District or Supreme Courts).

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, Legal Professional Rules and Practice Directions.

4. Fourthly the paper discusses the various mechanisms available to accused persons to obtain or compel disclosure. These include temporary stays and orders made pursuant to the court's power to order disclosure, or an order to restrain a prosecutor from appearing. 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.

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 has 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 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 too 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 that they do not stand trial or receive sentence until necessary disclosure is made.

A Duty that exists without prompting or 'fossicking' by the Defence

15. The prosecutor's duty is one that must be honoured without the need for prompting by the defence or any onus on the defence to obtain the

material itself. However, the defence is expected to exercise reasonable diligence in the preparation and conduct of the trial. *Grey v The Queen* [2001] HCA 65; (2001) 75 ALJR 1708 concerned an appeal from a conviction. The prosecution had failed to disclose a letter of comfort in relation to a witness (Mr Reynolds) to the accused. The letter revealed that the witness might reasonably be supposed to have been criminally concerned in the events giving rise to the counts alleged against the accused. Gleeson CJ, Gummow and Callinan JJ held as follows at [23]:

> "... *there has been a miscarriage of justice in this case... It is one thing to say that the defence knew or could have found out about various aspects of unsavoury behaviour on the part of Mr Reynolds but an altogether different thing to say that it knew of the special relationship between Mr Reynolds and the police. And although it might also be possible to say that a lucky (if extremely risky) question of him might have elicited an answer which revealed the existence of the letter of comfort and perhaps even its contents, there was no reason why the defence in a criminal trial should be obliged to fossick for information of this kind and to which it was entitled. Nor can we accept, in any event, as the Court of Criminal Appeal held, that reasonable diligence before or during the trial would have unearthed the letter.*"

16. As Simpson J said in her dissenting judgment in *R v Grey* [2000] NSWCCA 46 at [39] (Simpson J's decision prevailed on appeal to the High Court):

> *"In any case, the primary obligation lay on the prosecution to disclose the letter, not upon the appellant's lawyers to engage in a complicated detective exercise."*

17. See also McColl JA in *R v Lipton* [2011] NSWCCA 247 at [119].

The Content of the Duty

18. 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".

19. 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 the admissibility of evidence sought to be lead by the prosecution, including for example material relevant to whether evidence has been obtained improperly or in consequence of a contravention of any law;
    - To provide all material relevant to mitigation of sentence.

20. 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.

21. In *Boucher v. The Queen* (1955) S.C.R. 16 at 24 Rand J described the role or a prosecutor:

> "*It cannot be over-emphasised that the purpose of a criminal prosecution is 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 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.*"

22. 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".

23. 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.

The Fallacy of the Investigating Police / Prosecutor Distinction

24. It is not uncommon for counsel and solicitor appearing for the Crown, or even the police sergeant advocate appearing in summary proceedings, to respond to matters of disclosure by indicating that they do not personally hold any documents or material which they consider require disclosure to the accused. This is often the case in circumstances where there is nonetheless an acknowledgment that such documents or material are held by or may be accessible to the investigating police. This response may be a legitimate answer in practical terms but it is not a complete answer to the prosecution's duty of disclosure.

25. Such a distinction between the prosecution advocate or agency and the investigating agency is a fallacy.

26. As McColl JA stated in *Lipton* at [119] (Emphasis added):

> *"Mallard v R confirms that there may be a miscarriage of justice whether it is **the police or the DPP** who fail to disclose material relevant to an issue in criminal proceedings to the accused."*

27. The Commonwealth DPP Statement on Disclosure (referred to further below) specifically address this point and eschew any notion of there being a meaningful distinction between the investigating agency or agencies and the prosecuting agency, whilst acknowledging the practical barrier to disclosure by the prosecuting agency if they do not receive the material from the investigating agency. At [5]-[7] (footnotes omitted, emphasis added), the Statement on Disclosure says:

> *"A precondition for prosecution disclosure is that the material is in the possession of, or the information is known by, the prosecution. **For the purposes of this disclosure policy and at common law there is no distinction between the prosecuting agency and the investigative agency.** The courts generally regard the investigative agency and the prosecuting agency as "the prosecution". Consequently, the CDPP largely depends on the investigative agency to inform it of the existence of material which should be disclosed to the defence, whether the investigative agency holds it or is aware*

it is held by a third party including a Commonwealth, State or Territory agency, private entity or individual.

If a matter involves investigation by more than one agency, the CDPP depends on the investigative agency which refers the brief to inform the CDPP of all disclosable material which any of the agencies involved hold or are aware of.

The CDPP is available to assist and work with agencies in discharging the Prosecution's duty of disclosure."

28. The Commonwealth DPP Statement on Disclosure cites *R v Farquharson* (2009) 26 VR 410 at [212] for the proposition that there is no distinction between the prosecuting agency and the investigative agency when it comes to disclosure. In that decision, Warren CJ, Nettle JA and Redlich JA stated at [210]-[212] (footnotes omitted, emphasis added) the following:

210. It is axiomatic that there must be full disclosure in criminal trials. The prosecution has a duty to disclose all relevant material. A failure of proper disclosure can result in a miscarriage of justice.

211. The pre-condition for prosecution disclosure is, of course, that the material is in the possession of, or the information is known by, the prosecution. In argument reference was made to an affidavit provided by the informant Detective Sergeant Gerard Damian Clanchy dated 18 August 2008. Clanchy deposed that:

> *On or about the 28th May 2007 I was contacted by Mr Baker who told me that he had interviewed Mr King for offences arising out of a fight at a hotel on Christmas eve and that a brief would be submitted in due course. I believed at that time that the investigation into the fight was still ongoing and that what charges, if any were to be laid was still to be determined. At no time was there any agreement, understanding or direction that any charges to be laid against Mr King were to be delayed or deferred until after Mr King gave evidence against Mr Farquharson.*

212. It was accepted by the Director that there is no distinction for disclosure purposes to be drawn between the prosecution in the present trial and the police informant on King's charges. Accordingly, ***the Crown must be taken to have known*** *prior to the trial (at least from 28 May 2007) that King may have been charged with an indictable offence."*

29. In this way it can be seen that knowledge is imputed to the prosecuting agency (the DPP, the police sergeant conducting a prosecution or otherwise) of the documents or material in the possession or known to the investigating agency (including in relation to other criminal investigations); and accordingly the Crown prosecutor, DPP solicitor or police sergeant conducting the prosecution in court cannot meaningfully shield themselves from the duty to disclose.

30. See also Basten JA (with whom Johnson and Adamson JJ agreed) in *Gould v Director of Public Prosecutions (Cth)* [2018] NSWCCA 109 at [15].

Criminal records of prosecution witnesses

31. In relation to the disclosure of criminal records of prosecution witnesses (and issue of subpoena for them), a recent decision of Hamill J in *R v Jenkin (No 2)* [2018] NSWSC 697 is on point. The Crown had disclosed criminal records of some prosecution witnesses in advance of the trial. Shortly before the trial, the accused had issued a subpoena for all criminal records of thirty prosecution witnesses. The Commissioner of Police resisted compliance with the subpoena on a number of grounds, including the privacy of the citizens to whom the criminal records related. Informal access to the accused was ultimately negotiated in relation to many of the records and Hamill J ordered production of the records and granted access to the accused. At [32], his Honour commented that *"at least some of the records finally obtained under the subpoena constituted material that should have been disclosed to the legal representatives of the accused without them having to seek it out."*

32. His Honour referred to the observations of Ormiston JA in *R v Garofalo* [1999] 2 VR 625; [1998] VSCA 145 at [63]:

> *"Notwithstanding the absence of direct authority in this country relating to the obligation to disclose prior convictions, I would conclude, by reference to considerations both of authority and principle, that at the least there is, in general terms, a common law duty to make disclosure of previous convictions of prosecution witnesses, though the precise manner in which this duty should be worked out and applied may depend upon the court in which the prosecution has been brought, the means of obtaining that information and possibly other circumstances relevant to the individual case, as analysed below."*

33. Hammil J went on to state at [33]:

> *"It is unnecessary to adopt the absolute terms of the statement of principle of Ormiston JA in R v Garofalo. However, I agree with it in general terms. A cautious prosecutor would act in accordance*

with its terms. Where a witness is expected to give evidence adverse to an accused person, or where their evidence is expected to be controversial, or where, as here, their conduct is impugned in relevant ways in other parts of the prosecution brief, the prosecution should disclose that witness's criminal history to the accused's legal advisers and do so at an early stage. Inherent in that proposition is the fact that investigating police should have disclosed the material to the prosecutor."

34. At [19] Hammil J rebuffed a submission that the accused was required to establish that a criminal history had some particular and direct relevance to the issue of credibility. The submissions made on behalf of the Commissioner of Police – respondent to a subpoena issued for "all criminal records" of thirty named prosecution witnesses – included that:

> *"if a person is a drug dealer that doesn't make them a dishonest person … or just because someone's a drug dealer or just because someone's been in a fight before and convicted of common assault, doesn't mean that they should have their criminal history laid bare to a court."*

35. Hamill J stated at [20]-[21] the following:

> *There is also a fundamental misconception in the implication that the accused is required to establish that the criminal history has some particular and direct relevance to the issue of credibility. As was posited in argument, the fact that a witness has a criminal record that is not, on its face, relevant to their credibility may not be the end of the inquiry. To use Mr Regener's examples [on behalf of the Commissioner of Police], a witness may have a record for assault or drug dealing. That may or may not, of itself, bear upon their credibility. However, further investigation may establish that the witness lied about the issue when confronted by police or in a formal interview. The outcome of the proceedings may also establish matters relevant to the witness's credibility. An example emerged in this trial after the present issue was resolved. During the course of the evidence of a witness (D), her criminal record was called for and produced. (I note in passing that this was able to be done in less than 10 minutes). The sentencing outcomes demonstrated that D had long term psychiatric issues and that a number of criminal offences had been dealt with under s 32 of the Mental Health (Forensic Provisions) Act 1990.*
>
> *16. I agree with the observations of Gillard J in R v Mokbel (Ruling No 1) [2005] VSC 410 at [71]:*
>
> > *"It follows that any document or thing which impinges upon a witness's credibility is important to the accused's defence. Defence lawyers are in a far better position than a judge to make an appraisal of the value of information contained. There is a fine line between*

fishing for information and knowing or suspecting that there is information in the documents relevant to the credibility of a witness. A more liberal approach to the question is required in a criminal proceeding. Experience shows that full examination of documents by defence counsel sometimes produces relevant material for cross-examination, material which may to others not fully conversant with all the factual matters, be not important."

Public Interest Immunity

36. 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'.

37. 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".

38. 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.

39. 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"

40. 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 *Evidence Act*.

41. It also commonly arises however when the prosecution brings 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. In those circumstances no subpoena will be necessary to trigger the determination of the issue.

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

Two - Statutory Provisions Relevant to Disclosure

The DPP Act

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

> ***15A Disclosures by law enforcement officers***
>
> *(1) Law enforcement officers investigating alleged 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.*
>
> *(1A) The duty of disclosure arises only if the Director exercises any function under this Act with respect to the prosecution of the offence (including in connection with a law enforcement officer seeking advice from the Director under section 14A of the Criminal Procedure Act 1986 about the commencement of proceedings for an offence).*

(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) Law enforcement officers investigating alleged 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 law enforcement 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 law enforcement officers in connection with the investigation and prosecution of offences.

(6) The duty imposed by this section does not require law enforcement officers to provide to the Director any information, documents or other things:

(a) that are the subject of a claim of privilege, public interest immunity or statutory immunity, or

(b) that would contravene a statutory publication restriction if so provided.

(7) The duty of a law enforcement officer in such a case is to inform the Director of:

(a) the existence of any information, document or other thing of that kind, and

(b) the nature of that information, document or other thing and the claim or publication restriction relating to it.

However, a law enforcement officer must provide to the Director any information, document or other thing of that kind if the Director requests it to be provided.

(8) (Repealed)

(9) In this section:

***law enforcement officer** means a police officer, or a member of staff of one of the following agencies, who is responsible for an investigation into a matter that involves the suspected commission of an alleged offence:*

(a) the Law Enforcement Conduct Commission,

(b) the New South Wales Crime Commission,

(c) the Independent Commission Against Corruption.

***statutory publication restriction** means a prohibition or restriction on publication that is imposed by or under:*

(a) section 176 (Disclosure and use of examination material) or 177 (Disclosure and use of evidence given at examination) of the Law Enforcement Conduct Commission Act 2016, or

(b) section 45 or 45A of the Crime Commission Act 2012, or

(c) section 112 of the Independent Commission Against Corruption Act 1988.

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

45. 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 within sections 141(1)(a) and 142 of the *Criminal Procedure Act* 1986 (NSW) (formerly s 137) discussed below.

46. The provision only applies where the Director exercises a function under the *DPP Act* to prosecute or otherwise. However, since an amendment in 2017 to subsection (1) the provision no longer applies only in matters where the law enforcement officer is investigating an indictable offence.

47. In 2013, the provision was expanded from applying only to police officers vis-à-vis the DPP to other investigating agencies, namely the Law Enforcement Conduct Commission (formerly the Police Integrity Commission), the NSW Crime Commission and ICAC.

48. The regulations referred to in sub-section (4) were promulgated in 2010 and subsequently in 2015.

49. Regulation 5 of the *Director of Public Prosecutions Regulation* 2015 states:

5 Prescribed form for law enforcement officer disclosure

For the purposes of section 15A of the Act, disclosures by a law enforcement officer to the Director must:

(a) be in the form set out in Schedule 1, and

(b) be completed, signed and dated by the law enforcement officer, and

(c) be signed and dated by the law enforcement officer's relevant superior officer, being:

(i) in the case of a disclosure by a police officer—another police officer who holds a rank in the NSW Police Force senior to that police officer, or

(ii) in the case of a disclosure by an officer of the New South Wales Crime Commission—the Commissioner or an Assistant Commissioner of the Commission, or

(iii) in the case of a disclosure by an officer of the Law Enforcement Conduct Commission—the Chief Commissioner, a Commissioner or an Assistant Commissioner of the Commission, or

(iv) in the case of a disclosure by an officer of the Independent Commission Against Corruption—the Commissioner or an Assistant Commissioner of the Commission.

50. 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:

    - https://www.legislation.nsw.gov.au/#/view/regulation/2015/514/sch1

51. 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.*

52. 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.

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

54. *Lipton* raised an issue as to whether section 15A (prior to the insertion of subs (6) in response to the case, but noting that subs (6) has since been

amended) 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).

55. The Court of Criminal Appeal held that the section did so obligate the police and the Parliament soon after enacted the former subs (6) to obviate the effect of the decision. The old subs (6) was in the following terms:

> *(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.*

56. In the amendments that came into force on 1 January 2013 the limitation on the provision of documents or other things to the Director the subject of a claim of privilege, public interest immunity or statutory immunity was overridden by a requirement to provide such material to the Director if requested to do so by the Director (amendments that mirror the current subs (7)).

The Criminal Procedure Act

57. In both matters dealt with summarily in the Local Court (and Children's Court) and matters dealt with on indictment in the higher courts, there is a statutory regime for the disclosure of prosecution evidence on the defence.

58. In relation to matters dealt with to finality in the Local Court (whether summary or indictable offences), the following provisions set out the requirements for disclosure of evidence by the prosecution to the defence in Chapter 4, Part 2, Division 2.

> ***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.

184 Exhibits

(1) Despite section 183, the prosecutor is not required to include a copy of a proposed exhibit identified in the brief of evidence if it is impossible or impractical to copy the exhibit.

(2) However, in that case the prosecutor is:

(a) to serve on the accused person a notice specifying a reasonable time and place at which the proposed exhibit may be inspected, and

(b) to allow the accused person a reasonable opportunity to inspect each proposed exhibit referred to in the notice.

185 Recording of interviews with vulnerable persons

(1) If the prosecutor intends to call a vulnerable person to give evidence in proceedings, the brief of evidence may include a transcript of a recording made by an investigating official of an interview with the vulnerable person, during which the vulnerable person was questioned by the investigating official in connection with the investigation of the commission or possible commission of the offence (as referred to in section 306R).

(2) A copy of the transcript of the recording must be certified by an investigating official as an accurate transcript of the recording and served on the accused person in accordance with section 183.

(3) A brief of evidence that includes a transcript of a recording of an interview with a vulnerable person is not required also to include a written statement from the vulnerable person concerned.

(4) The transcript of the recording is taken, for the purposes of this Division, to be a written statement taken from the vulnerable person. Accordingly, any document or other thing identified in the transcript as a proposed exhibit forms part of the brief of evidence.

(5) Nothing in this Division requires the prosecutor to serve on the accused person a copy of the actual recording made by an investigating official of an interview with the vulnerable person.

(6) This section does not affect section 306V (2).

(7) In this section:

investigating official has the same meaning as it has in Part 6 of Chapter 6.

Note. Part 6 of Chapter 6 allows vulnerable persons (children and cognitively impaired persons) to give evidence of a previous representation in the form of a recording made by an investigating official of an interview with the vulnerable person. Section 306V (2) (which is contained in that Part) provides that such evidence is not to be admitted unless the accused person and his or her Australian legal practitioner have been given a reasonable opportunity to listen to or view the recording.

185A Recordings of interviews with domestic violence complainants

(1) If the prosecutor intends to call a domestic violence complainant to give evidence in proceedings for a domestic violence offence, the brief of evidence may include a recorded statement relating to the offence.

(2) For the purpose of the service of a recorded statement included in a brief of evidence, the requirements of Division 3 of Part 4B of Chapter 6 in relation to service of, and access to, a recorded statement must be complied with.

(3) This Division (other than section 185 (1)) applies to a recorded statement included in a brief of evidence and the person whose representation is recorded in the recorded statement in the same way as it applies to a written statement included under this Division and the person who made the written statement.

(4) A brief of evidence that includes a recorded statement is not required also to include a written statement from the domestic violence complainant.

(5) This section does not affect section 289I (2).

59. In certain circumstances, the prosecutor is not required to serve a brief of evidence on the defence as provided for by section 187 and cl 24 *Criminal Procedure Regulation 2017*, both set out below.

187 When brief of evidence need not be served

(1) The court may order that all or part of the copy of the brief of evidence need not be served if it is satisfied:

(a) that there are compelling reasons for not requiring service, or

(b) that it could not reasonably be served on the accused person.

(2) The court may make an order under this section on its own initiative or on the application of any party.

(3) An order may be made subject to any conditions that the court thinks fit.

(4) Without limiting any other power to adjourn proceedings, the court may grant one or more adjournments, if it appears to it to be just and reasonable to do so, if the copy of the brief of evidence is not served in accordance with this Division. For that purpose, the court may extend the time for service of the brief of evidence.

(5) A prosecutor is not required to serve a brief of evidence in proceedings for an offence of a kind, or proceedings of a kind, prescribed by the regulations.

24 Offences for which briefs of evidence not required

For the purposes of section 187 (5) of the Act, the following proceedings are prescribed as proceedings of a kind in which a prosecutor is not required to serve a brief of evidence:

(a) proceedings for an offence for which a penalty notice may be issued (other than an offence that is set out in Schedule 4 and that is not referred to below),

(b) proceedings for an offence under section 4 of the Summary Offences Act 1988,

(c) proceedings for an offence under any of the following provisions of the Road Transport Act 2013 (or a former corresponding provision within the meaning of that Act):

(i) section 53 (3) or 54 (1) (a), (3) (a), (4) (a), (5) (a) (i) or (b) (i),

(ii) section 110 or 112,

(d) proceedings for a summary offence for which there is a monetary penalty only,

(e) proceedings for an offence under section 10 of the Drug Misuse and Trafficking Act 1985,

(f) proceedings for an offence under section 16 (1) of the Poisons and Therapeutic Goods Act 1966.

60. Where a brief of evidence is required to be served, section 188 however allows the exclusion of evidence sought to be led where the requirements have not been complied with:

188 Evidence not to be admitted

(1) The court must refuse to admit evidence sought to be adduced by the prosecutor in respect of an offence if, in relation to that evidence, this Division or any rules made under this Division have not been complied with by the prosecutor.

(2) The court may, and on the application of or with the consent of the accused person must, dispense with the requirements of subsection (1) on such terms and conditions as appear just and reasonable.

61. There are a number of authorities dealing with the interpretation of these provisions.[2]

62. The Division for pre-trial procedure in the summary jurisdiction does not however create a disclosure obligation akin to the regime for indictable matters on trial in the District or Supreme Courts. The case management regime in the District and Supreme Courts, which includes mandatory provisions in relation to defence disclosure, does not apply in the Local Court: see *Director of Public Prosecutions (NSW) v Wililo and Anor.* [2012] NSWSC 713 at [50] per Johnson J. This regime will also remain unchanged following the amendments to the procedure for disclosure by the prosecutor in committal proceedings by the *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017*.

63. This creates a substantial difference between the procedure in the Local and Children's Courts on the one hand and the District and Supreme Courts on the other.

[2] See for example, *Director of Public Prosecutions (DPP) (NSW) v Chaouk* [2010] NSWSC 1418. *Director of Public Prosecutions v West Director of Public Prosecutions v West* (2000) 48 NSWLR 647 (concerned with predecessor legislation).

64. The case of *Emily Salisbury v Local Court of New South Wales and anor.* [2016] NSWSC 1082 highlighted the difference in the regimes, particularly in relation to the scope of powers of the Local Court to make any orders requiring a defendant to serve evidence in a criminal proceeding. On the day of hearing in the Local Court, counsel for the accused indicated that the hearing of the speeding offence would take some time as the defence were intending to call an expert. The prosecutor complained about not being put on notice of the evidence to be called by the defence. The Magistrate ordered that the proceedings be adjourned and that the accused serve on the prosecution in advance of the hearing the expert evidence on which they would rely. On appeal pursuant to s53(3)(b) *Crimes (Appeal and Review) Act 2001* against the interlocutory orders of the Magistrate, Bellew J contrasted the powers of the Local Court with the powers of the higher courts and concluded at [30]:

> "*Even accepting that a Local Court has an implied power of the kind of which Dawson J spoke in* Grassby *(supra), any such implied power does not extend to the power to make an order, the effect of which is to abrogate fundamental common law principles which govern the rights of an accused. The underlying principle of the accusatorial system is that it is for the prosecution to put its case both fully and fairly, before the accused is called upon to announce the course that he or she will follow:* R v Soma *[2003] HCA 13; (2003) 212 CLR 299 at [27] per Gleeson CJ. The order that the plaintiff serve an expert report in advance of the hearing traversed that principle. In making it the Magistrate acted beyond his power.*"

65. Bellew J contrasted the general power to give directions in s 28 *Local Court Act 2007* with the regime in the *Criminal Procedure Act 1986* in relation to trials on indictment which confers an express power on this Court to require an accused to serve any expert report upon which he or she proposes to rely in advance of the trial: at [34]. It is worth noting that the other provisions in relation to defence disclosure obligations for trial matters on indictment do not apply in the Local Court, and applying the reasoning of Bellew J, there is no power of the Local Court to order the accused to disclose, for example, the nature of the accused person's defence, including particular defences to be relied on, or points of law which the accused person intends to raise.

66. In relation to committal proceedings in the Local Court for offences to be dealt with on indictment, ss 74-80 in Chapter 3, Part 2, Division 3 set out the requirements on a prosecutor to serve evidence on the defence. They require evidence to be in the form of written witness statements, and mirror the requirements in relation to transcripts of interviews from vulnerable or domestic violence complainants. The provisions are not set out here in whole because the procedure in the Local Court for matters which are ultimately to be dealt with on indictment is about to change substantially.

67. The new procedure commences on 30 April 2018.

68. The *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017* passed Parliament on 18 October 2017. It introduces a new scheme that fundamentally changes the nature of committal proceedings and the requirements for the prosecution to serve evidence on the defence.

69. The amendments will remove Chapter 3, Part 2, Divisions 2-5 *Criminal Procedure Act 1987* and replace them with a totally re-configured regime.

70. In relation to prosecution disclosure, the following provisions will apply for committal matters commenced on or after 30 April 2018:

> ***Division 3 Disclosure of evidence***
>
> ***61 Requirement to disclose evidence***
>
> *(1) The prosecutor must, after the commencement of committal proceedings and on or before any day specified by order by the Magistrate for that purpose, serve or cause to be served on the accused person a brief of evidence relating to each offence the subject of the proceedings.*
>
> *(2) This Division is subject to, and does not affect the operation of, section 15A of the Director of Public Prosecutions Act 1986 or any other law or obligation relating to the provision of material to an accused person by a prosecutor.*
>
> *Note. Examples of such a law are laws about privilege and immunity in relation to evidence.*
>
> ***62 Matters to be disclosed in brief of evidence***
>
> *(1) The brief of evidence must contain the following:*
>
> *(a) copies of all material obtained by the prosecution that forms the basis of the prosecution's case,*
>
> *(b) copies of any other material obtained by the prosecution that is reasonably capable of being relevant to the case for the accused person,*
>
> *(c) copies of any other material obtained by the prosecution that would affect the strength of the prosecution's case.*
>
> *(2) The material contained in the brief of evidence may be, but is not required to be, in the form required under Part 3A of Chapter 6 or in any particular form otherwise required for the material to be admissible as evidence.*
>
> *(3) The regulations may specify requirements for material included in a brief of evidence.*

(4) The Minister is to consult with the Minister for Police before a regulation is made under subsection (3).

63 Additional material to be disclosed

(1) The prosecutor must serve or cause to be served on the accused person copies of material obtained by the prosecutor and not included in the brief of evidence, if the material is of a kind required to be included in the brief of evidence.

(2) The prosecutor must serve or cause the material to be served as soon as practicable after it is obtained by the prosecutor.

64 Exceptions to requirement to provide copies of material

(1) The prosecutor is not required to include a copy of a thing required to be provided under this Division, or to serve or cause it to be served, if:

(a) it is impossible or impractical to copy the thing, or

(b) the accused person agrees to inspect the thing in accordance with this section.

(2) However, in that case the prosecutor is:

(a) to serve or caused to be served on the accused person a notice specifying a reasonable time and place at which the thing may be inspected or other reasonable means by which the thing is to be provided for inspection, and

(b) to allow the accused person a reasonable opportunity to inspect each thing referred to in the notice.

71. According to the 2nd Reading Speech introducing the Bill, the Hon. Mark Speakman SC stated that:

> "... *the investigating agency that charged the accused person with the offence, usually the NSW Police Force or the Australian Federal Police, will provide a simplified brief of evidence to the Office of the Director of Public Prosecutions or its Commonwealth equivalent*..." (Emphasis added.)

72. It is not clear what a 'simplified brief of evidence', nor what the terms of s 62(2) that the brief is not required to be in admissible form will mean in practice. A protocol between the NSW Police Force and the DPP is being formulated in relation to the issue of disclosure of the brief of evidence. Practitioners can expect that protocol to be made publicly available.

73. Exclusion of evidence for a failure to comply and a discretion to override the statutory regime are set out in the following provisions:

> ***90 Evidence not to be admitted***
>
> *(1) The Magistrate must refuse to admit evidence sought to be adduced by the prosecutor under this Division if, in relation to that evidence, this Division or any applicable requirements specified by or under Part 3A of Chapter 6, have not been complied with by the prosecutor.*
>
> *(2) Despite subsection (1), the Magistrate may admit the evidence sought to be adduced if the Magistrate is satisfied that:*
>
> *(a) the non-compliance is trivial in nature, or*
>
> *(b) there are other good reasons to excuse the non-compliance, and admit the evidence, in the circumstances of the case.*
>
> ***91 Magistrate may set aside requirements for statements***
>
> *(1) In any committal proceedings, the Magistrate may dispense with all or any of the following requirements relating to statements or exhibits:*
>
> *(a) service of documents on the accused person,*
>
> *(b) provision to the accused person of a reasonable opportunity to inspect proposed exhibits,*
>
> *(c) specification of the age of the person who made a statement,*
>
> *(d) any requirement specified by the regulations under this Division or Part 3A of Chapter 6, if the regulations do not prohibit the Magistrate from dispensing with the requirement.*
>
> *(2) A requirement may be dispensed with under this section only on an application by the accused person or with the consent of the accused person.*
>
> *Note. Some of these requirements are made by or under Part 3A of Chapter 6.*

74. If, upon service of the brief, there is material that is considered necessary for the purpose of advising or taking instructions from an accused, then the subsequent case conference procedure provides an opportunity for further material to be obtained from the prosecutor. In addition to any requests for disclosure that might be made by the defence in the ordinary

course of criminal proceedings, s 70(3)(a) provides specific statutory recognition of the case conference process as a means of achieving disclosure. Section 70 is in the following terms:

> ***70 Case conferences to be held***
>
> *(1) A case conference is to be held in accordance with this Division.*
>
> *(2) The principal objective of the case conference is to determine whether there are any offences to which the accused person is willing to plead guilty.*
>
> *(3) A case conference may also be used to achieve the following objectives:*
>
> *(a) to facilitate the provision of additional material or other information which may be reasonably necessary to enable the accused person to determine whether or not to plead guilty to 1 or more offences,*
>
> *(b) to facilitate the resolution of other issues relating to the proceedings against the accused person, including identifying key issues for the trial of the accused person and any agreed or disputed facts.*
>
> *(4) The case conference is to be held after the filing of the charge certificate by the prosecutor.*
>
> *(5) More than one case conference may be held.*
>
> *(6) A further case conference may be, but is not required to be, held after the filing of an amended charge certificate by the prosecutor.* (Emphasis added)

75. It will be important to ensure that the new regime does not in practice erode the fundamental principles of criminal proceedings in relation to their accusatory nature and the role of the prosecutor in disclosing material to the defence. It may be necessary for an accused to avail themselves of one or more of the avenues dealt with later in this paper to ensure that an appropriate level of disclosure is made at the committal stage of proceedings.

76. Schedule 3 of the Act amends legislation concerning committal procedures for children charged with serious children's indictable offences and otherwise. The new committal procedure will apply to serious children's indictable offences.

77. The former committal provisions continue to apply to existing proceedings as if the amendments had not been made.

78. Once a matter has been committed to the trial court, sections 141(1)(a) and 142 of the *Criminal Procedure Act* 1986 (NSW) requires disclosure by the prosecution in trial matters. It sits within Division 3 of Part 3 of Chapter 3 of the Act which as a whole only prescribes the indictable procedure which applies to trial matters heard before the District Court or Supreme Court. Section 141 sets up the structure for mandatory pre-trial disclosure by both sides in criminal proceedings and is as follows:

> ***141 Mandatory pre-trial disclosure***
>
> *(1) After the indictment is presented or filed in proceedings, the following pre-trial disclosure is required:*
>
> *(a) the prosecutor is to give notice of the prosecution case to the accused person in accordance with section 142,*
>
> *(b) the accused person is to give notice of the defence response to the prosecution's notice in accordance with section 143,*
>
> *(c) the prosecution is to give notice of the prosecution response to the defence response in accordance with section 144.*
>
> *(2) Pre-trial disclosure required by this section is to take place before the date set for the trial in the proceedings and in accordance with a timetable determined by the court.*
>
> *Note. Practice notes issued by the court will guide determinations of the timetable for pre-trial disclosures and related matters.*
>
> *(3) The court may vary any such timetable if it considers that it would be in the interests of the administration of justice to do so.*
>
> *(4) The regulations may make provision for or with respect to the timetable for pre-trial disclosure.*

79. Section 142 states the following:

> ***142 Prosecution's notice***
>
> *(1) For the purposes of section 141 (1) (a), the prosecution's notice is to contain 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,*

(c1) in accordance with Division 3 of Part 4B of Chapter 6, a copy of any recorded statement that the prosecutor intends 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 law enforcement officers to the prosecutor, or otherwise in the possession of the prosecutor, that would 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,

(l) a copy of any information, document or other thing in the possession of the prosecutor that would reasonably be regarded as adverse to the credit or credibility of the accused person,

(m) a list identifying the statements of those witnesses who are proposed to be called at the trial by the prosecutor.

(2) The regulations may make provision for or with respect to the form and content of a statement of facts for the purposes of this section.

(3) In this section, law enforcement officer means a police officer, or an officer of one of the following agencies:

(a) the Law Enforcement Conduct Commission,

(b) the New South Wales Crime Commission,

(c) the Independent Commission Against Corruption.

80. An interesting difference can thus be seen between section 15A (which creates a disclosure obligation on law enforcement officers in respect of the Director) and section 142.

81. 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.*"

82. Section 142 however, as seen above, creates a broader corresponding disclosure obligation on the Director in the following terms to provide:

"*(i) a copy of any information, document or other thing provided by law enforcement officers to the prosecutor, or otherwise in the possession of the prosecutor, that would reasonably be regarded as relevant to the prosecution case or the defence case, and that has not otherwise been disclosed to the accused person*"

and

(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"

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

84. 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.

85. 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 142(1)(i) because they will not have been provided by a law enforcement officer to the office of the Director. However, it may be that such material falls into the category of documents contemplated by section 142(1)(j). Such documents may have to be obtained by the defence by subpoena or by a request for disclosure to the prosecutor.

86. 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-à-vis the accused than on police or other investigating agencies vis-à-vis the Director.

87. 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.

88. Section 143 then creates a disclosure obligation on the defence. It expands on the requirements of the former s138 and states:

> ***143 Defence response***
>
> *(1) For the purposes of section 141 (1) (b), the notice of the defence response is to contain the following:*
>
> *(a) the name of any Australian legal practitioner proposed to appear on behalf of the accused person at the trial,*
>
> *(b) the nature of the accused person's defence, including particular defences to be relied on,*
>
> *(c) the facts, matters or circumstances on which the prosecution intends to rely to prove guilt (as indicated in the prosecution's notice under section 142) and with which the accused person intends to take issue,*
>
> *(d) points of law which the accused person intends to raise,*
>
> *(e) 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,

(f) a statement as to whether or not the accused person intends to give any notice under section 150 (Notice of alibi) or, if the accused person has already given such a notice, a statement that the notice has been given,

(g) 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).

(2) The notice of the defence response is also to contain such of the following matters (if any) as the court orders:

(a) a copy of any report, relevant to the trial, that has been prepared by a person whom the accused person intends to call as an expert witness at the trial,

(b) if the prosecutor disclosed an intention to adduce evidence at the trial that has been obtained by means of surveillance, notice as to whether the accused person proposes to require the prosecutor to call any witnesses to corroborate that evidence and, if so, which witnesses will be required,

(c) notice as to whether the accused person proposes to raise any issue with respect to the continuity of custody of any proposed exhibit disclosed by the prosecutor,

(d) if the prosecutor disclosed an intention to tender at the trial any transcript, notice as to whether the accused person accepts the transcript as accurate and, if not, in what respect the transcript is disputed,

(e) notice as to whether the accused person proposes to dispute the authenticity or accuracy of any proposed documentary evidence or other exhibit disclosed by the prosecutor,

(f) notice of any significant issue the accused person proposes to raise regarding the form of the indictment, severability of the charges or separate trials for the charges,

(g) notice of any consent the accused person proposes to give under section 184 of the Evidence Act 1995.

89. Whilst not the focus of this paper, it should be noted that section 143 marks a significant incursion into the accused's otherwise right to remain silent about his or her defence until the close of the Crown case in line with the accusatory nature of criminal proceedings. The mandatory

pre-trial disclosure provisions currently in force follow an incremental incursion into the ordinary course of criminal proceedings, initially only applying in complex matters or by order of the trial court.

90. Section 144 then requires the prosecutor to respond to the defence as follows:

> ***144 Prosecution response to defence response***
>
> *For the purposes of section 141 (1) (c), the notice of the prosecution response to the defence response is to contain the following:*
>
> *(a) if the accused person has disclosed an intention to adduce expert evidence at the trial, notice as to whether the prosecutor disputes any of the expert evidence and, if so, in what respect,*
>
> *(b) if the accused person has disclosed an intention to tender any exhibit at the trial, notice as to whether the prosecutor proposes to raise any issue with respect to the continuity of custody of the exhibit,*
>
> *(c) if the accused person has disclosed an intention to tender any documentary evidence or other exhibit at the trial, notice as to whether the prosecutor proposes to dispute the accuracy or admissibility of the documentary evidence or other exhibit,*
>
> *(d) notice as to whether the prosecutor proposes to dispute the admissibility of any other proposed evidence disclosed by the accused person, and the basis for the objection,*
>
> *(e) a copy of any information, document or other thing in the possession of the prosecutor, not already disclosed to the accused person, that might reasonably be expected to assist the case for the defence,*
>
> *(f) a copy of any information, document or other thing that has not already been disclosed to the accused person and that is required to be contained in the notice of the case for the prosecution.*

91. 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).

Alibi and Mental Health Defences

92. Sections 150 and 151 *Criminal Procedure 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.

93. There are no equivalent provisions in the *Criminal Procedure Act* applicable to matters disposed of summarily.

The *Evidence Act* 1995 (NSW)

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

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

Specific Statutorily Authorised Limitations on Disclosure

96. 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*
- 'Giving of evidence by domestic violence complainants' as set out in Part 4B 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

97. Pursuant to section 13 of the *Director of Public Prosecutions Act* 1986 (NSW) ("*DPP Act*") the Director may promulgate guidelines.

98. Section 15(2) *DPP Act* further provides that prosecutors to whom the Director has furnished guidelines are obligated to comply with those guidelines.

99. The current Guideline 18 concerns Disclosure and is attached to this paper.

100. 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."

101. Guideline 26 in relation to Witnesses also refers to the obligation to disclose material to the defence. It states in part:

"*There should be disclosure of any information, including any criminal convictions, in the possession of the prosecutor that reflects materially on the credibility of a prosecution witness or where cross-examination based upon it might reasonably be expected to materially affect that credibility.*"

102. Guideline 18 sets out 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."

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

104. 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.*"

105. The *Prosecution Policy of the Commonwealth* "underpins all of the decisions" made by the Commonwealth Director of Public Prosecutions.[3] It contains the Statement on Prosecution Disclosure which according to the policy document: "the requirements imposed by the Statement on Prosecution Disclosure will be complied with, subject to any laws which are applicable in the prosecution of Commonwealth offences, by the DPP in conjunction with investigative agencies in prosecutions conducted by the DPP."[4]

106. The Statement on Disclosure, attached to this paper, includes the following at [3] (footnotes omitted):

> *"Subject to any claim of public interest immunity, legal professional privilege, or any statutory provision to the contrary, in prosecutions conducted by the Commonwealth, the prosecution must, in accordance with this Statement:*
>
> *a. first, fulfil any applicable local statutory obligations relating to disclosure; and*
> *b. second, if not already required by the applicable state or territory provisions, also disclose to the accused, any material which:*
>
> *(i) can be seen on a sensible appraisal by the prosecution to run counter to the prosecution case (i.e. points away from the accused having committed the offence); or*
>
> *(ii) might reasonably be expected to assist the accused to advance a defence; or*
>
> *(iii) might reasonably be expected to undermine the credibility or reliability of a material prosecution witness."*

107. The Statement on Disclosure contains the following on material that might be disclosed beyond the prosecution brief of evidence at [12]-[22] (footnotes omitted):

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[3] The Prosecution Policy of the Commonwealth is available at: https://www.cdpp.gov.au/prosecution-process/prosecution-policy.
[4] The CDPP Statement on Disclosure is available at: https://www.cdpp.gov.au/sites/g/files/net2061/f/Disclosure%20Statement-March-2017_0.pdf.

Other Material

12. The prosecution may hold or be aware of information or material, other than the material in the brief of evidence, which has:

a. been gathered or come to the attention of investigators in the course of the investigation; or
b. is otherwise held within any part of the investigative agency, agencies or third party;

that satisfies the requirements for disclosure set out in Part 1 of this Statement.

13. Some important examples of material that may fall within this category of material appear below.

Disclosure affecting credibility or reliability of a prosecution witness

14. The prosecution should disclose to the defence information in its possession which is relevant to the credibility or reliability of a prosecution witness, for example:

a. a relevant previous conviction or finding of guilt;
b. a statement made by a witness which is inconsistent with any other statement made by the witness;
c. a relevant adverse finding in other criminal proceedings or in non-criminal proceedings (such as disciplinary proceedings, civil proceedings or a Royal Commission);
d. evidence before a court, tribunal or Royal Commission which reflects adversely on a witness;
e. any physical or mental condition which may affect reliability;
f. any concession or benefit which has been offered or granted to a witness in order to secure that person's testimony for the prosecution;
g. where credibility is in issue, that the witness has been charged with a relevant offence.

Some of these examples are further explained below.

Previous convictions

15. A degree of common sense should be applied in this area. In practical terms, minor prior convictions for formal or non-contentious witnesses may not meet the requirements for disclosure, whereas previous convictions for perjury and offences involving dishonesty should always be disclosed to defence.

16. In some jurisdictions, defence requests for criminal history checks for witnesses are supported by local procedural laws. In other jurisdictions, there is no applicable statutory regime. Where blanket requests for 'all witnesses' are made, the prosecution should attempt to negotiate with defence practitioners to ensure that unnecessary checks do not have to be undertaken for formal or non-contentious witnesses.

17. The duty to disclose relevant prior convictions is not confined to cases of specific requests for the criminal histories of witnesses. For that reason, it is appropriate for the prosecution to ensure, prior to the commencement of any trial or summary hearing, that criminal history checks have been undertaken for significant civilian witnesses whose credit may be in issue.

Adverse findings

18.Where a prosecution witness has been the subject of an adverse finding (including a finding of dishonesty) in other criminal proceedings, disciplinary proceedings, civil proceedings or a Royal Commission, such adverse findings should be disclosed by the prosecution to the defence unless the finding does not meet the requirements for disclosure set out in Part 1 of this Statement. Regard should be had to the nature of the evidence expected to be given and the issues likely to arise in the case at hand. For example, it may not be necessary to disclose adverse findings which arise from inefficiency, incompetence or disobedience of orders.

Concessions to witnesses

19.The prosecution must disclose:

a. any concession offered or provided to a witness with respect to his or her involvement in criminal activities in order to secure his or her evidence for the prosecution, whether as to choice of charge, the grant of an undertaking under subsection 9(6) or subsection 9(6D) of the Director of Public Prosecutions Act 1983 or otherwise;
b. any monetary or other benefit or inducement that has been claimed by, or offered or provided to, a witness. This does not include any payments made in the ordinary and usual course of a witness coming to court to give evidence (e.g. the payment of travel and accommodation expenses or the fees of expert witnesses) and disclosure will be subject to any legislative requirements such as witness protection legislation. 'Other benefit' might include an agreement by the police/prosecution not to oppose the granting of bail; and

c. where the witness participated in the criminal activity the subject of the charges against the defendant, whether the witness has been dealt with in respect of his or her own involvement and, if so, whether the witness received a discount on sentence as a result of undertaking to cooperate with law enforcement authorities in relation to the current matter.

Disclosure affecting the competence or credibility of an expert witness or of expert or scientific evidence

20.The prosecution should disclose to the defence information of which it is aware that is relevant or potentially relevant to the competence or credibility of an expert witness the prosecution intends to rely on.

21.The prosecution should also disclose to the defence information of which it is aware that is in the form of an expert opinion and/or in the nature of scientific evidence, which differs from such evidence already received by the prosecution or in some way casts doubt on the opinions or evidence on which the prosecution intends to rely where that opinion or evidence is relevant and not merely speculative.

Disclosure of a statement by a witness who is not credible

22.If the prosecution has a statement from a person whose evidence meets the requirements for disclosure as set out in Part 1 of this Statement, but who will not be called because they are not credible, the defence should be provided with the name and address of the person and a copy of the statement.

Legal Profession Rules

108. The *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* include rules for solicitors appearing as prosecutors. They include:

29.5 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.

29.6 A prosecutor who has decided not to disclose material to the opponent under Rule 29.5 must consider whether:

29.6.1 the charge against the accused to which such material is relevant should be withdrawn, or

29.6.2 the accused should be faced only with a lesser charge to which such material would not be so relevant.

109. The *Legal Profession Uniform Conduct (Barristers) Rules*, see rules 83-95, place special obligations on barristers appearing as prosecutors.

110. These rules state relevantly to disclosure:

87 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.

88 A prosecutor who has decided not to disclose material to the opponent under rule 87 must consider whether:

(a) the charge against the accused to which the 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.

Standard Operating Procedures for Police Prosecutors

111. In addition to being bound by the common law principles of disclosure, police prosecutors in NSW are subject to Standard Operating Procedures which include reference to their duty of disclosure.

112. In 2014, the Aboriginal Legal Service advocated for better compliance with the duty of disclosure by the NSW Police Force including police prosecutors.

113. Then Director of Prosecuting Operations, Superintendent Ian Dickson, sent an email directive to all police prosecutors in relation to the issue of

disclosure and said that the Police Prosecution standard operating procedures would be updated accordingly. A copy of the email directive is attached to this paper and is able to be relied upon in dealings with police on the issue of disclosure. It is noteworthy, however, that there persists within the NSW Police Force a notion that there is no obligation on investigating officers to "discover" material that they have access to, for example, within the Police COPS database, other databases or otherwise available to police. This approach is not consistent with the common law, which clearly requires police to disclose to an accused all material in their possession or available to them. This is particularly so, in summary prosecutions conducted by a police prosecutor, where as a police officer, the prosecutor has direct access to the NSW Police COPS database and other records.

Practice Notes

114. The Supreme Court Practice Note SC CL 2 sets out requirements for criminal proceedings in the Supreme Court and subject to a specific direction in the proceedings, the prosecution is required to file and serve their notice no later than 8 weeks before trial; the defence is required to file and serve their response no later than 5 weeks before trial and the prosecution response is due no later than 3 weeks before trial.

115. The District Court Criminal Practice Note 9 similarly sets a timetable for pre-trial disclosure. Unless the court otherwise orders, the prosecution is to serve its notice on the accused no later than 5 weeks before trial; the defence response is to be served no later than 3 weeks before trial and the prosecution response is to be given before the date for trial.

116. Local Court Practice Note Crim 1 creates an obligation on legal representatives in criminal matters to complete 'Court Listing Advice' in the event that a plea of not guilty is confirmed.

117. 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:*

(i) the legal representative of the accused is to hand to the Court and to the prosecutor a completed Court Listing Advice (Attachment B);

(ii) the prosecution is to indicate whether it seeks that any witness identified to the defence as a corroborative witness in accordance with paragraph 5.4(c)(ii) give evidence by audio link or audio visual link in accordance with s 5BAA, Evidence (Audio and Audio Visual Links) Act 1998.

(d) When listing the matter for hearing, notwithstanding sub-paragraph (c)(ii) and without limiting the Court's discretion under s 5BAA, the Court may direct that a witness is to attend to give evidence in person if:

(i) The written statement of the witness and/or a list of corroborative witnesses has not been served upon the defence in accordance with paragraph 5.4, such that the Court cannot be satisfied that the witness is a corroborative witness;

(ii) The necessary audio link or audio visual link facilities are not available and cannot reasonably be made available on the first available date for listing the matter for hearing.

(e) Any audio link or audio visual link proposed to be used must be capable of enabling the witness' evidence to be recorded by the court's recording system, in accordance with the constitution of the Local Court as a court of record under s 7, Local Court Act 2007.

(f) Nothing in this paragraph precludes the defence from making an application that the court direct a witness to attend to give evidence in person under s 5BAA(3).

(g) The prosecution is required only to call at the hearing those witnesses nominated for cross-examination on the Court 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.

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

119. 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 Obtain or Compel Disclosure

Making a Written Request

120. Whilst the onus is firmly on the prosecution to ensure that they comply with their duty of disclosure to the defence, in many cases it will be necessary or prudent for the accused's legal representative to take steps to ensure there is proper compliance.

121. The first practical step is likely to be a written request for disclosure to the police officer in charge of the investigation and/or the police prosecutor or DPP solicitor with carriage of the matter. An initial request for particular documents that appear to be relevant or potentially relevant to the defence and "any other material that could on a reasonable appraisal assist the defence" is worthwhile in most if not all criminal proceedings.

122. In defended matters where the credit of a prosecution witness is in issue, a request for their criminal record is warranted.

123. It is not uncommon for requests to be rebuffed with a response that the accused should issue a subpoena or obtain documents through a freedom of information avenue. This is not a proper answer to a request that the prosecution make disclosure of material that is in their possession or available to them and that could on a reasonable appraisal be relevant or assist the defence.

124. It may be necessary to point out to the recipient of the request that the duty of disclosure extends to material which the prosecution has in its possession or available to it. It is therefore not an answer to any request for disclosure that the police prosecutor or OIC or DPP solicitor personally does not hold the document(s) or does not know about them. Reasonable inquires of the COPS database and other police records must be made.

125. If a request for disclosure of material is refused in circumstances where you can prove that disclosable material is likely to exist, or where the prosecutor confirms it does exist, or where the prosecutor refuses to confirm that it does not exist, the next step should be seeking a court order for disclosure or resorting to a subpoena for production.

126. Making a request at an early stage of proceedings allows for time ahead of any trial or hearing to take necessary steps to pursue alternatives if an appropriate response is not obtained from the request.

Temporary Stay

127. 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.

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

129. Judge Finnane stated as follows, see [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."*

130. Justice McColl (with whom RS 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."*

131. A recent decision of the Court of Criminal Appeal in *Gould v Director of Public Prosecutions (Cth)* [2018] NSWCCA 109 concerned an application by notice of motion for a temporary stay pending "disclosure to the accused" of documents relied on in support of applications for telephone intercept warrants. It may shed some doubt on the terms of an application for a temporary stay. See Basten JA (with whom Johnson and Adamson JJ agreed) at [60]-[64]. However, to the extent

that this decision is contrary to established High Court authority, such as *Mallard* and *Grey* in relation to the scope of the prosecution duty to disclose (not merely consider material) and other authorities referred to below, it should be considered cautiously.

Costs

132. 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.

133. 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."*

134. 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

135. 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.[5]

136. 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".*

[5] *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.

137. 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."*

138. 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.

139. 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.

Application to restrain prosecutor

140. In a case where the prosecutor is refusing or failing to comply with their duty of disclosure, it may be possible to apply to restrain that prosecutor from appearing in the case.

141. *MG v R* [2007] NSWCCA 57 concerned the restraint of a Crown Prosecutor from appearing in a trial given her public comments about the trial and lack of detachment from the case. McClellan CJ at CL, Bell and Hoeben JJ made an order restraining the Crown Prosecutor from appearing in the trial. Their joint judgment includes the following extracts that are apposite in the context of a potential application to restrain a prosecutor for failure to adhere to the requirements of disclosure:

> "*78 ... In order to protect the integrity of the trial process and ensure that it is not only fair, but seen to be fair, evidentiary and procedural rules have been provided by statute and adopted by the courts. They include discrete obligations which are imposed upon a crown prosecutor.*
>
> *...*

83 However, because of the special role of crown prosecutors in the criminal justice system they are subject to obligations beyond the court room, both before and after any trial. The relevant Bar Rules and Prosecution Guidelines have been made with the object of ensuring that crown prosecutors conduct themselves in a manner which will ensure the integrity of the criminal justice system. A breach of them may diminish public confidence in that system. In an exceptional case it may be necessary for the courts to intervene to ensure that public confidence is maintained.

...

87 ... a crown prosecutor is afforded a unique role in a criminal trial. He or she has the carriage of the Crown case and has the responsibility of making decisions as to the evidence which is placed before the court. Unlike some other jurisdictions, and in particular, the inquisitorial system a judge has little if any role to play in the evidence produced at the trial see R v Apostilides (1984) 154 CLR 563.

88 That responsibility must be approached with fairness and detachment with the objective of establishing the truth. If, by reason of their prior conduct, a crown prosecutor has demonstrated that in a particular case they may not be able to discharge their obligations in that manner the legitimacy of the prospective trial will be compromised. This is not to say that in a particular case those obligations will not be appropriately discharged, but a reasonable observer would conclude that they may not be.

89 That risk is more acute in this case. As we have indicated the applicant's solicitor complained, inter alia, to the Legal Services Commissioner about her conduct. Although the complaint was dismissed and described as an error of judgment, the Commissioner found that, if the matter came before the Tribunal, Ms Cunneen would be likely to be found guilty of unsatisfactory professional conduct.

90 There could be no doubt that a judge who had been the subject of a serious complaint by a litigant to the NSW Judicial Commission could not sit in judgment of a case brought by that person. Similarly as the obligation resting upon a prosecutor is one of fairness and detachment, the fact that a complaint was made to the Commissioner which was not frivolous or vexatious, would give rise to a concern in the mind of a reasonable person that the Crown Prosecutor may not maintain the detachment required if the accused is to have a fair trial.

91 That is not to say that in any case where complaint is made about a prosecutor that person must stand aside. Spurious complaints made for ulterior purposes must always be a possibility. Each case requires its own consideration.

...

95 This case cannot be determined by consideration of the trial judge's ability to control the actions of the Crown Prosecutor in court. It requires consideration of whether a reasonably informed fair minded person would conclude that, if prosecuted by Ms Cunneen, the trial of the applicant would be fair. In our opinion, because of her public statements that person would inevitably conclude that she may not discharge her obligations with appropriate fairness and detachment. Accordingly, in the unusual circumstances of this case if Ms Cunneen were to prosecute the applicant's trial, justice would not be seen to be done.

96 It is not without significance that if Ms Cunneen does not prosecute the applicant's trial the Director will be able to appoint another prosecutor from any number of experienced and competent prosecutors. The evidence before this Court indicates that the complainant will not give oral testimony. The transcript of her evidence at the previous trial will be tendered. If we had any doubt whether the present circumstances justified the intervention of this Court these further matters would lead us to resolve them in favour of intervention."

Five - Relevance of a Failure of Disclosure on Appeal

142. 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.

143. In *Livermore v R* [2006] NSWCCA 334; (2006) 67 NSWLR 659**,** the following extract from *Whitehorn v The Queen* (1983) 152 CLR 657 at 663-664 per Deane J was described as a "seminal statement of the responsibilities of a Crown Prosecutor in a criminal trial" (at [25]):

"*Prosecuting counsel in a criminal trial represents the State. The accused, the court and the community are entitled to expect that, in performing his function of presenting the case against an accused, he will act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused trial is a fair one. The consequence of a failure to*

observe the standards of fairness to be expected of the Crown may be insignificant in the context of an overall trial. Where that is so, departure from those standards, however regrettable, will not warrant the interference of an appellate court with a conviction. On occasion however, the consequences of such a failure may so affect or permeate a trial as to warrant the conclusion that the accused has actually been denied his fundamental right to a fair trial. As a general proposition, that will, of itself, mean that there has been a serious miscarriage of justice with a consequence that any conviction of the accused should be quashed and, where appropriate, a new trial ordered."

144. 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."

145. 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.*"

146. In *Wood v R* [2012] NSWCCA 21, the Court of Criminal Appeal considered a ground of appeal that there had been a miscarriage of justice in the trial on account of fresh evidence and evidence undisclosed at the trial. McClellan CJ at CL (with whom Rothman and Latham JJ agreed) held the following at [706]-[714]:

> "*706 The general principle is that parties to litigation, including a criminal trial, are bound by the manner in which they presented their cases at first instance: Khoury v The Queen [2011] NSWCCA 118 at [104] (Simpson J, Davies J and Grove AJ agreeing). In a criminal trial there is an obligation on the prosecution to disclose all relevant evidence to the accused. There is no obligation on an accused person to seek out information which the prosecution is obliged to produce: Mallard v The Queen [2005] HCA 68; (2005) 224 CLR 125 at [16]-[17]; Grey v The Queen [2001] HCA 65; (2001) 75 ALJR 1708 at [23].*
>
> *707 The law makes a distinction between "new evidence" and "fresh evidence." "New evidence" is evidence that was available and not adduced at the trial. "Fresh evidence" is evidence which either did not exist at the time of the trial or, if it did, could not then have been discovered by an accused exercising due diligence: R v Abou-Chabake [2004] NSWCCA 356; (2004) 149 A Crim R 417 at [63] (Kirby J, Mason P and Levine J agreeing).*
>
> *708 In Ratten v The Queen [1974] HCA 35; (1974) 131 CLR 510 at 516, Barwick CJ (McTiernan, Menzies, Stephen and Jacobs JJ agreeing), in his analysis of what may constitute a miscarriage of justice, referred to a category of instances of miscarriage as including the "production of evidence not available to the appellant at his trial." His Honour said:*
>
> > *"The rule in relation to civil trials is that evidence, on the production of which a new trial may be ordered, must be fresh evidence; that is to say, evidence which was not actually available to the appellant at the time of the trial, or which could not then have been available to the appellant by the exercise on his part of reasonable diligence in the preparation of his case. <u>However, the rules appropriate in this respect to civil trials cannot be transplanted without qualification into the area of the criminal law</u> " (emphasis added).*
>
> *709 His Honour went on to say at 517 that:*
>
> > *"It will not become an unfair trial because the accused of his own volition has not called evidence which was available to him at the time of his trial, or of which,*

bearing in mind his circumstances as an accused, he could reasonably have been expected to have become aware and which he could have been able to produce at the trial. Great latitude must of course be extended to an accused in determining what evidence by reasonable diligence in his own interest he could have had available at his trial, and it will probably be only in an exceptional case that evidence which was not actually available to him will be denied the quality of fresh evidence " (emphasis added).

710 And later at 520:

"To sum up, if the new material, whether or not it is fresh evidence, convinces the court upon its own view of that material that there has been a miscarriage in the sense that a verdict of guilty could not be allowed to stand, the verdict will be quashed without more. But if the new material does not so convince the court, and the only basis put forward for a new trial is the production of new material, no miscarriage will actually be found if that new material is not fresh evidence" (emphasis added).

711 In Gallagher v The Queen [1986] HCA 26; (1986) 160 CLR 392 at 395, Gibbs CJ said in relation to s 6(1) of the Criminal Appeal Act :

"The circumstances of cases may vary widely, and it is undesirable to fetter the power of Courts of Criminal Appeal to remedy a miscarriage of justice. I respectfully agree with the statement of King C.J. in Reg. v. McIntee [(1985) 38 SASR 432 at 435], that 'appellate courts will always receive fresh evidence if it can be clearly shown that failure to receive such evidence might have the result that an unjust conviction or an unjust sentence is permitted to stand.'

The authorities disclose three main considerations which will guide a Court of Criminal Appeal in deciding whether a miscarriage of justice has occurred because evidence now available was not led at the trial. The first of these, that the conviction will not usually be set aside if the evidence relied on could with reasonable diligence have been produced by the accused at the trial, is satisfied in the present case, and need not be discussed, although it should be noted that this is not a universal and inflexible requirement: the strength of the fresh evidence may in some cases be such as to justify interference with the verdict, even though that evidence might have been discovered before the trial ..." (emphasis added).

712 The Chief Justice later said at 399:

> *"It seems to me, with all respect, that where the trial was by jury, the accused was entitled to have the question of his guilt determined by the verdict of the jury, and that the Court of Criminal Appeal, in considering the effect of the fresh evidence, should consider what effect it might have had upon a reasonable jury. It is not enough that there is a bare possibility that a jury might have been influenced by the evidence to return a verdict of not guilty. On the other hand, it is too severe, and indeed speculative, a test, to require that the court should grant a new trial only if it concludes that the fresh evidence was likely to have produced a different result, in the sense that it would probably have done so."*

713 There is a difference in approach between fresh evidence and relevant evidence not disclosed by the prosecution to the defence in a criminal trial. Where evidence has not been disclosed, the discussions in Grey and Mallard are authoritative and apply. The prosecution must disclose all relevant evidence to an accused, and a failure to do so may require the quashing of a verdict of guilty: Mallard at 133 [17] (Gummow, Hayne, Callinan and Heydon JJ); Grey at 1713 [23] (Gleeson CJ, Gummow and Callinan JJ). In relation to evidence to which this common law obligation attaches, "there [is] no reason why the defence in a criminal trial should be obliged to fossick for information of this kind and to which it was entitled": Grey at [23] (Gleeson CJ, Gummow and Callinan JJ).

714 Where such evidence remains unpresented at trial, it is not the function of an appellate court to "seek out possibilities, obvious or otherwise, to explain away troublesome inconsistencies which an accused has been denied an opportunity to exploit forensically": *Mallard* at 135 [23]. Where evidence has a capacity to discredit the prosecution case, these matters are of significant forensic value: *Mallard* at 135 [23], 141 [42].

Application for an inquiry into a conviction after appeals exhausted

147. It is worth bearing in mind that even after a conviction and failed conviction appeal(s), there may still be an avenue for relief in the event that a failure to earlier disclose important evidence is discovered.

148. The case of *JB v R (No 2)* [2016] NSWCCA 67 is an illuminating example of the extent of breaches of disclosure by the prosecution and

the availability of relief if ultimately uncovered. JB, a 15-year-old boy was convicted of murder following a trial. His appeal against conviction and sentence was unsuccessful (*JB v R* [2012] NSWCCA 12; 83 NSWLR 153) as was an application for special leave in the High Court (*JB v R* [2013] HCA Trans 28). JB subsequently made an application to a judge of the Supreme Court pursuant to s78 *Crimes (Appeal and Review) Act* 2001 for an inquiry into the conviction. That application was successful and RA Hulme J referred the whole of the case to the Court of Criminal Appeal be dealt with as an appeal under the *Criminal Appeal Act* 1912, pursuant to s 79(1)(b) of the *Crimes (Appeal and Review) Act* 2001.

149. The matter was referred to the Court of Criminal Appeal because evidence had been discovered that raised questions of non-disclosure by police, non-compliance with the prosecution's duty of disclosure, as well as a possible conflict of interest on the part of the accused's solicitor at trial and on appeal. In submissions by the Attorney-General, it was acknowledged that the accused did not know, nor was it disclosed by the Crown Prosecutor, instructing solicitor, or police to his defence counsel that a prosecution witness, A107, whose evidence as to admissions made by the accused formed a central plank of the prosecution case, was at the time of the alleged admissions a registered police informer. The non-disclosure was in circumstances where the Crown case at trial was that A107 was acting as a support person for the accused at the time the alleged admissions were made.

150. The breach of the Crown prosecutor and ODPP instructing solicitor extended to the fact that they held a conference with the witness A107, and served an edited version typed notes of the conference that did not include any reference to A107 stating that he was a police informer.

151. The Crown conceded in the Court of Criminal Appeal that the conviction had to be quashed. Ultimately a verdict of acquittal was entered rather than a re-trial being ordered. JB served 6 years and 8 months of his sentence before being released on bail and ultimately acquitted by the Court of Criminal Appeal.

Six - Subpoenas as a Mechanism to Obtain Material

152. Subpoenas may 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; or where the material sought is not in the possession or available to the prosecutor (for example, third-party material).

153. Seeking the issue of a subpoena for material that should be disclosed in accordance with the prosecution's duty of disclosure is arguable

acquiescing to a second-rate system of criminal justice. Whilst resort to the court process of a subpoena may be necessary in some situations, it is important to emphasise (to opponents and judicial officers on occasions) that a subpoena is not an appropriate mechanism for an accused to obtain material which, *according to law*, should be disclosed to the accused from the outset.

154. In Local Court proceedings section 222 *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.*

155. 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.*

156. By virtue of s 171(5) *District Court Act 1973*, the provisions in relation to the issue of subpoenae in Part 3 of Chapter 4 of the *Criminal Procedure Act 1986* and any rules under that Part apply to proceedings in the District Court in its criminal jurisdiction.

157. 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.

158. 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."*

159. 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."*

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

161. 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 possibly exist is able to be obtained.

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

The authors welcome feedback and comments on this paper.

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From: Ian Dickson [redacted]
Sent: Friday, 28 March 2014 8:45 AM
To: -M-MDL-PPROS@police.nsw.gov.au
Cc: McKenzie, John
Subject: Prosecution SOPs -Disclosure and Discovery of evidence

Dear Police Prosecutors, Have you been asked by the defence to provide the victim's criminal record? I trust the following clarification assists you.

- - -

Duty of Disclosure v Duty to Discover.

I would like to remind all Prosecutors about your duty of disclosure and the related subject of the duty to discover relevant evidence. I would also like to offer you some practical advice.

Disclosure:

The Police Prosecution Command SOPs (Role of the Prosecutor) makes it clear that Police Prosecutors have a duty to disclose information to the defendant in criminal proceedings that is relevant to the issues in the case they are prosecuting. Marco Carlon has previously provided very good information about that. I have attached that again to refresh your memory.

In particular, the core requirement derives from the common law.

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, 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.

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

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.

The common law has been restated in various rules including Rule 86 of the Barrister's rules:

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...

Have no doubt about this obligation. Do not create artificial exceptions in your own mind. Make it a normal part of your approach. In short, if you have information or are aware of its existence you will disclose it to the defence as part of your routine function.

Be open and transparent about your duty to both the defence and your police informant so that no one has any doubt about your role and how you will carry it out.

Discovery:

The Prosecutor has no duty of discovery (or inquiry). When you examine the Barrister's Rules and the decision referred to by Marco in *Reg v Thompson*, the obligation to disclose relates to material available to the prosecutor or of which the prosecutor is aware.

The prosecutor is not the investigator. If the defence suggest a line of inquiry or the existence of information, the question for you as the prosecutor is whether or not that material has been provided to you in the brief or whether you have been made aware of that information. If you are not aware of that information, (which is different to knowing where that information may be found, for example in COPS, from open sources, archives, or by further interviewing witnesses) your role as the prosecutor does not require you to investigate that line of inquiry. You, as the prosecutor, are not obliged to discover it. That is an investigation task and it is a mistake to blur the distinction. You should however refer that question to the investigator for consideration.

Typically, this is in the form of an enquiry from the defence solicitor, "Does the victim have criminal antecedents?" If you have that information in your possession or available to you, you must disclose it. Tell both the defence and the police informant of your intention to disclose it. If you are not aware of the criminal antecedents, the response, "I have no such information and I am not aware of that information" is a legitimate response.

Practical Advice:

1. If the defence alert you to a line of inquiry you should pass that line of inquiry to the investigator to follow-up. You should remind the investigator of the duty of disclosure which the NSW Police Force has in criminal matters. If it is potentially a real issue, the investigator ought to explore it because no doubt the answer is of interest to the prosecution also. If you are made aware of the answer, then your duty of disclosure will arise.

2. If the defence wish to compel discovery of particular information, then the law has provided a mechanism for that. It is called a subpoena. The usual tests of legitimate forensic purpose applies to that compulsion to discover. When discovered, the question of access is then considered.

3. When the defence put you on notice of a line of inquiry that is real and that can not reasonably be ignored, for example, "Can you provide me the victim's criminal record as she was previously convicted of making false accusations about the accused!", then it is essential that the investigator follow up this line of inquiry and provide you with the material. You should urge the investigator to make those inquiries. You should note that the duty of disclosure exists from the outset of a prosecution and continues until it is finished and it exists even without any request or enquiry from the defence. In the example given, the criminal record of the complainant should have been provided at least in the brief of evidence if not from the outset with the original charge paperwork. Do not wait for a subpoena. Not only will you then disclose the material provided to the defence, you will re-assess the reasonable prospects of conviction when informed of the new information.

4. If you receive blanket requests from the defence for all witness criminal records, you are entitled to apply at least the same standards as apply to subpoenas. Is there a legitimate forensic purpose? Or is this a fishing expedition?

The Police Prosecution SOPs will be updated accordingly.

Regards

Superintendent Ian Dickson
Director, Prosecuting Operations
[redacted]

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18 Disclosure

[Furnished 20 October 2003; amended 1 June 2007]

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.

The prosecution duty of disclosure does not extend to disclosing 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.

In all matters prosecuted by the Director, police, in addition to providing the brief of evidence, must notify the Director of the existence of, and where requested disclose, all other documentation, material and other information, including that concerning any proposed witness, which documentation, material or other information might be of relevance to either the prosecution or the defence in relation to the matter and must certify that the Director has been notified of all such documentation, material and other information. (Procedures are in place for such certification to occur.)

Subject to public interest immunity considerations, such material, if assessed as relevant in the way described above, should be disclosed and, where practicable, made available, to the defence.

Where a prosecutor receives, directly or indirectly, sensitive documentation, material or information, or material that may possibly be subject to a claim of public interest immunity, the prosecutor should not disclose that documentation, material or information to the defence without first consulting with the police officer-in-charge of the case. The purpose of the consultation is to give that officer the opportunity to raise any concerns as to such disclosure. Accordingly, the officer should be allowed a reasonable opportunity to seek advice if there is any concern or dispute.

Where there is disagreement between a prosecutor and the police as to what, if any, of the sensitive documentation, material or information should be disclosed and there is no claim of public interest immunity, then in cases being prosecuted by

counsel, the matter is to be referred to the Director or a Deputy Director and in cases being prosecuted by lawyers, the Solicitor for Public Prosecutions or a Deputy Solicitor.

In cases where a claim of public interest immunity is to be pursued or is being pursued, then the question of disclosure will be determined by the outcome of that claim.

The duty of disclosure extends to any record of a statement by a witness that is inconsistent with the witness' previously intended evidence or adds to it significantly, including any statement made in conference (recorded in writing or otherwise) and any victim impact statement. Subject to public interest immunity considerations, the Director will not claim legal professional privilege (including client legal privilege) in respect of such statements recorded in writing or on tape, provided the disclosure of such records serves a legitimate forensic purpose.

If a witness makes any such statement in conference (adding significantly to or inconsistent with any previous statement/s), the lawyer present must note that fact and arrange for a supplementary written statement to be taken by investigators. That supplementary statement should be disclosed to the defence.

Rare occasions may arise where the overriding interests of justice - for example, a need to protect the integrity of the administration of justice, the identity of an informer (covered by public interest immunity) or to prevent danger to life or personal safety - require the withholding of disclosable information. Such a course should only be taken with the approval of the Director or a Deputy Director.

Legal professional privilege ordinarily will be claimed against the production of any document in the nature of an internal ODPP advising (eg. a submission to the Director, submissions between lawyers and Crown Prosecutors).

Reference should be made to Barristers' Rules 66, 66A and 66B and Solicitors' Rules A66, A66A and A66B (Appendix B). The requirement of Barristers' Rule 66 and Solicitors' Rule A66 to disclose *"the means of finding prospective witnesses"* may be satisfied by making the witnesses available to the opponent where possible, subject to public interest immunity considerations. It remains the practice of the ODPP not to include addresses or telephone numbers of witnesses in statements provided to the defence (except where they are material to an issue in the proceedings).

Regard should be had to the protection of the privacy of victims. (See also point 8, Charter of Victims' Rights, *Victims Rights Act* 1996 - Appendix D.)

Security of documents and other material

All due care must be taken to protect the security of sensitive documents and other material and information, the inappropriate disclosure of which may affect the safety of individuals, jeopardise continuing investigations, potentially affect the flow of confidential information to and between justice agencies or otherwise prejudice the criminal justice process or diminish public confidence in the criminal justice system. This includes the locking away of such material when the workplace is not attended and not leaving the material unattended at court, in motor vehicles or other non-

secure places or exposing it to casual perusal by unauthorised observers. It also includes discussion of such matters in circumstances where it may be overheard by members of the public or persons not authorised to receive such information.

26 Witnesses

[Furnished 20 October 2003]

The prosecution should generally call all apparently credible witnesses whose evidence is admissible and essential to the complete unfolding of the prosecution case or is otherwise material to the proceedings. Unchallenged evidence that is merely repetitious should not be called unless that witness is requested by the accused.

If a decision is made not to call evidence from a material witness where there are identifiable circumstances clearly establishing that his or her evidence is unreliable, the prosecution, where the accused requests that the witness be called and where appropriate, should assist the accused to call such a witness by making him or her available or, in some cases, call the witness for the purpose of making him or her available for cross-examination without adducing relevant evidence in chief (see Rule A.66B(j) of the Solicitors' Rules – Appendix B).

Mere inconsistency of the testimony of a witness with the prosecution case is not, of itself, grounds for refusing to call the witness. A decision not to call a witness otherwise reasonably to be expected to be called should be notified to the accused a reasonable time before the commencement of the trial, together with a general indication of the reason for the decision (eg The witness is not available or not accepted as a witness of truth). In some circumstances, the public interest may require that no reasons be given. Where practicable the prosecution should confer with the witness before making a decision not to call the witness.

If the defence provides a statement of a witness containing evidence that is unfavourable to the prosecution case, the material may be investigated by police. In any event, such action does not alone oblige the prosecution to call that evidence in its case.

There should be disclosure of any information, including any criminal convictions, in the possession of the prosecutor that reflects materially on the credibility of a prosecution witness or where cross-examination based upon it might reasonably be expected to materially affect that credibility.

The mere unwillingness or unavailability of a witness to testify is not ordinarily required to be disclosed unless the matter proceeds to a contested hearing.

Any immunity (indemnity or undertaking) – granted or approved in principle – or inducement provided to a prosecution witness should be disclosed to the accused in advance of the trial.

Child witnesses are to be treated, so far as practicable, consistently with the provisions of the UN Convention on the Rights of the Child (excerpts from which are Appendix G).

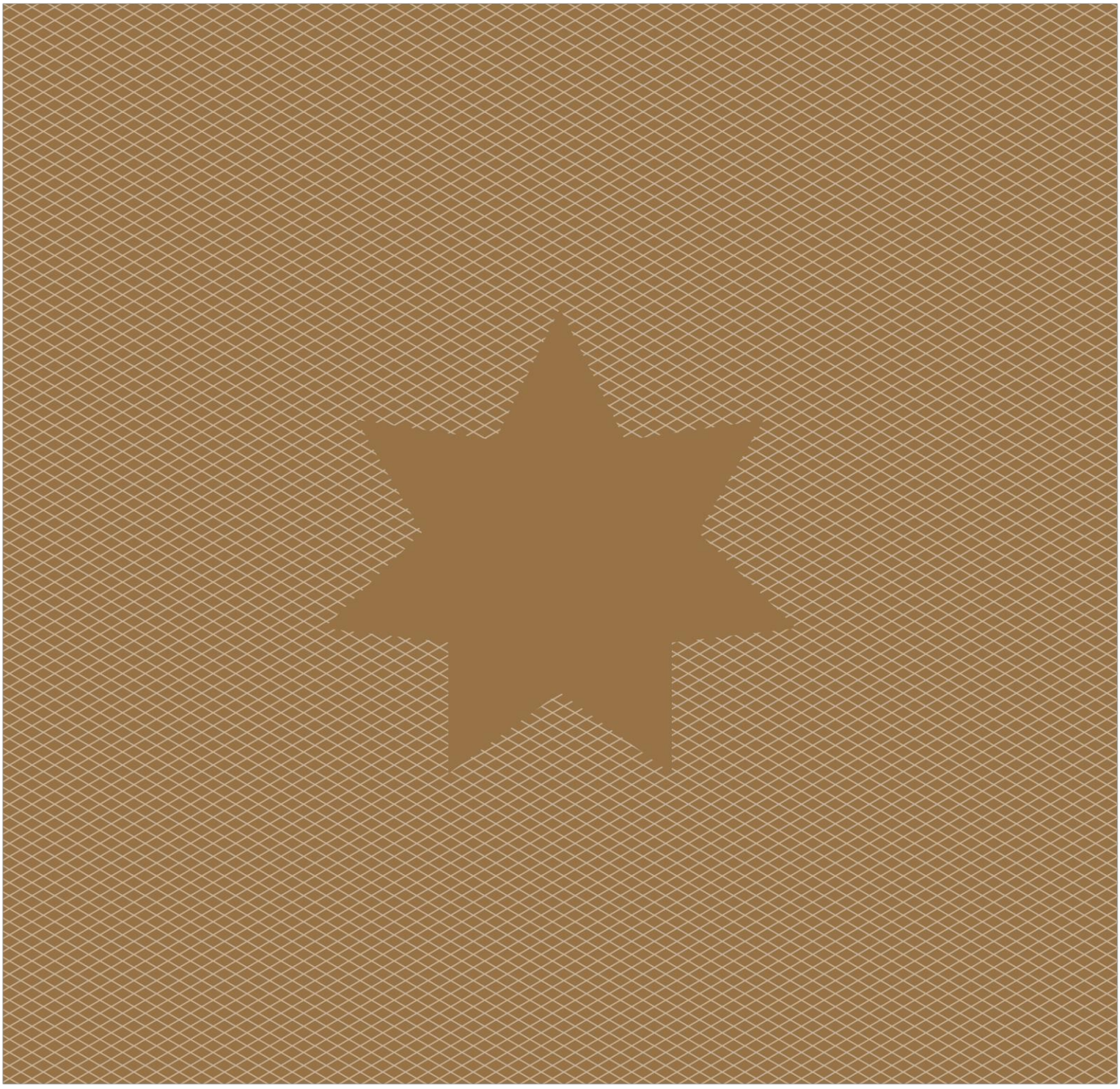
CDPP

Australia's Federal Prosecution Service

Statement on Disclosure

STATEMENT ON DISCLOSURE IN PROSECUTIONS CONDUCTED BY THE COMMONWEALTH

March 2017



Statement on Disclosure in Prosecutions Conducted by the Commonwealth

Last update: 22 March 2017

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Summary

- The need to ensure that the accused receives a fair trial is the ultimate criterion for determining what material should be disclosed by the prosecution.
- In order to ensure that the accused receives a fair trial, he or she must have adequate notice of the evidence to be adduced as part of the prosecution case.
- In addition to fulfilling any local statutory obligations relating to disclosure, the prosecution must disclose to the accused any material which:
  - can be seen on a sensible appraisal by the prosecution to run counter to the prosecution case (i.e. points away from the accused having committed the offence); or
  - might reasonably be expected to assist the accused in advancing a defence; or
  - might reasonably be expected to undermine the credibility or reliability of a material prosecution witness.

1. This Statement sets out the Commonwealth Director of Public Prosecution's expectations as to how the prosecution should fulfil its duty of disclosure. Part 1 sets out the duty under this Statement and Part 2 addresses compliance with the duty.

Part 1 – Duty of disclosure

2. The prosecution's duty of disclosure is ethical in nature and it is an obligation that is owed to the court.[1] It is a significant aspect of the administration of criminal justice and the court's capacity to ensure the accused's right to a fair trial. It is a longstanding tenet of the Australian criminal justice system that accused persons are entitled to know the case against them, so that they can properly defend the charges they face. An accused is entitled to know the evidence that will be adduced in support of the charges and whether there is any other material which may be relevant to the defence of the charges, including material relating to the credibility or reliability of a prosecution witness. A failure to disclose may result in a miscarriage of justice.[2]

3. Subject to any claim of public interest immunity, legal professional privilege, or any statutory provision to the contrary,[3] in prosecutions conducted by the Commonwealth, the prosecution must, in accordance with this Statement:

a. first, fulfil any applicable local statutory obligations relating to disclosure;[4] and

b. second[5], if not already required by the applicable state or territory provisions, also disclose to the accused, any material which:

(i) can be seen on a sensible appraisal by the prosecution to run counter to the prosecution case (i.e. points away from the accused having committed the offence); or

(ii) might reasonably be expected to assist the accused to advance a defence; or

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[1] *Cannon and Anor v Tahche* (2002) 5 VR 317 at 340.

[2] *Mallard v R* (2005) 224 CLR 125.

[3] E.g. *National Security Information (Criminal and Civil Proceedings) Act 2004*.

[4] These obligations are summarised in the "*CDPP Summary of State and Territory Disclosure Regimes*" published on the CDPP website (www.cdpp.gov.au).

[5] See *Kev v The Queen* [2015] VSCA 36; *Mallard v The Queen* (2005) 224 CLR 125; *Grey v The Queen* (2001) 184 ALR 593.

(iii) might reasonably be expected to undermine the credibility or reliability of a material prosecution witness.

4. The prosecution duty of disclosure under this Statement does not extend to disclosing material which is:[6]

a. relevant only to the credibility of defence (as distinct from prosecution) witnesses; [7]

b. relevant only to the credibility of the defendant;[8]

c. relevant only because it might deter the defendant from giving false evidence or raising an issue of fact which might be shown to be false;[9]

d. relevant in that it might alert and prevent the defendant from creating a trap for himself/herself based on suspect evidence (i.e. a suspect alibi), if at the time the prosecution became aware of the material it was not disclosable pursuant to Paragraph 3.

5. A precondition for prosecution disclosure is that the material is in the possession of, or the information is known by, the prosecution. For the purposes of this disclosure policy and at common law there is no distinction between the prosecuting agency and the investigative agency.[10] The courts generally regard the investigative agency and the prosecuting agency as "the prosecution". Consequently, the CDPP largely depends on the investigative agency to inform it of the existence of material which should be disclosed to the defence, whether the investigative agency holds it or is aware it is held by a third party including a Commonwealth, State or Territory agency, private entity or individual.

6. If a matter involves investigation by more than one agency, the CDPP depends on the investigative agency which refers the brief to inform the CDPP of all disclosable material which any of the agencies involved hold or are aware of.

7. The CDPP is available to assist and work with agencies in discharging the Prosecution's duty of disclosure.

8. Disclosure should be timely, and occur as soon as is reasonably practicable. The disclosure obligation is ongoing throughout the prosecution process and continues after trial and the conclusion of any appeals.[11] In jurisdictions which have committals disclosure should, subject to the requirements of local legislative provisions, commence no later than at the time of the committal.

Part 2 – Complying with the Duty

9. Pursuant to paragraph 3, this Statement firstly requires compliance with any applicable local statutory obligations relating to disclosure. If not already required by the applicable state or territory provisions, the following disclosure obligations also apply.

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[6] *R v Spiteri* (2004) 61 NSWLR 369; *R v Farquharson* (2009) 26 VR 410.

[7] If the defence seek details of any convictions or any information in the possession of the prosecution which reflects materially upon the credibility of defence witnesses or those who are closely connected with the events giving rise to the subject offence even though they may not be called by either party, these should be disclosed by the prosecution: *R v Trong Ruyen Bui* [2011] ACTSC 102 at paragraphs 18-19.

[8] There may however be a jurisdictional requirement to disclose this, for example the *Criminal Procedure Act 1986* (NSW) s 142.

[9] Caution should be exercised by the prosecution where an accused or other defence witness is giving evidence and the prosecution proposes to cross examine on the basis of material which is in its possession but which hasn't previously been led or disclosed to the defence: see *Fuller v The Queen* [2013] NTCCA 10 at paragraphs 35-40.

[10] *R v Farquharson* (2009) 26 VR 410 at [212].

[11] *Cannon and Anor v Tahche* (2002) 5 VR 317 and e.g s590AL *Criminal Code (Qld)*.

10. When in doubt about whether to disclose material, the matter should be raised with the relevant Assistant Director at the CDPP.

Prosecution Case

11. Disclosure of the prosecution case will ordinarily be by provision of a copy of the brief of evidence. A copy of the brief should always be provided where requested. There may be matters however where a defendant wishes to plead guilty quickly without a copy of a brief of evidence being requested and provided. The duty of disclosure is not incompatible with a defendant wanting to plead guilty before a full brief is served and a plea of guilty may well be accepted by the prosecution in such circumstances.

Other Material

12. The prosecution may hold or be aware of information or material, other than the material in the brief of evidence, which has:

a. been gathered or come to the attention of investigators in the course of the investigation; or

b. is otherwise held within any part of the investigative agency, agencies or third party;

that satisfies the requirements for disclosure set out in Part 1 of this Statement.

13. Some important examples of material that may fall within this category of material appear below.

Disclosure affecting credibility or reliability of a prosecution witness

14. The prosecution should disclose to the defence information in its possession which is relevant to the credibility or reliability of a prosecution witness, for example:

a. a relevant previous conviction or finding of guilt;

b. a statement made by a witness which is inconsistent with any other statement made by the witness;

c. a relevant adverse finding in other criminal proceedings or in non-criminal proceedings (such as disciplinary proceedings, civil proceedings or a Royal Commission);

d. evidence before a court, tribunal or Royal Commission which reflects adversely on a witness;

e. any physical or mental condition which may affect reliability;

f. any concession or benefit which has been offered or granted to a witness in order to secure that person's testimony for the prosecution;

g. where credibility is in issue, that the witness has been charged with a relevant offence.

Some of these examples are further explained below.

Previous convictions

15. A degree of common sense should be applied in this area. In practical terms, minor prior convictions for formal or non-contentious witnesses may not meet the requirements for disclosure, whereas previous convictions for perjury and offences involving dishonesty should always be disclosed to defence.

16. In some jurisdictions, defence requests for criminal history checks for witnesses are supported by local procedural laws. In other jurisdictions, there is no applicable statutory regime. Where blanket requests for 'all witnesses' are made, the prosecution should attempt to negotiate with defence practitioners to ensure that unnecessary checks do not have to be undertaken for formal or non-contentious witnesses.

17. The duty to disclose relevant prior convictions is not confined to cases of specific requests for the criminal histories of witnesses.[12] For that reason, it is appropriate for the prosecution to ensure, prior to

[12] *R v Garofalo* (1999) 2 VR 625.

the commencement of any trial or summary hearing, that criminal history checks have been undertaken for significant civilian witnesses whose credit may be in issue.

Adverse findings

18. Where a prosecution witness has been the subject of an adverse finding (including a finding of dishonesty) in other criminal proceedings, disciplinary proceedings, civil proceedings or a Royal Commission, such adverse findings should be disclosed by the prosecution to the defence unless the finding does not meet the requirements for disclosure set out in Part 1 of this Statement. Regard should be had to the nature of the evidence expected to be given and the issues likely to arise in the case at hand. For example, it may not be necessary to disclose adverse findings which arise from inefficiency, incompetence or disobedience of orders.

Concessions to witnesses

19. The prosecution must disclose:

a. any concession offered or provided to a witness with respect to his or her involvement in criminal activities in order to secure his or her evidence for the prosecution, whether as to choice of charge, the grant of an undertaking under subsection 9(6) or subsection 9(6D) of the *Director of Public Prosecutions Act 1983* or otherwise;

b. any monetary or other benefit or inducement that has been claimed by, or offered or provided to, a witness. This does not include any payments made in the ordinary and usual course of a witness coming to court to give evidence (e.g. the payment of travel and accommodation expenses or the fees of expert witnesses) and disclosure will be subject to any legislative requirements such as witness protection legislation. 'Other benefit' might include an agreement by the police/prosecution not to oppose the granting of bail; and

c. where the witness participated in the criminal activity the subject of the charges against the defendant, whether the witness has been dealt with in respect of his or her own involvement and, if so, whether the witness received a discount on sentence as a result of undertaking to cooperate with law enforcement authorities in relation to the current matter.

Disclosure affecting the competence or credibility of an expert witness or of expert or scientific evidence

20. The prosecution should disclose to the defence information of which it is aware that is relevant or potentially relevant to the competence or credibility of an expert witness the prosecution intends to rely on.

21. The prosecution should also disclose to the defence information of which it is aware that is in the form of an expert opinion and/or in the nature of scientific evidence, which differs from such evidence already received by the prosecution or in some way casts doubt on the opinions or evidence on which the prosecution intends to rely where that opinion or evidence is relevant and not merely speculative.

Disclosure of a statement by a witness who is not credible

22. If the prosecution has a statement from a person whose evidence meets the requirements for disclosure as set out in Part 1 of this Statement, but who will not be called because they are not credible, the defence should be provided with the name and address of the person and a copy of the statement.[13]

Material withheld from disclosure

23. Where material has been withheld from disclosure as:

[13] Subject to jurisdictional prohibitions on disclosing the person's address, for example the *Criminal Procedure Act* 2009 (Vic) ss 48 and 114.

a. it is considered that the material is immune from disclosure on public interest grounds; or

b. disclosure of the material is precluded by statute; or

c. it is considered that legal professional privilege should be claimed in respect of the material;

the defence should ordinarily be informed of this. In most cases it should be possible to provide some general information as to the nature of the material concerned. The extent of any further information will be determined by reference to the particular matter, but as a general rule information about the nature of the claim should be provided unless it will compromise that claim (e.g. the fact of there being an informer claim is not usually disclosed). Notification of the existence of such material may in some circumstances generate the issuing of a subpoena.

24. If the existence of material that otherwise meets the requirements for disclosure as set out in Part 1 of this Statement cannot be disclosed at all pursuant to paragraph 23, or where a claim for immunity has been upheld by a court, then consideration will need to be given as to whether it is fair for the prosecution to proceed or continue in the absence of such disclosure. In some circumstances a prosecution may not be able to proceed and may need to be discontinued.

Disclosure and Sentencing

25. While disclosure most frequently arises in the context of defended criminal cases there are some important obligations on the prosecution in the context of the sentencing process. In particular, any information or material that may affect an assessment of the moral culpability of a defendant on sentence should be disclosed. Such material will most frequently be in the possession of the investigative agency and should be disclosed to the CDPP.

General Matters

Timing of Disclosure

26. Disclosure should be timely, and occur as soon as practicable, always remembering the obligation is ongoing throughout the prosecution process, including during the sentencing process and continues after trial and the conclusion of any appeals.[14] However, in certain circumstances, it may be appropriate to delay disclosure. Some examples of this may include the following:

a. where disclosure might prejudice ongoing investigations (see paragraphs 23 – 24), and the investigative agency requests the non-disclosure of material that would otherwise be disclosable under this Statement, disclosure may be able to be delayed until after the investigations are completed;

b. where the prosecution is of the opinion that to disclose evidence is likely to lead to a witness being intimidated, or a risk to the safety of a witness, or to some other interference with the course of justice.

27. Where disclosure of material has been delayed in accordance with the preceding paragraph, the defence should ordinarily be so informed, unless to do so might compromise the reason for the delay (e.g. the existence of an ongoing investigation).

How material should be disclosed

28. There are various ways material may be disclosed – there is no hard and fast rule under this Statement. The prosecution may, for example, provide the material itself in hard copy or electronic form. Disclosure may occur via a schedule listing the material or by making the material available for inspection or copying. Where a schedule listing material is provided, it should include a description

[14] *Cannon and Anor v Tahche* (2002) 5 VR 317 and e.g. s590AL *Criminal Code* (Qld).

making clear the nature of that material and the defence should be informed that arrangements may be made to inspect the material. This is because the essence of disclosure is that the defence be made aware of the existence of the material – in many instances they may not actually wish to have a copy of the material itself.

29. There may be cases where, having regard to:

a. the absence of information available to the prosecution as to the lines of defence to be pursued; and/or

b. the nature, extent or complexity of the material gathered in the course of the investigation;

there may be special difficulty in accurately assessing whether particular material meets the requirements for disclosure set out in Part 1 of this Statement. In these cases, after consultation with the relevant investigative agency, the prosecution may permit the defence to inspect such material.

Disclosure of material held by third parties

30. Where the prosecution is aware of disclosable material that is in the possession of a third party, the defence should be informed of:

a. the name of the third party;

b. the nature of the material; and

c. the address of the third party (unless there is good reason for not doing so and if so, it may be necessary for the prosecution to facilitate communication between the defence and the third party).