

Ethics: The Prosecutor's Duty of Disclosure in the Local Court

When you don't know what you don't know: 10 things you should know

1. The duty that applies to a summary prosecution mirrors the duty that applies to matters on indictment.

- a. There is no basis in principle to distinguish between the duty that applies to police prosecutors and the duty that applies to the DPP.
- b. The duty is largely governed by established common law principles – which are of particular significance where criminal proceedings are prosecuted summarily by police.
- c. Some statutory provisions in relation to summary prosecutions on service of brief by prosecution and consequences for lack of service: see Chapter 4, Part 2, Div 2 *Criminal Procedure Act 1986* (NSW); and also cl 24-25 *Criminal Procedure Regulation 2017* (NSW).
- d. Also reflected in policy, practice, guidelines and operating procedures: eg. Email from Superintendent Dickson extracted at *Bradley* [16].

2. It is a duty owed to the court, not to the accused.

- a. There is no duty of disclosure or 'discovery' on the prosecution in criminal matters akin to that which exists as between the parties in the civil litigation context.
- b. 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: *Cannon v Tahche* (2002) 5 VR 317.
- c. 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.

3. The duty operates without prompting or fossicking by the defence.

- a. 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. The defence is not obliged to fossick for information of a kind to which they are entitled – by subpoena or otherwise.
- b. The prosecution is not absolved from discharging its duty of disclosure by the circumstance that the matter could be explored by the accused in cross-examination, and the material may be discovered by the accused by asking a lucky (if extremely risky) question of a witness at trial. 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

4. What material must be disclosed? It cannot be exhaustively stated.

- a. Material which is or might be relevant to any issue in the case;
- b. Material which raises a new issue, the existence of which is not apparent from the prosecution case;
- c. Material which holds out a real prospect of providing a lead on evidence in the first two categories.

R v Reardon (No 2)(2004) 60 NSWLR 454; [2004] NSWCCA 197 at [46]ff

- d. Material as required by the various statutory disclosure provisions such as in the *Criminal Procedure Act* 1986 (NSW); and the *Director of Public Prosecutions Act* 1986 (NSW).
- e. Material does not need to be admissible:
 - i. Sufficient if the material arms the defence with information that might lead to a forensic goal, eg. erosion of complainant's credit;
 - ii. Accused is *prima facie* entitled to any documents which may give him or her the opportunity to pursue a proper and fruitful course in cross-examination.

R v Mokbel (Ruling No 1) [2005] VSC 410

The list of what material must be disclosed by the prosecution cannot be stated exhaustively, but would certainly seem to extend to providing:

- a. All material obtained or generated through the investigation;
- b. Statements of witnesses proposed to be called;
- c. Advanced notice of discrepancies between a statement and the evidence proposed to be led – by way of conference notes or otherwise – privilege should not be claimed over material which ought to be disclosed to the accused;
- d. Statements of witnesses not proposed to be called;
- e. Prior convictions of prosecution witnesses and Facts Sheets for relevant/potentially relevant entries on criminal record;
 - i. The possibility that a facts sheet could contain incorrect or unreliable information is not to the point, since, whether correct or otherwise, it may lead to an inquiry which might assist the defence: *Bradley* at [74];
 - ii. Accused should not be deprived of material which would put him/her at mercy of prosecution witness (such as complainant) – who might choose to lie about matters in cross-examination or simply not recall details: *Bradley* at [82];

- iii. Accused is not required to establish that a criminal history has some particular and direct relevance to the issue of credibility – eg. s32 outcomes; witness may have lied about allegations when confronted by police or in formal interview: *Jenkin* at [20]-[21];
 - iv. The criminal history of a prosecution witness may be relevant in a number of ways: for example, offences of dishonesty; administration of justice offences; outcomes which reveal alcohol/drug use – either because of the nature of the offence or because of conditions on bonds requiring counselling etc.; outcomes relating to being dealt with under mental health diversions (as relevant to credibility and/or reliability); offences of violence or outcomes that reveal a person has been required to undertake anger management counselling etc. (if his/her own conduct could be in issue, such as a self-defence case); outcomes that reveal a witness was on conditional liberty at relevant times (which might bear upon a motive to lie/deflect blame); charges/convictions which may demonstrate a witness has a particular relevant tendency (for example to fabricate allegations or to be violent etc.);
- f. Other material relevant or potentially relevant to credit, such as a letter of comfort (*Grey*); results of scientific experiments exculpatory of the accused (*Mallard*); evidence that the witness to whom a contested confession made was a police informer (*JB*); other material held on the COPS system;
 - g. All material which could reasonably be seen as capable of assisting the defence case;
 - h. 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;
 - i. All material relevant to mitigation of sentence.

5. Material in the possession or available to the prosecution must be disclosed – following an objective, impartial and thorough investigation.

- a. The prosecution may not suppress evidence in its possession or available to it that is material to the contested issues in the trial and must ordinarily provide such evidence to the defence: *Mallard v R* (2005) 224 CLR 125.
- b. Before a concern for resources of NSW Police could even have any relevance to the question of the duty, there would need to be evidence of oppression in terms of time/cost: *Bradley* at [78]. But query how a failure to disclose leading to unfairness or potential unfairness could be justified on the basis of the impost on resources.

- c. To a great degree, the integrity of the investigation process depends upon the assumption that police investigators have been objective and have attempted to uncover *all* relevant evidence that can reasonably be assembled, whether it is inculpatory or exculpatory. Indeed, sometimes a prosecution case can gain unassailable strength in the eyes of a jury if it is evident that the evidence that has been put forward has been the result of an utterly objective investigation and one in which, having regard to the truth of the Crown case, the investigators did not fear to find and put forward evidence that might exculpate an accused person: *R v Ernst* [2020] QCA 150 at [35], referring also to the Queensland *Police Operations Procedures Manual* which provides: “When conducting investigations, officers are to remain objective and impartial and consider their initial appreciation of an occurrence, based on the preliminary information provided by complainants, witnesses or informants, may differ to what has occurred.” In that case, the investigation lacked objectivity because exculpatory information which had been offered to police by a witness was not properly recorded or passed onto the defence (subsequently discovered and lead to convictions being quashed): at [36].

6. A broad view of relevance and of what the issues might be, and performance of the duty by a person familiar with the case and access to the material is expected.

- a. Prosecution should not take a narrow view as to which the defence might be or as to what might prove useful to the defence, as to what might open up useful lines of enquiry to the defence. There is no onus on the defence to demonstrate a forensic purpose in relation to material said to be subject to the Crown’s duty of disclosure: *Reardon* at [58].
- b. Not sufficient for a police officer who has no familiarity with the case to be asked to work out whether material is disclosable; performance of duty requires attention to be given to the issues in the case and to all the material within the possession of the NSW police; can only be performed by someone who has knowledge of, and familiarity with, the case and who has access to databases, documents and other records held by NSW Police: *Bradley* at [81].
- c. 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: *Mokbel* at [71]; affirmed in *Jenkin*.

7. The investigating police / prosecutor distinction is a fallacy.

- a. It is not uncommon for counsel and solicitor appearing for the Crown in a matter on indictment, or 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.

- b. Such a distinction between the prosecution advocate or agency and the investigative agency is a fallacy. The law regards the investigative agency and the prosecuting agency as "the prosecution". Knowledge is imputed to the prosecutor or prosecuting agency of the documents or material in the possession or known to the investigating agency: *R v Farquharson* (2009) 26 VR 410 at [212].
- c. Police sergeant cannot meaningfully shield themselves from the duty to disclose by saying they do not personally have the documents. Plus, such a distinction is illusory when police sergeants have access to the COPS database and other police documents etc.
- d. 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: *Lipton* at [119].

8. The accused can effectively enforce the duty through various avenues.

- a. Court order for disclosure based on statutory pre-trial disclosure provisions in *Criminal Procedure Act* 1986 (both for summary proceedings and committal proceedings).
- b. Temporary stay or permanent stay if still refuse to prevent an unfair trial – if the substantive hearing, absent production of the documents, would likely be unfair or if there is a tangible risk that it would be unfair: *Bradley* at [51]; *Marwan* at [29], [51]; *Lipton* at [120]; *Dietrich* at 311; *Re K* at [9]-[10]; *Gould* at [60]-[64]; *Kinghorn* at [139].
 - a. Preferable course to subpoena.
 - b. Although the obligation for disclosure is on the prosecution, there may be some obligation on the defence to identify the parameters of issues at trial/hearing.
- c. Subpoena to check or enforce compliance: *Bradley* at [52]; *Gould* at [14], [18] and [19]; *Kinghorn* at [140]. An accused who alleges that disclosure is inadequate is, however, entitled to request that subpoenas be issued to obtain the documents said to fall within the ambit of the duty. As long as the subpoena is not set aside, the subpoena is enforceable.
 - i. However, a subpoena should not be necessary. As a first resort it is arguably perpetuating and further entrenching a culture of non-disclosure by police and prosecuting agencies and acquiescing to a second-rate system of justice.

- ii. 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.
 - iii. There may be a difficulty of establishing legitimate forensic purpose. Tension between *Bradley, R v Jenkin (No 2)* [2018] NSWSC 697 and *Mann v Commissioner of Police* [2020] NSWSC 369 (which may be going on appeal.)
- d. Question of court-order for disclosure – some contrasting views in the authorities:
- i. Not available or not ordinarily available: *Bradley* at [84]; *Marwan* at [29]; *Gould* at [60]-[64].
 - ii. Available in exercise of implied power to safeguard a fair trial including in the Local Court; potentially available if interests of justice so require: *Sobh v Police Force of Victoria* [1994] VR 41 per Brooking J at 47; *Carter v Hayes* (1994) 61 SASR 451 King CJ; *Gaffee v Johnson* (1996) 90 A Crim R 157 at 165.
- e. **REMEMBER** the accused doesn't know what he/she doesn't know so evidencing a breach of disclosure and the likely unfairness must be seen in that context. A starting point may be evidencing a lack of making reasonable inquiries.
- f. See also procedural requirements and orders: *CDPP v Kinghorn* [2020] NSWCCA 48 at [141].
- g. Restraint on prosecutor where they are refusing or failing to comply with their duty of disclosure: see example of restraint of prosecutor in another context in *MG v R* [2007] NSWCCA 57.
- h. Costs – there is ample authority that stay can also be made conditional on prosecution meeting costs of accused person thrown away by failure of disclosure: *R v Selim* [2007] NSWSC 154.

9. If a breach of disclosure is revealed after conviction, the accused can get relief.

- a. Where a breach of the disclosure obligation is discovered/demonstrated post-trial, a conviction may be quashed and this may lead to a re-trial or an outright acquittal.
- b. A prosecuting authority's duty of disclosure of relevant information and evidence is not just a protection against miscarriages of justice – its fulfilment is a presupposition of a fair trial: *R v Ernst* [2020] QCA 150 at [34].
- c. On a conviction appeal – a breach can lead to quashing of conviction that was or might have been unfair by reason of the breach of

disclosure or where there has been a miscarriage of justice: *Livermore v R* [2006] NSWCCA 334; (2006) 67 NSWLR 659; *Re Ratten* [1974] VicRp 26; *Wood v R* [2012] NSWCCA 21; *Gallagher v The Queen* [1986] HCA 26; (1986) 160 CLR 392.

- d. On a conviction inquiry (after appeals have been exhausted): *JB v R (No 2)* [2016] NSWCCA 67 where initial appeal against conviction and sentence unsuccessful, application for special leave refused; subsequent s78 *CARA* inquiry into conviction resulted in quashing of murder conviction and verdict of acquittal entered.
 - a. JB spent 6 years and 8 months incarcerated and serving his sentence before being released on bail and ultimately acquitted by the Court of Criminal Appeal following the discovery of critical evidence that the witness who allegedly heard the contested confession to murder was a registered police informer and a fraudster – evidence which both the police and DPP had failed to disclose to the accused at any earlier stage of the proceedings.
 - b. JB's case serves as a real reminder not to give up!

10. Tips for securing disclosure in practice.

- a. Think about disclosure often and early on.
- b. Read the disclosure cases. Recall your own experiences where potentially relevant and even critical evidence has been disclosed late, or not at all. There are too many cases where a grave miscarriage of justice has occurred. An entrenched attitude of non-disclosure by police and prosecuting authorities is dangerous. It puts our whole system of justice in peril. Remind yourself frequently that the accused does not know what the accused does not know; that a breach of disclosure can result in unjust convictions and the lengthy and unwarranted loss of liberty of a human being; and that we must all be vigilant to avoid unfairness and injustice.
- c. Arm yourself with the legal principles to push back against any institutional reluctance to honour the obligation of disclosure. Insisting on the minimum standards of fairness is not “attempting to break the entire criminal justice system”. There is power in collective insistence by practitioners on behalf of accused persons that disclosure obligations are met in criminal proceedings for offences determined summarily to the most serious of indictable crimes. Cultural change can be achieved through such collective insistence.
- d. Always have in mind that at a hearing or trial it is for the prosecution to prove the charges beyond reasonable doubt, not an inquiry into truth.
- e. Ascertain issues from the brief and instructions.

- f. Do your own investigating – of witnesses, of the scene, in relation to the types of documents that one would expect to exist given certain facts etc.
- g. Work out what you want and why.
- h. Build disclosure requests and compliance checks into your case management practices, particularly where your client has entered a plea of not guilty or is otherwise entitled to a brief of evidence.
- i. Keep an eye on the practicalities – is your client on bail or not, what is the likely hearing date, apply to re-list the proceedings to deal with any non-disclosure so that timeframes are not blown out to the disadvantage of your client.
- j. Raise the issue with the prosecution as early as possible.
- k. Write to the prosecutor/OIC early or upon entering PNG:
 - i. 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 by making an express request in writing.
 - ii. Seek disclosure in general terms and as relevant to particular issues you may be able to identify or reveal from instructions, and setting out the parameters of the issues at hearing (or trial) to the extent possible or appropriate.
 - iii. Initial correspondence seeking disclosure can be done by a quick email. See also more fulsome template letter which may be useful if initial correspondence does not yield a result.
 - iv. 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.
 - v. 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 inquiries of the COPS database and other police records must be made.
 - vi. 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 an application for a temporary stay. In this way, the paper trail is likely to be very significant for any subsequent application to the court.

- vii. Making a request at an early stage of proceedings allows for time ahead of any defended hearing (or trial) to take necessary steps to pursue alternatives if an appropriate response is not obtained from the request.
- l. Check compliance with procedural requirements and court orders. Raise issue in court early, for Local Court hearings at reply-to-brief stage or ahead of hearing, or pre-committal if lack of compliance or not satisfied with compliance.
- m. If not satisfied with the result from requests to the prosecution, list for separate hearing on temporary stay application ahead of the defended hearing (or trial). As for the form of the application – notice of motion with affidavit in support from solicitor, and written submissions in *Bradley*. Establish evidentiary basis for the relief sought, for example, by way of tender of correspondence relevant to disclosure requests and sufficient evidence from brief of evidence, or as to your instructions to bear upon the disclosure issue; cross-examination of OIC may also be appropriate. Formal adducing of evidence and written submissions in support will protect the accused’s interests below and in the event appellate litigation is necessary as in *Bradley*.
- n. In relation to cross-examination of the officer in charge, note the requirements of objectivity of the investigator as explained in *Ernst*. In that case – the police officer gave evidence (on appeal) that his attention was “only upon facts that might assist the prosecution case. He was only interested to find out if Ms V might be able to give evidence to strengthen the credit of the complainant. He was uninterested in learning that there may be issues about the reliability of the complainant and so he ignored (or did not hear) what Ms V had to say.”: at [36].
- o. If stay refused or otherwise appropriate, seek issue of a subpoena to Commissioner of Police.
- p. It is not over until it is really over. Don’t give up!

Madeleine Avenell
Public Defender

Felicity Graham
Black Chambers

Tim McKenzie
Legal Aid NSW

September 2020

Key Cases

R v Ernst [2020] QCA 150 at [28]-[37]
CDPP v Kinghorn [2020] NSWCCA 48 at [125]-[128]
Bradley v Senior Constable Chilby [2020] NSWSC 145
Marwan v DPP [2019] NSWCCA 161 at [27]-[28], [35]
Gould v Director of Public Prosecutions (Cth) [2018] NSWCCA 109; (2018) 359 ALR 142 at [14], [18]-[19], [60]-[65]
R v Jenkin (No 2) [2018] NSWSC 697 at [21]
JB v R (No 2) [2016] NSWCCA 67
Potier v R [2015] NSWCCA 130 at [549]-[552]
Wood v R [2012] NSWCCA 21
R v Lipton (2011) 82 NSWLR 123; [2011] NSWCCA 247 at [77]-[81] and [119]-[120] per McColl JA, R S Hulme and Hislop JJ agreeing
Cornwell v R [2010] NSWCCA 59 at [210], [297]-[298], [340]
R v Farquharson (2009) 26 VR 410 at [212]
Livermore v R [2006] NSWCCA 334; (2006) 67 NSWLR 659
Mallard v The Queen (2005) 224 CLR 125; [2005] HCA 68
R v Mokbel (Ruling No 1) [2005] VSC 410 at [71]-[76]
R v Livingstone [2004] NSWCCA 407 at [44]-[45]
R v Reardon (No 2)(2004) 60 NSWLR 454; [2004] NSWCCA 197 at [46]-[58]
R v Spiteri (2004) 61 NSWLR 369 at [20], [25]
Re K [2002] NSWCCA 374 at [9]-[10] per Beazley JA, Sully and Simpson JJ
Grey v The Queen [2001] HCA 65; (2001) 75 ALJR 1708
R v Garofalo [1999] 2 VR 625; [1998] VSCA 145 at [63]
Dietrich v The Queen (1992) 177 CLR 292; [1992] HCA 57 at 311 per Mason CJ and McHugh
Gallagher v The Queen [1986] HCA 26; (1986) 160 CLR 392

Statutory provisions and other sources of the duty

For example ss 61, 62, 70(3)(a), 141, 142, 183-188 *Criminal Procedure Act* 1986 (NSW); cl 24-25 *Criminal Procedure Regulation* 2017 (NSW)
ss15A, 17 *Director of Public Prosecutions Act* 1986 (NSW)
NSW ODPP Guidelines, in particular Guideline 18
CDPP Statement on Disclosure
Standard Operating Procedures for Police Prosecutors/instructions to police prosecutors on disclosure (see extract in *Bradley* at [16] and endorsed at [50])
Legal Profession Rules

The authors welcome any feedback or cases to update this paper.

Template Correspondence seeking Disclosure

Our Ref:

DATE

NAME

Senior Police Prosecutor / DPP Solicitor with carriage

ADDRESS

Emailed to: EMAIL

CC: OIC NAME

Emailed to: EMAIL

[If police matter] CC: The Area Commander, [X] LAC Police

Faxed to: NUMBER

[If applicable] CC: Name of lawyer for Commissioner of Police

Emailed to: EMAIL

Dear Senior Sgt SO-AND-SO / Ms/Mr SO-AND-SO

Re: Police / R v ACCUSED

H Number: HXXXXXXXX

Case No.: XXXX

Next listed: LOCATION LC/DC on DATE for [return of subpoena / disclosure hearing]

LOCATION LC/DC on DATE for [defended hearing / trial]

I act for the accused NAME in these proceedings.

[If prosecuted by Police: I ask that this matter be brought to the attention of the Police Prosecutor allocated to appear in the defended hearing on DATE. Where no Prosecutor allocation has occurred yet, I ask that you or another Police Prosecutor review the matter.]

Background to the Matter

ACCUSED is charged with an offence of [eg. assault occasioning actual bodily harm of COMPLAINANT], alleged to have occurred on DATE at PLACE. S/he was subsequently charged with the offence on DATE. The central allegation of the proceedings against ACCUSED is that [eg. he bit the complainant's finger causing injury].

ACCUSED appeared before the Local Court at PLACE on DATE and entered a plea of not guilty to the charge.

A brief of evidence was served on the defence on **DATE**.

It contains, amongst other things, a statement from the **COMPLAINANT/WITNESS A/WITNESS B** dated **DATE**. **COMPLAINANT/WITNESS A/WITNESS B** is required for cross-examination at the defended hearing listed on **DATE**.

During the course of the investigation, it is apparent that the Officer-in-Charge **NAME** consulted with **POLICE OFFICERS X AND Y**: cite brief reference.

*[If applicable, noting that disclosure should be made without a subpoena to Police being necessary/appropriate: On **DATE**, the Local Court issued a subpoena on behalf of the accused to the Commissioner of Police, NSW Police Force (**the Commissioner**) compelling the Commissioner to produce certain documents relating to the proceedings.*

The matter is listed on **DATE** in relation to compliance with the subpoena by the Commissioner. **SO-AND-SO**, appears for the Commissioner in relation to the subpoena.

A copy of the subpoena to the Commissioner is attached.]

Issues in the Matter

The events as alleged by **COMPLAINANT/WITNESS A/WITNESS B** are disputed.

[As appropriate, set out issues as they emerge from brief of evidence, why credibility and reliability of complainant and/or other witnesses is in issue and/or other contested matters in the case. If appropriate include a summary of the accused's instructions, (noting waiver of privilege issues if instructions not revealed in an ERISP or otherwise on police brief). If not appropriate to include nature of instructions, PNG can be relied upon to indicate dispute.]

[For example:

The **ACCUSED** disputed the allegations from the outset, when he was confronted by police with the allegations on **DATE**. **ACCUSED** denied in his interview with police [certain conduct]... (QA## ERISP).

As set out in the summary of the interview with police in the Facts Sheet, the accused stated [set out self-defence account].

In the course of the ERISP, **ACCUSED** explained how **COMPLAINANT** physically attacked him [set out questions and answers which give rise to self-defence account].

It will be readily apparent that self-defence arises as one of the issues in the proceedings.

It was also obvious, from before proceedings were even commenced against **ACCUSED**, that the credibility and reliability of the complainant is in issue.]

[As appropriate, set out any other basis on which issues of credibility/reliability or other matters for disclosure arise, eg. information obtained through your own investigations on Facebook, the court list etc.]

[For example:

Attached is an affidavit by the writer annexing documents obtained via publically available searches on the NSW Online Registry. Those **searches** appear to reveal that in recent times there have been at least three separate prosecutions brought by the NSW Police Force in the Local Court against the complainant. It is anticipated that this affidavit will be relied upon by **ACCUSED** in these proceedings in the event that it is necessary to litigate the issue of the prosecution non-compliance with its disclosure obligations and/or the Commissioner's failure to comply with the subpoena.]

Disclosure Obligations

As you are no doubt aware, the prosecution's duty of disclosure is one that must be honoured without the need for prompting by the accused or any onus on the accused to obtain the material **him/herself** (for example, by way of a subpoena **such as the one referred to above**, or this letter): *Grey v The Queen* [2001] HCA 65; (2001) 75 ALJR 1708. A failure to disclose may cause a miscarriage of justice: see for example *JB v R* [2015] NSWCCA 182; and *JB v R (No 2)* [2016] NSWCCA 67.

The duty to disclose material to the accused extends to material in the prosecution's possession, or available to it, that is 1) relevant or possibly relevant to the contested issues in the case; 2) raises a new issue, the existence of which is not apparent from the prosecution case or 3) holds out a real prospect of providing a lead on evidence in the first two categories: see *Bradley v Senior Constable Chilby* [2020] NSWSC 145 Adamson J at [46] where her Honour cites *R v Reardon (No 2)* [2004] NSWCCA 197 Hodgson JA at [46]-[54] and *R v Spiteri* (2004) 61 NSWLR 369; [2004] NSWCCA 321. See also *Mallard v R* (2005) 224 CLR 125 per Kirby J.

At common law, for the purposes of the duty of disclosure, there is no distinction between the prosecuting agency (whether the Director of Public Prosecutions or Police Prosecutor) on the one hand and the investigative agency or investigating police officers on the other. The Police Prosecutor allocated to this matter [or the Director of Public Prosecutions] is taken to have possession of, or available to them, all the material that is in the possession of or available to the NSW Police Force and is subject to the duty to disclose. However, for practical purposes, it is acknowledged that the Officer-in-Charge or other investigating police officer may make the appropriate enquiries, collect the material for disclosure to the accused and arrange service of that material.

[In DPP matters, you could also refer to relevant parts of NSW ODPG Guidelines or Cth DPP Guidelines.]

Documents to be Disclosed

The accused requests that the following material be disclosed to him/her *[list specific items as appropriate to the case]*:

1. Criminal history of **COMPLAINANT** (DOB ##/##/####);
2. NSW Police Force Facts Sheets relating to entries on **COMPLAINANT's** criminal history;
3. NSW Police Force Facts Sheets relating to criminal proceedings against **COMPLAINANT** in the Local Court at **PLACE** and **PLACE** (Case nos. ## and ##/##);
4. All other material in the possession of NSW Police Force or available to NSW Police Force that is relevant or possibly relevant to the credibility and/or reliability of **COMPLAINANT**;
5. All COPS entries related to **HXXXXXXXX**;
6. Any record of the conversations between **OIC AND POLICE OFFICERS X AND Y** contained in the COPS entries or otherwise;
7. Custody Management Record for the accused on **DATE**; and
8. Any other material which could reasonably be seen as capable of assisting the defence case.

[Include other documents or categories of documents which are sought by way of disclosure as appropriate.]

Subpoena

The law is clear that a subpoena to the Commissioner is not required and the material referred to above should be provided by the Police in the first instance in accordance with the prosecutorial duty to disclose. See *Bradley v Senior Constable Chilby* [2020] NSWSC 145.

I remind you it is well established that the issuing of a subpoena is a remedy for a party who is dissatisfied with a prosecutor's compliance with the duty of disclosure. It is distinct and separate to the prosecutorial disclosure obligation. See *Mann v Commissioner of Police* [2020] NSWSC 369 at [35]; *Gould v Director of Public Prosecutions (Cth)* [2018] NSWCCA 109; (2018) 359 ALR 142.

It is my view that a subpoena to the Commissioner is/was not required and the material referred to above should have been provided by the Police in the first instance. A continued failure to provide this material is unacceptable and compromises my ability to properly advise and defend my client.

If the accused is not in receipt of the above material before **DATE** when the matter is next listed, I foreshadow that the accused will make an application to the Local Court for a temporary stay of the criminal proceedings until such

time as the prosecution comply with its duty of disclosure. [If necessary, in addition the accused will be pressing for compliance with the subpoena issued to the Commissioner and seeking access to the documents sought under it.] Counsel has been briefed to appear for the accused on DATE.

Please confirm in writing receipt of this correspondence as soon as possible.

Please also confirm in writing as soon as possible that the prosecution has made appropriate enquiries, and has complied with its duty of disclosure.

If you refuse to serve any of the material in items 1-8 above on the accused, please confirm in writing your reasons for doing so.

This correspondence may be relied upon by the accused in the event that it is necessary to litigate the issue of prosecution compliance with the duty of disclosure and/or the issue of the Commissioner's compliance with the subpoena.

This correspondence may also be relied upon by the accused in relation to any application for costs.

I look forward to your prompt response.

Yours sincerely,

NAME
SOLICITOR