THE PROSECUTOR'S DUTY OF DISCLOSURE:

A Practical Approach with Some Historical Context[1]

'Fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed to the defence. Bitter experience has shown that miscarriages of justice may occur where such material is withheld from disclosure. The golden rule is that full disclosure of such material should be made'

R v H [2004] 2 AC 134, 146 [14] per Lord Bingham of Cornhill

Introduction

Until relatively recently, there was no duty upon Australian prosecutors[2] to disclose anything pre-trial to the defence in criminal matters, even the indictment. Whilst we have come a long way from this position that seems so untenable to modern criminal practitioners, there are still significant issues and controversies that arise out the deceptively simple notion of the 'prosecutorial duty of disclosure'.

This paper does not seek to regurgitate in any great detail the well-known principles of statute and common law that apply to prosecutorial disclosure in NSW. There are many good papers which do this better than I could, and a quick perusal of the main appellate cases in this area identifies erudite and eloquent recitations of the relevant principles.

What this paper aims to do is put the current law of disclosure into some context by discussing the development of the prosecutor's duty of disclosure over the years, and how the duty of disclosure helps give expression to the rule of law. Once we understand the history of the development of the law of disclosure we will be better placed to understand and appreciate how and why the principles operate, or perhaps more accurately how and why, on some occasions, they do not operate as they should.

An appreciation of jurisprudential history explains why disclosure in New South Wales is 'governed by a patchwork of common law obligations, prosecution guidelines, and statutory and ethical rules[3]'. In addition to an understanding of the past, it is important to bear in mind

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[2] 'Prosecutor' includes Police Prosecutors, Police Officers (ie CI,GD's), DPP, Crown Prosecutors

[3] *Edwards v The Queen* [2021] HCA 28 at [48].

the human element when dealing with disclosure issues as DPP and Police culture has a significant impact on how these duties are addressed.

Within the context of history and understanding of human nature, this paper will then discuss practical approaches to disclosure and ensuring the accused is afforded their right to a fair trial (or more properly expressed, the right not to be tried unfairly), which is ultimately the essence of the prosecutor's duty of disclosure, and the overall requirement that the prosecutor act as a 'minister of justice'.

History

"Those that fail to learn from history are doomed to repeat it"

Winston Churchill (1948)

Role of the Prosecutor

The duty of disclosure is one of the most important aspects of the role of the prosecutor and is therefore inextricably linked with the development of the role of the prosecutor. Today, prosecutors must act as *'ministers of justice, and not … struggle for a conviction…. A prosecutor has a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion 'of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings'*[4]. Similar sentiments are found in DPP Guidelines, Barrister's Rules and authorities such as *Whitehorn v R* [1983] HCA 42; (1983) 152 CLR 657.

Despite the popular view that prosecutors are the State's 'attack dog', whose sole purpose is the zealous pursuit of securing a conviction at all costs, the proper role of the prosecutor is to act with fairness, impartiality and to assist the court in arriving at the truth. However, there is a clear tension within the role of the prosecutor, between being an impartial 'minister of justice' on one hand, and an advocate in adversarial litigation on the other hand. Furthermore, it cannot be forgotten that prosecutors are subject to human failings, as we all are, of ego and

[4] *Boucher v The Queen* [1955] S.C.R. 16

competitiveness, which may consciously or sub-consciously impact the way a matter is prosecuted.

Whilst the importance of a prosecutor's duty of fairness and impartiality cannot be overstated, there are equally good reasons for the prosecutor to press firmly for conviction, where there is a proper basis to do so, and not to simply act as a disinterested spectator in the criminal proceedings. There is merit in the rationale behind the adversarial process in that the truth is more likely to emerge from the fray of a vigorous contest between two opposing parties[5]. Whilst the prosecutor must act with temperance and according to special rules which reflect the onus and standard of proof and the rule of law, the adversarial process requires an active, engaged and at times firm advocate so that the Crown case can be properly presented.

As with much in the law, there is a goldilocks zone that is often difficult to achieve, and which differs on a case-by-case basis. An over-zealous prosecution is apt to result in an unsafe conviction, whilst an emasculated prosecution is apt to do injustice to the victim and community, and both situations can result in a miscarriage of justice and undermining of the criminal justice system. The tension between the competing roles within the prosecutor's duty is reflected in the duty of disclosure, and is perhaps one explanation for difficulties encountered in terms of disclosure.

Development of the duty[6]

In England (and therefore Australia), it was only in the mid to late 19th Century that the idea of 'trial by ambush' was challenged as a proper and legitimate approach to criminal trials. An accused was not entitled know the names of the prosecution witnesses nor even know the precise nature of the charges levelled against them, let alone the contents of statements or other prosecution material. It was thought that the truth would be best exposed if an accused was only confronted with the evidence during trial.

The situation is best illustrated in the 1792 case of *Holland*[7], referred to in *Eastman v DPP* (No 13) [2016] ACTCA 65 at [330]. In *Holland*, the accused made an outrageous request to review the evidence against him before trial. In response:

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[5] Rogers, S, 'The Ethics of Advocacy' (1897) 59 LQR 259 at 260

[6] See Plater, D '*The Development of the Prosecutor's Role in England and Australia with Respect to its Duty of Disclosure: Partisan Advocate or Minister or Justice'*, The University of Tasmania Law Review, Vol 25 No 2 2006

[7] (1792) 4 TR 691

'Buller J described the prevailing practice as follows:

The practice on common law indictments, and on informations on particular statutes, shews it to be clear that this defendant is not entitled to inspect the evidence, on which the prosecution is founded, till the hour of trial.

And Grose J observed:

It is clear that neither at common law, or under any of the statutes, is the defendant entitled as a matter of right, to have his application granted. And if we were to assume a discretionary power of granting this request, it would be ***dangerous in the extreme****, and totally unfounded on precedent.'*[emphasis added]

Over the next hundred years or so, there developed an obligation upon the prosecution to call all the witnesses listed on the back of the indictment whether they assisted the prosecution or otherwise. Legislation was passed which conferred upon the accused the right to inspect depositions of prosecution witnesses called at committal. There was a suggestion that in a murder trial in 1871 called *'Pook'* that the judge ordered the defence be provided with all the information that was available to the police and by 1882 it had been established that every accused person had the right to know, before his trial, what evidence will be given against him[8]. Although, it is important to note that the accused did not, at this stage, have the right to disclosure of unused material and the prosecutor was entitled to act as a partisan advocate.

In Australia, despite some modest formal requirements of disclosure inherited from the UK, it really wasn't until *R v Reardon [No 2]*[9] in 2004 and *Mallard v R*[10] in 2005 that the prosecutorial duty of disclosure, as we understand it today, was confirmed as the common law[11] in Australia. It is instructive to note that Kirby J's extensive analysis in *Mallard* of cases from other common law countries in relation to the duty of disclosure goes back no further than 50 years.

Prior to *Reardon*[12] and *Mallard*[13], the common law approach to disclosure was governed by the overarching ethical constraints of the prosecutor's position as a 'minister of justice', NSW

[8] R v Harris (1882) CCC Sec Pap xcv 525
[9] (2004) 60 NSWLR 454
[10] (2005) 224 CLR 125
[11] See below for discussion of statutory obligations that arose in 2001 in NSW
[12] See n8 above
[13] See n9 above

Bar Association professional rules and DPP Guidelines[14]. The accused relied upon informal and individual arrangements, in each case, between the prosecutor and defence, as to what exculpatory material might be disclosed to them. In 1981, Lane[15] described the situation in the following way:

'The general approach of the Australian courts to the non-disclosure of exculpatory evidence is to leave it to the unguarded discretion of the prosecutor. Such an approach appears to be founded on the concept of the prosecutor as a 'minister of justice' who can be trusted to ensure that justice is done.'

Unsurprisingly, this informal and ad hoc approach to the duty of disclosure did not ensure a fair trial for an accused person, nor did it prevent miscarriages of justice. In both Australia and England there were some terrible cases involving the conviction of innocent people due to lack of proper disclosure. It is surprising, however, that it took the Australian legal system such a long-time to remedy such a seemingly obvious problem – perhaps this is further illustrative of the 'old mates act' and the trust the profession puts in the special position of prosecutors in the criminal justice system. See for example *Lawless v R*[16] in which members of the High Court of Australia differed as to whether an exculpatory statement of an eyewitness to a murder should have been provided to the defence prior to trial.

Throughout the 1990's there was growing discontent among practitioners and the judiciary as to the lack of specific, formal requirements of prosecutorial disclosure. The issue was considered in detail by various appellate courts around the country, including the High Court in *Grey*[17], however, whilst the courts agreed broadly on requirement for prosecution disclosure, there was no agreement on the exact nature and extent of such a duty. The HCA was not required to consider the issue in *Grey* to any great extent as the Director[18] very fairly and appropriately conceded that a 'letter of comfort' provided to the principal Crown witness by the police should have been provided to the defence prior to trial.

In 2001 the NSW Parliament enacted the *Criminal Procedure Amendment (Pre-trial Disclosure) Act 2001* (NSW) which inserted, *inter alia*, s47E(g) into the *Criminal Procedure*

[14] *Grey v R* [2001] HCA 65 at [46]
[15] Lane B, *Fair Trial and the Adversary System: Withholding of Exculpatory Evidence by Prosecutors'* in Basten J (et al) (eds) 'The Criminal Injustice System' (Australian Legal Workers Group, (NSW) Sydney, 1981)188.
[16] (1978) 142 CLR 659
[17] See n13 above
[18] Mr Nicholas Cowdery AO KC

Act 1986 (NSW) ('CPA') which required the prosecution to provide a copy of any information, document or other thing provided by police officers to the prosecuting authority, or otherwise in the possession of the prosecuting authority, that may be relevant to the case of the prosecuting authority or the accused person, and that has not otherwise been disclosed to the accused person.

In 2004 Hodgson JA in *Reardon [No 2]* (cited with approval in *Spiteri*[19]) followed the English authorities of *Brown*[20] and *Keane*[21] in laying down rules governing the disclosure of documents. At [48] Hodgson JA stated:

'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)…..'an issue in the case' must be given a broad interpretation…'

In 2005 Kirby J in *Mallard*, after reviewing the approach of courts in other jurisdictions concluded at [81] that there is a:

'…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.'

Various cases[22], guidelines, rules and pieces of legislation now make it clear that the Crown has a duty to disclose all relevant material to the defence, including material relevant only to a prosecution witness' credibility and material that the Crown does not propose to lead ('unused material'). Failure to do so, in some circumstances, may require the quashing of a verdict of guilty; *Edwards v R* [2021] HCA 28.

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[19] [2004] NSWCCA 321 at [20]
[20] [1998] AC 367; [1997] 3 All ER 769
[21] [1994] 1 WLR 746; [1994] 2 All ER 478,
[22] See *Eastman v DPP (No 13)* [2016] ACTCA 68 at [329]-[344]; *Marwan v DPP* [2019] NSWCCA 161 at [27] – [36]; *Edwards v The Queen* [2021] HCA 28 at [48] – [61]

The relatively recent and ad hoc history of the development of the law from 'trial by ambush' to contemporary duty of disclosure obligations explains the 'patchwork' approach to this issue and puts difficulties encountered with prosecutorial disclosure in some context.

Why are prosecutors burdened by a duty of disclosure?

When considering how to approach a prosecutor with respect to the disclosure of material, it is helpful to consider why it is that this duty exists. Very briefly:

i. The rule of law requires it: It has been said that the rule of law is the yardstick by which the exercise of governmental power is measured[23]. The idea of the rule of law is often cited as the basis for legitimate laws, even more basic than a state's Constitution. The rule of law has been described as a rare and protean principle of our political tradition[24] and that it "*sustains much more than constitutionalism*."[25] The International Bar Association resolved in 2009[26] that contemporary prerequisites for the rule of law could be reduced to twelve principles. The duty of disclosure is relevant to three of these principles, namely: the presumption of innocence; the prerequisite of fair and public trials conducted without undue delay; and, the conduct of governance in society through open and transparent institutions and procedures;

ii. The role of the prosecutor requires it: (see above);

iii. The administration of justice requires it: to ensure fair and efficient resolution of trials and to ameliorate the power imbalance between the individual and the State.

A Practical Approach to Disclosure Issues

A practical approach to disclosure issues requires: a good knowledge of the relevant law and the evidence (or at least a better knowledge that your opponent) and your case; and, an understanding of history, human nature, organisational culture and the ability to

[23] TUMER M and MULLER S (2012) '*Rule of Law: A Guide for Politicians'* The Raoul Wallenberg Institute of Human Rights and Humanitarian Law and the Hague Institute for the Internationalisation of Law 2012 p7
[24] HUTCHINSON A and MONAHAN P (1987) *The Rule of Law: Ideal or Ideology* p9
[25] MASON K (1995) *The Rule of Law*, published in *Essays on Law and Government, Vol 1: Principles and Values (1995) p123*
[26] KIRBY. M (2010), *The Rule of Law Beyond the Law of Rules,* Article for the Australian Bar Review p8

communicate. This paper is primarily directed towards indictable trial procedure, with some references to summary procedure. Dealing with police prosecutors is a whole different kettle of fish.

Law and Policy

Statutory Obligations - Criminal Procedure Act 1986 (NSW)

A practical approach begins well before the matter gets into the District Court and Chapter 3, Part 3, of the CPA applies.

The CPA contains a variety of related and intersecting obligations upon the prosecutor to disclose material to the defence, some relate directly to the 'EAGP' scheme and others were present before the scheme was introduced. There is some tension between EAGP requirements and disclosure requirements.

Section 36B imposes a duty of disclosure upon law enforcement and investigating officials where the DPP is not the prosecutor. It is in terms consistent with s15A of the Director of Public Prosecutions Act. See also Page 100 of the *New South Wales Police Handbook* which instructs officers instructs officers in charge that they have a duty to "tell the police prosecutor" about any relevant information, documents or other things obtained during an investigation, or which come into their possession, that are not contained in the brief of evidence and that might reasonably be expected to assist the case for the prosecution or the case for the defendant[27].

The EAGP committal process is found at Chapter 3, Part 2 of the CPA (ss47-120). For the purposes of disclosure, the following is important to know:

i. Section 55 is a summary of the committal process and the brief reference at (c) to filing of a charge certificate belies a lengthy process undertaken within the DPP, by the managing solicitor, solicitor with carriage and charge certifier (Crown Prosecutor or Solicitor Advocate).

[27] It is interesting to note that both the NSW Police Handbook and Code of Practice for CRIME are no longer available to the general public or easily accessible by legal practitioners.

a) The brief provided by the NSW Police to the DPP at this stage is subject to an MOU and requires only a limited brief to be served – See Part 3 and Appendix A of the MOU.

b)The purpose of the 'EAGP' brief is merely to provide "evidence necessary to satisfy the elements of the offence to enable the DPP to certify charge/s laid by the NSWPF" THIS IS IMPORTANT TO REMEMBER.

c) Once the brief has been certified as 'compliant' with Part 3 of the MOU by the Managing Solicitor the matter is then allocated to the solicitor with carriage, generally a level 2 or 3 lawyer. The SWC thoroughly reviews the brief and writes a report for the charge certifier as to their opinion on the correct charges for certification. The brief then goes back to the managing lawyer who writes a report on the SWC's report. It then goes to the charge certifier who will write a report on the basis of the SWC's report, MS's report and the brief. The certifier will either certify the charges, certify different charges or refuse to certify. The certifier must apply the test in s66(2) CPA and this is the undertaking that they are giving to the court by signing the certificate:

(a) the evidence available to the prosecutor is capable of establishing each element of the offences that are to be the subject of the proceedings against the accused person, and

AND

(b) for an alleged offence for which there are duties of disclosure under the Director of Public Prosecutions Act 1986, section 15A —the prosecutor has received and considered verification of compliance about the duties . THIS IS IMPORTANT TO REMEMBER

ii. Division 3 – Disclosure of Evidence (ss61-64) is a requirement that the prosecutor MUST serve a brief of evidence in the Local Court. This may occur prior to certification but MUST occur after certification and prior to case conference (so long as the Magistrate orders the brief to be served before case conference). My interpretation of this Division, is that the brief should be a complete brief which contains all the information upon which the Crown propose to rely, however, may be in non-admissible format. (Eg telco records without a s69 affidavit). I am aware of other interpretations based on the definition of terms within the

section and the reality is that a complete brief is never served pre-committal (if at all) and it is the MOU brief that is most often provided.

The duty of disclosure in matters to be dealt with summarily is dealt with in Chapter 4, Part 2, Division 2, in particular ss183, 187 and 188. The same applies to Children's Court proceedings per s27 Children (Criminal Proceedings) Act 1987 except with respect to 'serious children's indictable offences'.

Once the matter has been committed to the District or Supreme Court for trial, the following sections from Part 3, Division 3 are important to know:

i. Sections 141 and 142 provide for mandatory pre-trial disclosure by prosecutor which includes, inter alia, a copy of each document, evidence of the contents of which the prosecutor proposes to adduce at trial, and anything 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.

ii. Section 143 requires a defence response and s144 requires a prosecution response to the defence response.

iii. The DCJ will set the timetable in accordance with Practice Notices 18/19.

iv. Section 146 provides the sanctions for failure to comply with pre-trial notice requirements, which can include exclusion of the impugned evidence. I have never seen this happen, the most common sanction imposed is an adjournment, which cuts both ways for your client. Most judicial officers want to hear a matter on its merits, rather than allow administrative or procedural considerations to determine a matter.

v. Section 149E gives the court the power to make such orders, determinations or findings, or give such directions or rulings, as it thinks appropriate for the efficient management and conduct of the trial, including ordering disclosure of any matter that was required to be disclosed under Division 3.

Statutory Obligations – Director of Public Prosecutions Act 1986 (NSW)

Section 15A of the DPP Act requires that the law enforcement or investigating officer 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. The officer is required to give an undertaking in a notice this effect.

Section 16 empowers the Director to give direction to the police requiring information be referred to the Director.

Paragraph 19(c) of DCPN 18 requires the police to swear and serve an affidavit confirming compliance with s15A of the DPP Act and outlining further evidence to be obtained.

Statutory Obligations – Legal Profession Uniform Conduct (Barristers) Rules 2015 (Bar Rules)

Rules 83-95 are the duties imposed upon prosecuting counsel. Rule 83 requires a prosecutor to act fairly to assist the court to arrive at the truth, must seek impartially to have the whole of the relevant evidence placed intelligibly before the court. This is a general admonishment to the prosecutor to behave fairly, which would include complying with the duty of disclosure.

More specifically, rules 87,88 and 89 relate directly to the duty of 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.

89 *A prosecutor must call as part of the prosecution's case all witnesses:*

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

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

unless:

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

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

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

(iv) the prosecutor believes on reasonable grounds that the testimony of a particular witness is plainly untruthful or is plainly unreliable, or

(v) the prosecutor, having the responsibility of ensuring that the prosecution case is presented properly and presented with fairness to the accused, believes on reasonable grounds that the interests of justice would be harmed if the witness was called as part of the prosecution case.

Prosecution Guidelines

The ODPP Guidelines with respect to disclosure, and many other things, can be found at https://www.odpp.nsw.gov.au/prosecution-guidance/prosecution-guidelines

Chapter 13 relates to disclosure and includes the following pertinent extract;

Prosecutors are under a continuing obligation to fully disclose to the accused all material known to them in a timely manner that on their sensible appraisal:

1. is relevant or possibly relevant to an issue in the case

2. raises or possibly raises a new issue that is not apparent from the evidence the prosecution proposes to rely on

3. holds out a real as opposed to fanciful prospect of providing a lead to evidence that goes to either of the previous two situations.

The prosecution's duty of disclosure continues after trial and the conclusion of any appeal.

The prosecution's duty of disclosure does not extend to disclosing material relevant only:

1. to the credibility of defence (as distinct from prosecution) witnesses

2. because it might deter the accused from leading false evidence in his or her case in respect of a fact not otherwise in issue, and therefore not foreseeably relevant to the proceedings at the time the prosecution became aware of the material.

The Guidelines also consider the relationship between legal privilege, public interest immunity and 'Director's privilege'. The prosecution must put the defence on notice of any known material over which a claim of privilege or immunity has or is being made, so as to allow the defence the opportunity to contest the relevant claim and seek access to the material via subpoena. Generally, this will be achieved by the service of a s15A disclosure certificate by Police.

On rare occasions the overriding interests of justice may require the existence of otherwise disclosable information to be withheld – for example where disclosure may pose a threat to

the personal safety of a person, or to protect an ongoing investigation. Such a course can only be taken with the approval of the Director or a Deputy Director.

In such cases, consideration must be given to whether the charge against the accused to which the material is relevant should be withdrawn and/or whether the accused should be charged with a lesser offence to which such material would not be relevant.

Unless any unfairness caused to the accused by withholding notice of the existence of such material can be ameliorated, the prosecution must be discontinued. In extraordinary circumstances delayed notice of the existence of such material may be approved by the Director or a Deputy Director. Any decision to delay notice should be for a finite period of time and regularly reviewed.

Common Law

The obligations of disclosure that exist at common law were summarised by Edelman and Steward JJ in *Edwards v The Queen* [2021] HCA 28 at [48]:

'The common law required, and still requires, disclosure of all material that, on a sensible appraisal by the prosecution: (i) is relevant or possibly relevant to an issue in the case; (ii) raises or possibly raises a new issue that was not apparent from the prosecution case; and (iii) holds out a real (as opposed to fanciful) prospect of providing a lead in relation to evidence concerning (i) or (ii). Further, since the disclosure can occur prior to any crystallisation of the defence case, or any refinement of the prosecution case, expressions in relation to common law disclosure rules, such as "an issue in the case" or "all relevant evidence of help to the accused", must be given a broad interpretation.'

In addition to the general statements of law above, some important aspects of the duty of disclosure which are addressed in the common law include;

i. the 'prosecution' for the purposes of disclosure includes the police (or other investigative agency) *Grey v R* [2001] HCA 65; (2001) 75 ALJR 1708, *Mallard v R* [2005] HCA 68; (2005) 224 CLR 125, *NSW Crime Commission v D101* [2020] NSWSC 809 citing with approval *R v Farquaharson* (2009) 26 VR 410; *Brawn v The King* [2025] HCA 20 at [29]

ii. in *R v LN; R v AW (No 2)* [2017] NSWSC 153, Johnson J observed at [33] that "the statutory disclosure regime in the CPA is additional to the common law prosecution duty of disclosure";

iii. those obligations have been described as a duty to the court, rather than the accused, which must be complied with to ensure a fair trial: see *Marwan v DPP* [2019] NSWCCA 161 at [29] (Leeming JA);

iv. there is a very limited obligation upon the prosecution to investigate in order to comply with disclosure obligations; *Marwan v DPP* [2019] NSWCCA 161 at [45]-[53];

v. conference notes taken by lawyers employed by the DPP are protected by client legal privilege and are not generally amenable to disclosure; *R v Stanizzo* [2019] NSWCA 12 at [26];

vi. disclosure obligations are on-going and continue to apply in sentence proceedings; *R v Lipton*[2011] NSWCCA 247; s147 CPA

vii. in addition to material which could support an anticipated defence, the prosecutor should disclose material which the defendant could use during the trial to; object to prosecution evidence; cross-examine a prosecution witness; attack the credibility of a prosecution witness;[28]implicate a prosecution witness;[29] explore the mental health of a prosecution witness;[30] test the prosecution's expert evidence;[31]

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[28] *R v Jenkin (No 2)* [2018] NSWSC 697*; Easterday v The Queen* (2003) 143 A Crim R 154*; R v Livingstone* (2004) 150 A Crim R 117 at [43]*; Aouad and El-Zeyat v R* [2011] NSWCCA 61 at [354]; *Grey v The Queen* (2001) 184 ALR 593 at [16]-[18] and [70];

[29] *R v Jenkin (No 2)* [2018] NSWSC 697; *Grey v The* Queen (2001) 184 ALR 593 at [22]; *R v Dickson; R v Issakidis* (No 12) [2014] NSWSC 1595 at [57].

[30] *R v Jenkin (No 2)* [2018] NSWSC 697

[31] *Ragg v Magistrates' Court* (2008) 18 VR 300 at [122]

challenge an evidentiary certificate;[32] or, seek a direction that prosecution evidence is unreliable;[33]

viii. it is generally accepted that defence counsel are in a better position to assess what information may be of assistance to an accused's defence than a court who is not privy to the accused's instructions: *R v Jenkin (No 2)* [2018] NSWSC 697 at [21]-[22] (Hamill J).

ix. for a failure to comply with the duty of disclosure to give rise to a miscarriage of justice, that failure must be material in the sense that it could realistically have affected the reasoning of the jury to a verdict of guilty that was returned by the jury in the criminal trial that occurred: *Brawn v The King* [2025] HCA 20 at [10]

x. failure to disclose the discount for assistance for other offending afforded an important Crown witness is a breach of the duty of disclosure which would result in a miscarriage of justice: *Chamma v R* [2025] NSWCCA 84 at [3]-[5]

Police and DPP History and Culture

It is important to understand the history and culture of the NSW Police and NSW DPP, as those who work within each organisation are influenced at least as much by organisational culture as the legislation. Police and prosecutors are human beings and will have human reactions, human failings, and human foibles which must be considered and factored into your approach to the DPP. Each organisation has its own culture which changes over time and between location and will be relevant to how you approach disclosure and other negotiations.

[32] *Gaffee v Johnson* (1996) 90 A Crim R 157

[33] *Grey v The Queen* (2001) 184 ALR 593 at [21] and [61]

What to do about disclosure

Firstly, you need to know your brief, what you want and why you want it. You need to know the law and the obligations of prosecutor to act fairly and to disclose. You need to know the MOU and exactly what you are entitled to expect. If you know more about the brief and the law than the prosecutor, then you already have the upper hand (this is true for everything, not just disclosure).You need to consider:

i. whether it is tactically wise to ask for disclosure of a particular item or if you are tipping off the prosecution about potentially inculpatory material they have overlooked. You might be better to remain silent and cross-examine the OIC about it at trial and ask for a direction. If it is something that is glaringly obvious, that you will more than likely receive at some point during the process anyway, you are better off asking for it early. It is a difficult tactical decision though and will often come down to your instructions and the specifics of your brief.

ii. whether you might be better off obtaining the proof yourself and then you can decide whether and how to disclose and/or use the evidence and you can use the evidence to your tactical advantage. Often detectives will put their own 'spin' on a witness' statement in the process of taking that statement.

Once you have decided that you want the evidence to be disclosed by the prosecution, there are a number of approaches you could take:

Local Court Stage

i. Ask. Just informally ring the SWC, chat about it and follow up with a pleasant email. This will be successful in many cases. Generally, it is the police who cause the problem, not the DPP, and the SWC will do their best to obtain the material. Usually, it is the OIC who objects to reasonable disclosure requests.

ii. Make a formal request identifying items and quoting the law/policy. This tends to annoy DPP solicitors and Crowns, but it can work and can be useful as evidence when seeking remedy down the track.

iii. Make an application under s61(1) CPA requiring disclosure of complete brief (as opposed to the MOU brief) by a certain date. If the DPP say that is all they have then ask at court for an undertaking by the prosecutor, on the record, that there will be no further brief items served.

iv. Use the case conference to request production of further material per s70(3)(a),

v. Make an application under s82 of the CPA to call evidence from a 'person whose evidence is referred to in the brief'. Of course, this is only useful if the information is referred to in the brief, it does not help with discovering things you do not know. Usually, to avoid coming to court, the DPP/Police will stump up the statement before the hearing date. If you do get to hearing you can cross-examine disclosure out of the witness and call on the Crown to produce anything referred to by the witness.

vi. Issue a subpoena, but you need to have some idea of what you are after otherwise there is no legitimate forensic purpose. Also, anything with a SACP potential can only be sought once the matter is in the higher court and with leave. Don't forget, anything you see will be seen by the Crown – is this wise?

<u>District/Supreme Court Stage</u>

i. Ask, nicely again/invoke the 'old mate's act'

ii. Practice Note 18/19 will govern the timeline at this stage.

iii. Issue subpoena.

iv. Seek pre-trial orders for disclosure under ss136,139 and 149E.

v. Seek exclusion of late evidence per s146 CPA.

vi. Temporary stay pending disclosure of requested items; *Bradley v Senior Constable Chilby* [2020] NSWSC 145.

vii. Permanent stay.

viii. Directions, warnings and complaints.

Helpful cases on the duty of disclosure and prosecutor's duty to act fairly:

i. *Edwards v R* [2021] HCA 28
ii. *Brawn v The King* [2025] HCA 20
iii. *Lipton v R* [2011] NSWCCA 247
iv. *Mallard v R* [2005] HCA 68
v. *Kinghorn v DPP (C'th)* [2020] NSWCCA 48
vi. *Libke v The Queen* [2007] HCA 30
vii. *Whitehorn v R* [1983] HCA 42
viii. *R v Hannah Quinn (No 2)* NSWSC 494
ix. *Gould v DPP (C'th*) [2018] NSWCCA 109
x. *Marwan v DPP* [2019] NSWCCA 161
xi. *Eastman v DPP (No 13)* [2016] ACTCA 68
xii. *Grey v R* [2001] HCA 65
xiii. *Spiteri v* R [2004] NSWCCA 321

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31 October 2025