

Royal Commission into the Management of Police Informants
Submission by the Commonwealth Director of Public Prosecutions

Disclosure issues

December 2019

1 Introduction

1. The Office of the Commonwealth Director of Public Prosecutions (CDPP) is an independent prosecution service established by the *Director of Public Prosecutions Act 1983* (Cth) (the DPP Act) to prosecute offences against Commonwealth law.
2. The CDPP aims to provide an effective and efficient independent prosecution service that contributes to a fair, safe and just Australia, where Commonwealth laws are respected, offenders are brought to justice and potential offenders are deterred.
3. The CDPP thanks the Royal Commission for the opportunity to make submissions on questions relating to disclosure in criminal proceedings. The CDPP also thanks the Commission for the consultation paper it has provided on this issue.
4. This submission is addressed to the Royal Commission's term of reference 4, as it relates to disclosure in the criminal justice system.
5. The submission does not touch on whether, and if so what, disclosure failures occurred in particular cases arising from the use by Victoria Police of a human source with an obligation of confidentiality or privilege. Rather, the focus of this submission is on current disclosure practices, with a view to how those practices might be improved in Victoria, particularly as they relate to the use of such human sources.
6. In this submission the CDPP will outline in broad terms the legal and administrative framework for disclosure in prosecutions conducted by the CDPP and the policies and practices adopted in prosecutions conducted by the CDPP. It will then address the questions raised in the consultation paper.

2 Disclosure obligations applicable to prosecutions conducted by CDPP

7. The CDPP has a unique perspective on disclosure in criminal proceedings, because it has long experience in conducting prosecutions in each Australian State and Territory.
8. The principal function of the CDPP is to conduct prosecutions for offences against the laws of the Commonwealth. The DPP Act also permits the CDPP in appropriate circumstances, to conduct a prosecution for a State or Territory offence.
9. While prosecutions conducted by the CDPP are usually the product of investigations by a federal agency such as the Australian Federal Police (AFP), briefs are also commonly provided by State or Territory police forces or by joint taskforces consisting of officers from federal and State investigative agencies.¹ CDPP has conducted many cases investigated by Victoria Police, either as

¹ In the 2018-2019 financial year, 19% of the cases referred to the CDPP were referred by State or Territory agencies. This figure does not include joint investigations where the referring agency was a federal agency.

the sole investigative agency or when its members are part of a joint task force. These include prosecutions for serious drug offences, money laundering, child exploitation and terrorism offences, to mention a few examples.

10. The overwhelming majority of prosecutions conducted by the CDPP are heard and determined in the courts of the relevant State or Territory. The procedural law of the particular State or Territory applies in such matters, by virtue of ss 68 and 79 of the *Judiciary Act 1903* (Cth) (unless there is a Commonwealth law or legislative scheme which has the effect of rendering a particular State or Territory law inapplicable).² Since Commonwealth law does not currently provide a general regime for disclosure in proceedings for Commonwealth offences, laws of the relevant State or Territory relating to disclosure generally apply.
11. The CDPP has published a summary of statutory disclosure regimes in each State and Territory.³
12. The different disclosure requirements operating within these various regimes can create difficulties in prosecutions for federal offences, especially as federal investigations often cross State or Territory (or national) boundaries. There is also variation between jurisdictions in how actively courts manage disclosure and the procedures for identifying and narrowing issues in proceedings.
13. The Federal Court of Australia has jurisdiction to conduct summary hearings or proceedings on indictment for a narrow class of Commonwealth offences, though the court's criminal jurisdiction is anticipated to expand in the near future. The *Federal Court of Australia Act 1976* (Cth) and the *Federal Court (Criminal Proceedings) Rules 2016* (Cth) set out the procedure for the conduct of such proceedings. The Act and the Rules make extensive provision in relation to disclosure in criminal proceedings in that Court. Although there is, to date, little experience of the operation of this regime in practice, on its face the regime is a model of clarity and simplicity, with a clear focus on the disclosure by the prosecution of material relevant to the accused's case coupled with a mechanism for identification of the issues between the parties.
14. In proceedings for a Commonwealth offence (whether in a federal court or a State or Territory court), the court is always exercising federal jurisdiction. Pursuant to s 80 of the *Judiciary Act 1903* (Cth), the common law (as modified by the Constitution and by statutes of the relevant State or Territory) governs all courts exercising federal jurisdiction. The common law applies to fill gaps in Commonwealth law.⁴ The CDPP proceeds on the assumption that common law obligations of disclosure by the prosecution, which are duties owed to the court,⁵ are thus applied in Commonwealth prosecutions, to the extent that Commonwealth law leaves a gap in this regard.

3 Disclosure policy and practices in CDPP prosecutions

15. CDPP has published a *Statement on Disclosure*, which sets out the CDPP's expectations as to how the prosecution should fulfil its duties of disclosure. The current revision of the Statement, dated March 2017, is available for download from the CDPP website. For convenience, a copy is annexed to this submission.

² See *Williams v R [No 2]* (1934) 50 CLR 551; *Solomons v District Court (NSW)* (2002) 211 CLR 119; *R v Gee* (2003) 212 CLR 230.

³ The summary can be downloaded from the CDPP website at: <https://www.cdpp.gov.au/partner-agencies/disclosure-statement>

⁴ *Bui v DPP (Cth)* (2012) 244 CLR 638.

⁵ *Marwan v DPP* [2019] NSWCCA 161, [27]-[30].

3.1 Scope of the duty of disclosure

16. The scope of the duty is set out in Part 1 of the *Statement on Disclosure* ([2]-[8]). As that Part makes clear, subject to any claim of public interest immunity (PII), legal professional privilege (LPP), or any statutory provision to the contrary, the prosecution in Commonwealth matters must comply with any applicable statutory obligations in the relevant jurisdiction and (if not already required by such statutes) with ethical obligations at common law.

17. The latter obligations are summarised in the *Statement on Disclosure* (at [3]) as requiring disclosure of –

... 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
- 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.

18. For convenience this will be referred to as the relevance test.

19. The *Statement on Disclosure* (at [4]) also says —

The prosecution duty of disclosure under this Statement does not extend to disclosing material which is:

- a. relevant only to the credibility of defence (as distinct from prosecution) witnesses;
- b. relevant only to the credibility of the defendant;
- 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;
- 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. [Footnotes omitted]

(Compare *Spiteri*.⁶)

20. The *Statement on Disclosure* (at [14]) lists the following examples of disclosable material -

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;

⁶ *R v Spiteri* (2004) 61 NSWLR 369.

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

3.2 Material and information held by the investigative agency

21. The *Statement on Disclosure* (at [5]) treats material in the possession of, or information known by, the investigative agency as being in the possession of, or known by, “the prosecution” for the purposes of the disclosure obligation. The Statement adds (at [5]) -

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.

22. The requirement that an investigative agency inform the CDPP about such material or information is reinforced by s 12 of the DPP Act, which relevantly provides -

12 Provision of information to Director

Where a prosecution for an offence against a law of the Commonwealth has been instituted, or is being carried on, by a person other than the Director and:

- (a) the Director informs the person that the Director is considering taking over the prosecution or directing that the matter be referred to the Director for the carrying on of the prosecution;*
- (b) the Director takes over the prosecution or directs that the matter be referred to the Director for the carrying on of the prosecution; or*
- (c) the person considers that the Director should take over the prosecution or that the matter should be referred to the Director for the carrying on of the prosecution;*
the person shall furnish to the Director:
 - (d) a full report of the circumstances of the matter;*
 - (e) a copy of the statements of any witnesses;*
 - (f) each material document in the possession of the person; and*
 - (g) such other information or material as the Director requires.*

23. The reference to “*each material document*” in paragraph (f) must be read in light of the prosecution obligations of disclosure.

24. In practice, after an investigative agency provides a brief to the CDPP, the CDPP requests that it is provided, by the investigative agency case officer, with a list or copy of material which is required to be disclosed under paragraph [3] of the *Statement on Disclosure* and to inform the CDPP of the existence of any material which would fall within that paragraph but which may be immune from disclosure because of LPP, PII or a statutory prohibition. The CDPP requests that the case officer certify compliance with this requirement.

25. Neither the *Statement on Disclosure* nor s 12 of the DPP Act requires that the CDPP, rather than the investigative agency, determine for itself whether information or material held by the investigative agency satisfies the relevance test. In *Gould*,⁷ the investigative agency (the AFP) had determined that particular material which it held did not satisfy that test. The applicant contended that the CDPP was required to undertake an appraisal of the material held by the AFP to determine whether it was required to be disclosed to the accused. In rejecting that contention, Basten JA (with whom Johnson and Adamson JJ agreed) said ([16]) -

⁷ *Gould v DPP (Cth)* [2018] NSWCCA 109.

There were two issues sought to be raised by the applicant. The first was that it was the prosecutor, not the police, by whom the documents should have been assessed. However, no authority was relied on in support of that proposition and it was not part of the disclosure obligations, as articulated by the applicant before the primary judge, nor in the terms of the Director's published Statement [ie. the Statement on Disclosure]. No submission was made as to why the duty should be formulated in that way. Indeed, there are good reasons not to formulate a duty in such terms given the importance, in some circumstances, of quarantining particular material from the prosecution.

26. It is clear, therefore, that (absent a contrary statutory requirement) it is for an investigative agency to make an initial determination of whether information or material which it holds satisfies the relevance test. The CDPP will make an assessment of whether information or material which it holds should be disclosed, but is not required to examine the holdings of an investigative agency to determine whether any other material is disclosable. It would self-evidently be wholly impracticable to require otherwise.
27. Moreover, as Basten JA pointed out in *Gould*, there are good reasons not to formulate a duty in terms that the prosecutor, rather than the investigative agency, must assess whether any material in the possession of the investigative agency is disclosable. There are circumstances in which a prosecutor should not be provided with particular material held by an investigative agency.⁸
28. Statutory disclosure requirements generally proceed on the same basis. For example, in Victoria, under the *Criminal Procedure Act 2009* (Vic) (CPA), disclosure obligations for the purposes of summary hearings and committal hearings are imposed on the informant.⁹ Those are continuing obligations;¹⁰ that is, they continue to apply to material which comes into the possession of the agency or where the agency becomes aware of their existence or relevance. The common law obligations of a prosecutor run in parallel to the statutory requirements.¹¹
29. The CDPP regularly provides guidance and assistance to investigative agencies with whom it works to assist them in fulfilling disclosure obligations.

3.3 Material subject to PII, privilege or a statutory prohibition on disclosure

30. As the *Statement on Disclosure* makes clear (at [3]), disclosure obligations are subject to any claim of PII, LPP or any statutory provision to the contrary. (An example of a statute which restricts disclosure is the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (the NSI Act).)
31. If material which satisfies the relevance test is withheld on one of these bases, the *Statement on Disclosure* ([23]) requires that the defence should ordinarily be informed of this. As the Statement recognises, in most cases some general information as to the nature of the material concerned and the basis upon which it has been withheld can be provided without compromising the basis for the claim.
32. Sometimes the defence will respond by causing a subpoena to be issued for the production of the material. On occasions, the mere fact that the prosecution has notified the existence of the material has been held sufficient for the accused to establish a legitimate forensic purpose for the issue of the subpoena.¹² The basis of the claim for PII, LPP or statutory prohibition can then be determined on the return of the subpoena. Such claims are invariably argued by the holder of the

⁸ See, for example, *Lee v R* (2014) 253 CLR 455; *Strickland (a pseudonym) v DPP (Cth)* [2018] HCA 53.

⁹ CPA, Part 3.2, Division 2; Part 4.4.

¹⁰ CPA, ss 42, 111, 185.

¹¹ CPA, s 416.

¹² E.g. *R v Benrika (Ruling No.3)* [2007] VSC 283.

material (usually the investigative agency, but sometimes another agency, such as ASIO) or the holder of the privilege, as the case may be. The CDPP is involved only to the extent of providing assistance to the court about the nature of the prosecution case and the potential relevance of the material to the case.

33. On occasions, the existence of the material or the basis of the claim cannot be disclosed to the defence without compromising the basis for the claim. For example, a PII claim based on the need to protect the identity of an informer may in some cases be compromised merely by disclosing the existence of the material or the basis of the claim. In such a case, ideally the foundation of the claim would be considered on an *ex parte* application to a court. Western Australia, for example, provides a statutory procedure by which such an application can be made. (The merits of such a procedure are referred to later in this submission.)

34. The *Statement on Disclosure* ([24]) acknowledges that where relevant material is withheld on the basis of a claim of PII, LPP or a statutory non-disclosure requirement, or where a court has determined (for example, on the return of a subpoena) that such a basis is made out, “*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.*” The High Court adverted to this possibility in *AB v CD*.¹³ It must be stressed, however, that cases in which a prosecution must be discontinued for this reason are rare. In many circumstances, the risk of unfairness can be avoided by other means, such as prosecution on different charges or narrowing of the prosecution case.

4 CDPP responses to consultation questions

35. The following responses to questions raised in the consultation paper provided by the Royal Commission should be read in conjunction with the foregoing outline.

4.1 Police disclosure to DPP

Q1. In your view, should police be required to disclose to the DPP the use of a human source with legal obligations of confidentiality or privilege (or other categories of human sources) in an investigation, where that information is relevant to the case of the accused? Why or why not?

Q2. More broadly, should investigating police be required to disclose to the DPP the existence of all potentially disclosable material, even if the material is subject to a claim of public interest immunity? Why or why not?

Q4. Would the introduction of a disclosure certificate along the lines of the disclosure certificate provided for in Schedule 1 of the Director of Public Prosecutions Regulation 2015 (NSW) help facilitate the provision of relevant material from investigating police to the DPP?

a. Would the introduction of such a disclosure certificate help facilitate the provision of relevant material from investigating police to Victoria Police prosecutors in summary matters?

Q5. Is there a need for a statutory requirement for police to provide the DPP with material police have withheld from the DPP on the grounds of public interest immunity when requested by the DPP to provide that material (as is provided for in New South Wales)? Why or why not?

36. It is convenient to respond to these four questions together.

¹³ *AB v CD* [2018] HCA 58, [9].

37. The CDPP makes no comment on the current arrangements between Victoria Police and the Victorian DPP relating to the provision of information or on any possible changes to those arrangements. The following observations relate to briefs which may be provided to the CDPP.
38. The CDPP's arrangements for dealing with investigative agencies have been outlined above. There is no special rule or arrangement relating to the use of a human source. The mere fact that an investigative agency has obtained information from a human source in the course of an investigation does not mean that it is disclosable. It is disclosable only if it satisfies the relevance test in paragraph [3] of the CDPP's *Statement on Disclosure*. Often it will not. If it does, the same arrangements apply as for any other information or material.
39. As mentioned above, when a brief is provided to the CDPP, it requests the investigative agency to provide it with a list or copy of material which is required to be disclosed under paragraph [3] of the CDPP's *Statement on Disclosure* and to inform the CDPP of the existence of any material which would fall within that paragraph but which may be immune from disclosure because of PII, LPP, or a statutory requirement. The CDPP requests that the investigative agency case officer certify compliance with this requirement. If in doubt, investigative agencies are urged to err on the side of caution.
40. Currently, there is no need for the agency to provide to the CDPP the actual documents which are said to be immune from disclosure unless the CDPP asks to see them. Whether the CDPP does so depends on the circumstances. Highly confidential information such as the identity of a human source generally need not be disclosed to the CDPP.
41. If the agency has particular concerns about the possible effect of disclosing information to an accused (such as the possibility of identifying a human source), it is expected to advise the CDPP of these concerns and the reasons for them. The CDPP will then discuss these concerns with the agency and an appropriate course of action will be determined.
42. In the experience of the CDPP, such arrangements for the provision of information to the prosecution agency are necessary to ensure that prosecution disclosure requirements are fulfilled and that disclosure is managed effectively. The need is heightened in complex cases – for example, where there are different sets of charges against a particular accused, where there are multiple accused, where there are overlapping investigations or where there is more than one investigative agency. The arrangements which the CDPP has in place allow it to record and co-ordinate disclosure and promote consistency in approach. The CDPP in recent months has looked to identify how it might continue to further strengthen its arrangements with agencies. In 2020 the CDPP will seek to have 'disclosure meetings' with investigators at key junctures of the litigation (eg pre-charge, pre-committal, shortly after committal and prior to trial). The purpose of these meetings is to reiterate what proper disclosure looks like in the context of the particular case. This will include discussing the nature of the prosecution case and the nature of the defence case (which can and do change over time) and to also discuss the nature of the holdings of the investigative agency which might assist the defence case. Ultimately from the CDPP's perspective having schedules is one part of the information gathering process, but the continued discussions with investigators on the aforementioned topics ensures that investigators and prosecutors actively turn their minds to how disclosure obligations are discharged.
43. Managing disclosure can be challenging, but overall these arrangements have generally worked satisfactorily for the CDPP without the need for statutory provisions (apart from s 12 of the DPP Act, which applies in limited circumstances).

4.2 Disclosure to the accused of the existence of material subject to a claim of PII

Q3. Are the existing mechanisms by which an accused person is notified of the existence of relevant material that may be subject to a claim of public interest immunity adequate? (E.g. can such disclosure be appropriately made through the use of the Form 30 or the Form 11 or are other means more appropriate?) Why or why not?

44. As outlined above, the CDPP has its own procedures for disclosing to the defence the existence of relevant material which is subject to a claim of PII, LPP or statutory prohibition. Often the existence of the material and the nature of the claim is disclosed simply by a letter to the defence. How much information can be provided will depend upon the nature of the material; care is always taken to describe the material and, if practicable, the nature of the claim in a way which does not compromise the basis for the claim. Doing so will often lead the defence to cause a subpoena to be issued or an application to be made to the court. On the return of the subpoena, or the hearing of the application, the claim can be determined by the court.

45. In the CDPP's experience, some flexibility around the timing of the disclosure of material over which PII is claimed, is important. When a person is charged with a serious offence which is to be tried on indictment, there are often ongoing investigations into the offending, both in relation to the person charged and other persons. These investigations may include, for example, analysis of large quantities of seized material and electronic surveillance product and the pursuit of complex money trails. The months immediately following such charges are often particularly sensitive. There is often a high risk that revelation to an accused at that time of the existence of material or information held by investigators will lead to destruction or concealment of evidence, the removal of proceeds of crime or the escape of other offenders. During this period classes of material or information would often be subject to a claim of PII for such reasons, even though that material or information will become capable of disclosure once investigations are more advanced and other charges have been laid as appropriate. A blanket requirement for disclosure in a hand-up brief would generate an unnecessarily large number of PII claims of short duration. The existence of a provision such as s.138 Criminal Procedure Act 2004 (WA) is unlikely to provide a workable solution as this would lead to repeated applications, often ex parte, for rulings on those claims. This would be disruptive and resource-consuming for courts, prosecutors and investigators. It would also tend to delay the completion of hand-up briefs and of key investigations. It would be preferable, in the view of the CDPP, to allow the prosecution some discretion to defer disclosure until a more suitable time.

4.3 Disclosure in summary prosecutions

Q6. Do you have any experience or views regarding the approach that should be taken in relation to summary matters where the investigation has involved the use of a human source with legal obligations of confidentiality or privilege? Are there adequate safeguards currently in place? Why/why not?

46. Senior officers of the CDPP cannot recall a single case which it has prosecuted summarily in which, to the knowledge of the CDPP, the investigation has involved the use of a human source with legal obligations of confidentiality or privilege.

47. The CDPP's current disclosure arrangements would apply equally to summary prosecutions as to prosecutions on indictment. See the discussion above of those arrangements.

4.4 Challenges in complying with disclosure requirements and possible improvements

Q7. What in your experience are the key benefits and challenges of the approach taken in Victoria to disclosure where public interest immunity issues are involved? What measures might be needed to address any challenges?

Q9. In your view, how well are disclosure obligations, issues relating to legal professional privilege and public interest immunity understood by investigating police?

a. Do you have any views about how this could be improved (if needed)? (for example, the use of dedicated disclosure officers in complex investigations, targeted training, additional support and/or guidance materials?)

Q10. What, if any, challenges or barriers are experienced by police and the prosecution in discharging disclosure obligations in cases where public interest immunity issues arise? (e.g. does the volume of material obtained in some investigations present any challenges?)

48. It is convenient to answer these three questions together.

49. Numerous barriers and challenges are encountered by CDPP and investigative agencies in dealing with disclosure obligations. It is not useful to distinguish between those which relate to PII issues and other problems. They are inter-related.

50. Some of the major barriers and challenges include the following -

Scope of the duty: In Victoria, the CPA requires disclosure of various classes of material which are “relevant to the alleged offence” or “relevant to the charge”; these terms are not defined or explained in the Act, and can be misunderstood, but the CDPP takes the view that relevance in this context is directed at ensuring fairness to the accused and means relevance to assisting the defence case in the ways set out paragraph 17. In the early stages of litigation, or where the issues in dispute have not been clearly articulated by defence, investigators and prosecutors will usually err on the side of caution. This can lead to over-disclosure of material which can, in turn, overwhelm both the prosecution and the defence with material which is, at best, tangential to the case.

Voluminous material: The volume of electronic material that is routinely collected by investigators continues to grow. Even a single mobile telephone typically contains a vast quantity of data. Proper and efficient consideration of such material for disclosure purposes poses a great challenge.

Joint agency investigations: These problems of voluminous data, lack of understanding of disclosure requirements and over-disclosure are multiplied in matters where various agencies are involved in the investigation and have holdings on the defendants. The holdings of these agencies may be held on different digital platforms. Searching may be costly and resource-intensive. Significant and valuable public resources can be consumed searching for material which may go only to an issue that is not in dispute in the trial.

Cumbersome mechanisms for dealing with PII issues: The CDPP deals with material which can be extremely sensitive, not just around informers, but also around national security, and the current court mechanisms can be cumbersome.

Lack of onus on the defence to identify the issues: This lack of clarity about what the real issues are, wastes resources on the police and prosecution side in chasing down illusory or speculative disclosure issues. The need to fulfil disclosure requirements when there has been

no real identification of the issues leads to production of far more material than is necessary. In some cases this can lead to stay applications.

51. The Commission has noted in its consultation paper, the current work of the Victorian Law Reform Commission (VLRC) regarding its Committals Review. The CDPP agrees that there is a clear overlap in the work of the VLRC and the Commission. In general terms, it is the CDPP's view that a holistic approach to procedural reforms is more likely to yield an improved criminal justice system, rather than the focus being on quite specific aspects, such as disclosure. That said, particular areas for potential improvement in the disclosure regime include the following -

Mechanisms for early identification of issues: Identification of the defence case and the issues in dispute, at the earliest possible juncture, would enable prosecutors and police to ensure that their efforts at making proper disclosure were targeted in the correct areas, thereby ensuring fairness to the defendant.

Incentives for early resolution: In recent years New South Wales and some other jurisdictions have specified ranges for statutory sentence discounts which encourage defendants who intend to plead guilty to do so early.¹⁴ Indications to date are that these provisions have had some success in eliciting earlier pleas. The early resolution of such cases enables valuable resources of all agencies in the criminal justice system to be better focused on those matters which are to be contested.

Improved statutory procedure for resolving PII and other disclosure issues: This proposal is discussed below.

52. Western Australia provides for an expeditious and effective procedure for rulings on disclosure questions, on ex parte application where necessary: see *Criminal Procedure Act 2004 (WA)*, s 138. This procedure has been used in federal criminal cases and has worked well. A similar procedure in Victoria may have similar utility.
53. Some of the matters mentioned would have the effect of assisting in improving police compliance with disclosure obligations. Additional measures that would do so could include the following -

Improved guidance: Commonwealth investigative agencies are provided with detailed guidance on how to navigate and manage difficult disclosure issues. Feedback from those agencies is that they find such guidance invaluable and that it promotes a relationship of trust and co-operation between investigators and prosecutors. Investigative agencies feel reassured that the CDPP will work co-operatively with them to manage PII issues sensitively and effectively.

Improved training: Disclosure can be a complex and difficult subject. The experience of the CDPP is that even experienced investigators can benefit from continuing professional development in this area.

Early access to legal advice: The experience of the CDPP is that, in complex investigations, investigators benefit from having access to legal advice about potential disclosure questions and procedures (and other legal issues arising during an investigation) at any early stage. If that advice is available from the prosecution agency, it not only offers the benefit of relevant experience, but also allows for a seamless transition of matters from investigation to prosecution. The CDPP recognises, however, that, for a range of reasons, State prosecution agencies are not necessarily in a position to provide this kind of assistance. At the least,

¹⁴ Such schemes are not applicable to the sentencing of federal offenders, because they are contrary to the scheme of s 16A of the *Crimes Act 1914* (Cth): see, for example, *Ngo v R* [2017] WASCA 3.

however, it would clearly be beneficial for police to have access to, and be encouraged to obtain, independent legal advice (whether from the government solicitor or from in-house counsel) whenever questions arise about relevance, PII, privilege or statutory restrictions on disclosure.

Disclosure Officers: We note the reference in Q9a to the possible use of dedicated disclosure officers in complex cases. Whilst the experience of the use of such officers in England and Wales appears to have done little to stem disclosure failures that have beset the criminal justice system in those countries, the CDPP is of the view that dedicated disclosure officers may well be a beneficial model, where used appropriately. Some federal investigative agencies already use dedicated disclosure officers. As part of its recent internal updating of disclosure practices and policies the CDPP has specifically noted that prosecutors should encourage the appointment of dedicated disclosure police officers/investigators in large and complex matters. The CDPP will also be encouraging police/investigators in such matters to prepare a disclosure plan to assist with their management of disclosure.

4.5 Prosecution involvement in resolution of PII issues

Q8. Should the DPP be more involved at an early stage in assessing material over which police may wish to make a claim of public interest immunity and assisting police with any applications to a court to determine that claim? If so, what measures might be needed to achieve this?

54. As described above, the CDPP will be advised by an investigative agency, usually at an early stage, if relevant material is subject to a PII claim. In complex matters, this will sometimes occur before a brief is provided to the CDPP.

55. Where necessary and appropriate, the CDPP may consider the material in question and discuss PII and disclosure issues with the investigative agency. Those discussions may include such matters as the basis for the PII claim, the significance of the material for the case, and appropriate procedures for resolving the PII claim. Consideration will also be given to whether and when the existence of the material can be disclosed to the accused and how much information can be provided about the material and the basis for the claim.

56. However, the CDPP is not itself involved in pursuing a claim for PII. The invariable practice throughout Australia in Commonwealth prosecutions is for PII claims to be made and argued by the agency concerned. PII claims are usually made by the investigative agency but sometimes are made by an interested third party agency.

57. There are very good reasons for this practice.

58. First, it is at least doubtful whether the CDPP has power to appear on behalf of another agency to make a PII claim. In *Salmat*,¹⁵ McKechnie J held that the CDPP had no power to appear for a Commonwealth agency or authority (in that case, the AFP and Australia Post) on the return of a subpoena. His Honour said (at [26]-[28]) -

26 ... I conclude that it is neither an incident of the performance of the DPP's functions nor is it conducive to the performance of those functions that the DPP represents a third party who is subject to a witness summons to appear and give evidence or produce documents to a court in the course of a prosecution. There is no nexus between the witness and the proceedings such as to make a grant of power necessary because there will be cases where the interests of the DPP and those of the witness do not coincide and the DPP has power in any event to intervene in the matter to protect the prosecution's interests.

¹⁵ *R v Salmat Document Solutions Pty Ltd* [2005] WASC 232.

27 ... [Health Insurance Commission v Freeman (1998) FCR 544] establishes that the DPP may act for the AFP by giving legal advice as long as an investigation by the AFP provides a sufficient nexus between the DPP's functions under s 6(1)(2) and s 6(n) of the Director of Public Prosecution Act.

28. In the present case, the production or objection to production of documents pursuant to a summons does not create a nexus. Nor are the disclosure requirements on the DPP any answer. It is not necessary or conducive for the DPP to act for the AFP on the summons just because the DPP has disclosure requirements with which it must independently comply.

59. Second, as the quoted passage from *Salmat* indicates, a conflict may arise between the interests of the CDPP as prosecutor and those of the relevant agency.

60. Third, there may be circumstances in which the CDPP cannot have access to the material in question without compromising its position as prosecutor (e.g. where the material has been obtained under compulsion and cannot be provided to the prosecution).

61. Fourth, the practice by which PII claims are pursued by the relevant agency with its own legal representation better tends to maintain the independence of the prosecuting authority and the appearance of that independence, and therefore tends to promote public confidence in the due administration of justice. That is important, because once the PII claim is determined, the CDPP may be required to make an independent decision. If the PII claim is upheld, the question which arises is whether it would be fair to the accused to continue with the proceedings or with particular charges. If the PII claim is not upheld, the CDPP will need to determine whether it is in the public interest to continue with the case or with particular charges, if that would involve disclosure of the material in question.

62. As the judgment in *Salmat* makes clear, the CDPP's disclosure obligations do not mean that it is necessary or conducive to the performance of its functions to pursue a claim of PII over material held by another agency or authority. The appropriate role for the CDPP in the context of PII arguments is confined to assisting the court to provide context about the prosecution case in order to assist the court to assess the potential relevance of the material.

4.6 Appropriateness of Victoria Police practices

Q11. Do you have any other views or comments to make in relation to:

- the appropriateness of Victoria Police's practices around the disclosure or non-disclosure of the use of human sources who are subject to legal obligations of confidentiality or privilege to prosecuting authorities?

...

63. No

4.7 Adequacy of safeguards in prosecutions

Q11. Do you have any other views or comments to make in relation to:

...

- whether there are adequate safeguards in the way in which Victoria Police prosecutes summary cases, and the OPP prosecutes indictable matters on behalf of the DPP, when the investigation has involved human source material?

64. It is not appropriate for the CDPP to comment on the procedures or practices of Victoria Police or the State DPP in conducting prosecutions.



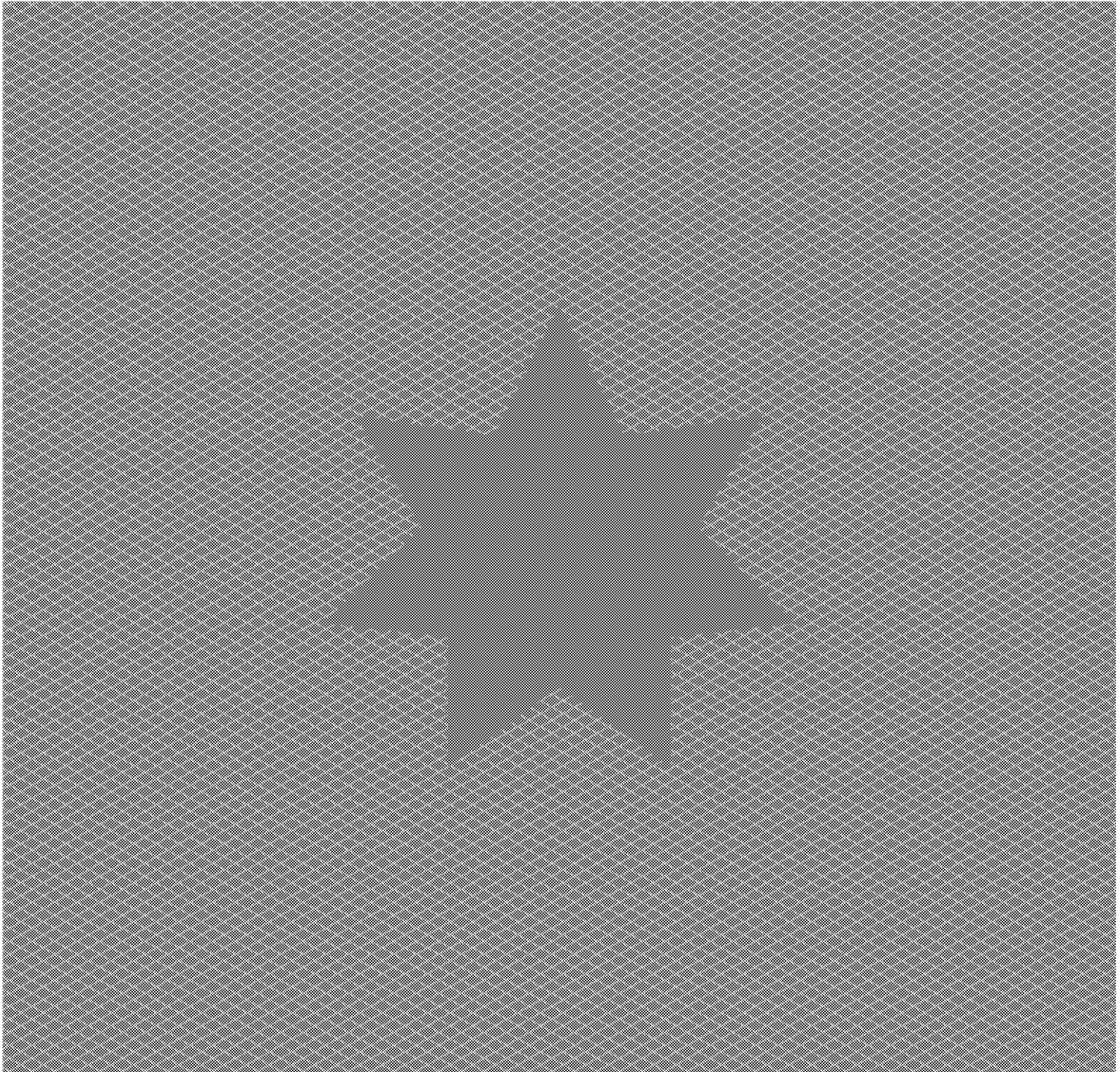
CDPP

Australia's Federal Prosecution Service

Statement on Disclosure

STATEMENT ON DISCLOSURE IN PROSECUTIONS CONDUCTED BY THE COMMONWEALTH

March 2017



Last update: March 2017

Statement on Disclosure in Prosecutions Conducted by the Commonwealth

Last update: 30 March 2020

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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. second⁵, 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

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.

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- (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.

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)*.

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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 the

¹² *R v Garofalo* (1999) 2 VR 625.

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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

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

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Material withheld from disclosure

23. Where material has been withheld from disclosure as:

- 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

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

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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 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).