



DPP

COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS

Statement on Prosecution Disclosure

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1. Introduction

This statement sets out the CDPP's disclosure obligations in the cases it prosecutes.

"Disclosure" refers to informing the defendant of:

- the prosecution's case against him/her;
- any information in relation to the credibility or reliability of the prosecution witnesses; and
- any unused material (see section 4.1).

Disclosure requirements continue throughout the prosecution.

The requirements imposed by this statement are to be complied with subject to any laws which are applicable in the prosecution of Commonwealth offences, including State and Territory laws and the *National Security Information (Criminal and Civil Proceedings) Act 2004*.

There are exceptions to the requirement to disclose material to the defence. These exceptions include situations where the material is immune from disclosure on public interest grounds, where the disclosure of the material is precluded by statute or where legal professional privilege applies to the material. These exceptions to disclosure are discussed below.

2. Disclosure of the Prosecution's case

2.1 In summary matters

There is no general disclosure obligation imposed under this policy where a defendant intends to plead guilty to charges in the summary jurisdiction.

Where the defendant has entered a plea of not guilty in proceedings for summary conviction the CDPP should provide the defence with the following:

- copies of any written statements by persons whom the prosecution intends to call to give evidence at the hearing. If the prosecution intends to call a person who has not made a written statement, the defence should be so advised.
- reasonable access to inspect proposed exhibits and, where it is practicable to do so, photocopies or photographs of such exhibits.

This material should be provided to the defence with as much notice as is reasonably practicable.

2.2 In indictable matters

2.2.1 At committal

In each Australian jurisdiction there is provision for disclosure of the evidence relied upon by the prosecution in matters proceeding on indictment. In most cases, this disclosure takes place in the course of committal proceedings.

2.2.2 *Post committal*

When the prosecution intends to rely on evidence that was not disclosed during the committal, the additional evidence should be disclosed to the defence with as much notice as is reasonably practicable.

If the prosecution intends to call a witness whose evidence was not relied on at the committal, the defence should be provided with a copy of the witness's statement or, if the witness has not made a written statement, the defence should be informed of the essence of the witness's anticipated evidence. The defence should also be provided with reasonable access to any proposed exhibit which was not relied on at the committal hearing and, where it is practicable to do so, a photocopy or photograph of any such exhibit.

2.3 *Likely intimidation of a witness*

Where the prosecutor is of the opinion that to disclose evidence is likely to lead to a witness being intimidated or result in some other interference with the course of justice, the prosecutor may delay disclosing the evidence until a time more proximate to the witness giving evidence. In summary matters, the prosecutor may decline to disclose the evidence. Where particular information has been withheld in accordance with this paragraph the defence should be so informed.

3. Disclosure affecting credibility or reliability of a prosecution witness

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

- a relevant previous conviction or finding of guilt,
- a statement made by a witness which is inconsistent with any prior statement,
- a relevant adverse finding in other criminal proceedings or in non-criminal proceedings (such as disciplinary proceedings, civil proceedings or a Royal Commission),
- evidence before a court, tribunal or Royal Commission which reflects adversely on a witness (e.g. allegations in relation to civil penalty proceedings or dishonesty offences which are yet to be finalised),
- any physical or mental condition which may affect reliability,
- any concession which has been granted to a witness in order to secure that person's testimony for the prosecution.

3.1 *Previous convictions*

It is not possible for investigating agencies to conduct criminal checks for all prosecution witnesses. Prosecutors should only request a criminal history check for a prosecution witness where there is reason to believe that the credibility of the prosecution witness may be in issue.

While the duty to disclose to the defence the previous convictions of a prosecution witness extends only to relevant prior convictions, a prior conviction recorded against a prosecution witness should be disclosed unless the prosecutor is satisfied that the conviction could not reasonably be seen to affect credibility having regard to the nature of, and anticipated issues in, the case. In that regard, previous convictions for perjury and offences involving dishonesty should always be disclosed.

The defence may request that the prosecution provide details of any criminal convictions recorded against a prosecution witness. Such a request should be complied with where the prosecutor is satisfied that the defence has a legitimate forensic purpose for obtaining this information, such as where there is a reason to know or suspect that a witness has prior convictions.

3.2 *Adverse findings in non-criminal proceedings*

Where a prosecution witness has been the subject of an adverse finding in other criminal proceedings or in non-criminal proceedings (such as disciplinary proceedings, civil proceedings or a Royal Commission), the matter should be disclosed to the defence unless the prosecutor is satisfied that the finding could not reasonably be seen to affect credibility having regard to the nature of, and anticipated issues in, the case. Findings involving dishonesty should always be disclosed. On the other hand, it may not be necessary to disclose adverse findings, for example, of inefficiency, incompetence or disobedience to orders.

3.3 *Concessions to witnesses*

The prosecution should disclose:

- any concession 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,
- any monetary or other benefit 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 securing the evidence of a witness (eg 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,
- 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.

3.4 *Timing of disclosure affecting credibility or reliability of a prosecution witness*

Where the prosecution is in possession of information which is relevant to the credibility or reliability of a prosecution witness that information should be disclosed to the defence:

- in matters to be disposed of summarily – as soon as reasonably practicable after the defendant has entered a plea of not guilty and the case has been set down for hearing,
- in matters to be dealt with on indictment – prior to the committal proceedings.

The requirement to disclose information affecting the credibility of reliability of a prosecution witness continues throughout a prosecution. If the prosecution becomes aware of the existence of such information during the course of a prosecution which has not been disclosed, that information should be disclosed as soon as reasonably possible.

4. Disclosure of unused material

4.1 Obligation to disclose unused material

The prosecution should disclose to the defence unused material.

For the purposes of this statement “unused material” is all information relevant to the charge/s against the defendant which has been gathered in the course of the investigation and which:

- (a) the prosecution does not intend to rely on as part of its case, and
- (b) either runs counter to the prosecution case (i.e. points away from the defendant having committed the offence) or might reasonably be expected to assist the defendant in advancing a defence, including material which is in the possession of a third party (i.e. a person or body other than the investigating agency or the prosecution) (see section 4.5).

4.2 Exceptions to the requirement to disclose unused material

The prosecution should disclose to the defence all unused material in its possession unless:

- it is considered that the material is immune from disclosure on public interest grounds,
- disclosure of the material is precluded by statute, or
- it is considered that legal professional privilege should be claimed in respect of the material.

Where material has been withheld from disclosure on public interest grounds the defence should be informed of this and the basis of the claim in general terms (for example, that it would disclose the identity of an informant or the location of premises used for surveillance) unless to do so would in effect reveal that which it would not be in the public interest to reveal.

In some cases it will be sufficient to delay rather than withhold disclosure, for example if disclosure might prejudice ongoing investigations, disclosure could be delayed until after the investigations are completed.

4.3 Timing of disclosure of unused material

In matters to be disposed of summarily the prosecution should disclose any unused material to the defence as soon as reasonably practicable after the defendant has entered a plea of not guilty and the case has been set down for hearing.

In matters to be dealt with on indictment the prosecution should disclose any unused material to the defence prior to the committal proceedings. If committal proceedings are not going to be conducted, the prosecution should disclose unused material to the defence as soon as is reasonably practicable after the defendant has been informed of the decision to proceed with a trial on indictment.

Where the defendant has entered a plea of guilty on indictment the prosecution should disclose to the defence any information in its possession which might reasonably be expected to be of assistance to the defence on the hearing of the plea.

The requirement to disclose unused material continues throughout a prosecution. If the prosecution becomes aware of the existence of unused material during the course of a prosecution which has not been disclosed, that material should be disclosed as soon as reasonably possible.

4.4 How unused material should be disclosed

Where feasible the defence should be provided with copies of the unused material. If this is not feasible (for example because of the bulk of the material) the defence should be provided with a schedule listing the unused material, with a description making clear the nature of that material. The defence should then be informed that arrangements may be made to inspect the material.

If the prosecution has a statement from a person who can give material evidence 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, ordinarily, a copy of the statement.

4.5 Unused material held by third parties

Where the prosecution is aware that material which runs counter to the prosecution case or might reasonably be expected to assist the defendant is in the possession of a third party, the defence should be informed of:

- the name of the third party;
- the nature of the material; and
- the address of the third party (unless there is good reason for not doing so and if so, it may be necessary for the prosecutor to facilitate communication between the defence and the third party.)

4.6 Other material

There may be cases where, having regard to:

- the absence of information available to the prosecutor as to the lines of defence to be pursued, and/or
- 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 satisfies the description of unused material. In these cases, after consultation with the relevant investigating agency, the prosecutor may permit the defence to inspect such material.

5. Disclosure to CDPP by investigation agencies

This Statement on Prosecution Disclosure relates to information and material held by the CDPP, investigation agencies and third parties. In order for the prosecution to meet its disclosure obligations, the CDPP depends on investigation agencies informing it of information and material covered by this Statement.