



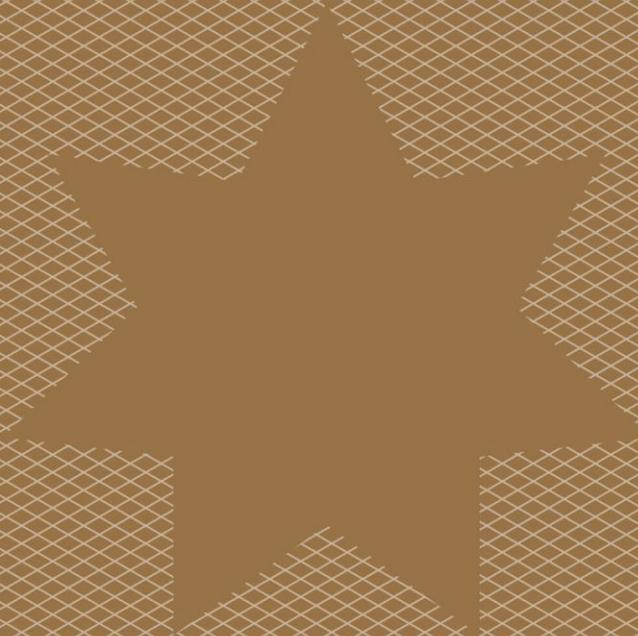
CDPP

Australia's Federal Prosecution Service

Statement on Disclosure

**STATEMENT ON DISCLOSURE IN PROSECUTIONS
CONDUCTED BY THE COMMONWEALTH**

March 2017



Statement on Disclosure in Prosecutions Conducted by the Commonwealth

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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.

(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)*.

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

Prosecution Case

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

Other Material

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

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

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

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

Disclosure affecting credibility or reliability of a prosecution witness

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

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

Some of these examples are further explained below.

Previous convictions

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

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

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

¹² *R v Garofalo* (1999) 2 VR 625.

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

Adverse findings

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

Concessions to witnesses

19. The prosecution must disclose:

- a. any concession offered or provided to a witness with respect to his or her involvement in criminal activities in order to secure his or her evidence for the prosecution, whether as to choice of charge, the grant of an undertaking under subsection 9(6) or subsection 9(6D) of the *Director of Public Prosecutions Act 1983* or otherwise;
- b. any monetary or other benefit or inducement that has been claimed by, or offered or provided to, a witness. This does not include any payments made in the ordinary and usual course of a witness coming to court to give evidence (e.g. the payment of travel and accommodation expenses or the fees of expert witnesses) and disclosure will be subject to any legislative requirements such as witness protection legislation. 'Other benefit' might include an agreement by the police/prosecution not to oppose the granting of bail; and
- c. where the witness participated in the criminal activity the subject of the charges against the defendant, whether the witness has been dealt with in respect of his or her own involvement and, if so, whether the witness received a discount on sentence as a result of undertaking to cooperate with law enforcement authorities in relation to the current matter.

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

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

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

Disclosure of a statement by a witness who is not credible

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

Material withheld from disclosure

23. Where material has been withheld from disclosure as:

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

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

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

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

Disclosure and Sentencing

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

General Matters

Timing of Disclosure

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

- a. where disclosure might prejudice ongoing investigations (see paragraphs 23 – 24), and the investigative agency requests the non-disclosure of material that would otherwise be disclosable under this Statement, disclosure may be able to be delayed until after the investigations are completed;
- b. where the prosecution is of the opinion that to disclose evidence is likely to lead to a witness being intimidated, or a risk to the safety of a witness, or to some other interference with the course of justice.

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

How material should be disclosed

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

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

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

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

- a. the absence of information available to the prosecution as to the lines of defence to be pursued; and/or
- b. the nature, extent or complexity of the material gathered in the course of the investigation;

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

Disclosure of material held by third parties

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

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