PRACTICAL GUIDE TO OBTAINING DISCLOSURE IN INDICTABLE CRIME

Introduction

1. Rather than focusing on the law involved, it is intended that this document be more of a practical guide for defence lawyers seeking disclosure.
2. When reviewing the brief, taking instructions, and at various stages in a proceeding leading up to trial, consideration should be given to whether there is material not contained in the brief which might assist the defence in the presentation of its case.
3. Some material may be in the possession of your client, or may be able to be accessed by your client – eg. their own bank or telephone records, Facebook or other social media, and of course whatever might be found on Google.
4. If not, you will need to obtain the material in another way.
5. Typically in a criminal matter, there are three ways in which disclosure of such material might occur:
    a. Disclosure by the prosecution
    b. Committal proceedings
    c. Subpoenas
6. It should be noted that there are also limited instances in which defence have an obligation of disclosure to the prosecution.

A. DISCLOSURE BY PROSECUTION

7. This has been largely dealt with largely by Ray Gibson in his document 'The Prosecution's Duty of Disclosure'.
8. There is an obligation by the prosecution – which includes police – to disclose material which is relevant or possibly relevant to the defence of the case against the accused. For example:
    a. Is there material that might bear on the credibility or reliability of a witness who is relied upon by the prosecution?
    b. Is there other material which might explain why the accused acted in a particular way, or might bear on his intent at the time?
9. The prosecution – or the police – may not always understand what is relevant to the defence case. The defence, by making some limited disclosures themselves, may be able to force more disclosure.
10. The defence lawyer must keep in mind that not all police or prosecutors share the same definition of relevance. One example of this was in the case of *AJ v The Queen* (2011) VSCA 215:
    a. Defence were asserting that an exculpatory text message had been sent by the complainant, which was denied by the complainant.

b. Prosecutor had knowledge that in an earlier trial involving a different accused the complainant had lied about not having sent text messages to that accused and didn't disclose that fact.

11. More problematic are cases where the police don't reveal the existence of evidence to the prosecution in order to prevent disclosure.

12. It should also be noted that there are often conferences between the prosecution and witnesses prior to their giving evidence in committals and trials:

    a. These appear to be occurring with much more regularity, and in greater detail, particularly in sexual offence cases.

    b. If something of relevance is disclosed during these conferences the prosecution ought to disclose this to the defence.

    c. There should be notes of such conferences.

    d. No privilege would attach to these notes as might be the case in relation to communications between the prosecutor, instructing solicitor and informant.

    e. If in doubt, consider requesting any such notes, or if you are told there are no notes then you might request a description of what occurred.

B. COMMITTAL PROCEEDINGS

13. One of the purposes of a committal is to ensure that the prosecution case against an accused is adequately disclosed, bearing in mind that the case brought against your client and the statements and evidence taken and collected by the authorities, is many times built upon a pre-conceived view of events.

Form 32 disclosure

14. Often the first opportunity for obtaining disclosure comes by way of the Form 32 Case Direction Notice, whereby the defence may request disclosure of material that ought to have been included in the hand up brief (HUB).

15. Rather than produce this material in the HUB, the police generally provide a list of material which exists but upon which the prosecution do not intend to rely.[1] This might provide a starting point as to what to request.

16. The following are examples of things often included in a Form 32, which will vary depending on the nature of the allegations:

    a. Witness prior convictions or findings of guilt;

    b. Police records including running sheets, surveillance logs, crime scene notes, exhibit logs, diaries (official or otherwise), LEAP records, Interpose records relating to the matter;

    c. Results of any forensic / scientific procedures carried out by the prosecution at any stage;

[1] *Criminal Procedure Act 2009*, s.110(e)

d. Expert witness notes or notifications received by police from expert witnesses;

e. Notes of prosecution witnesses received by police in the course of the investigation;

f. Any statement taken upon which the prosecution do not intend to rely;

g. Any draft and/or partial and/or unsigned statements made by anyone in relation to this matter;

h. Any recordings (written, audio or otherwise) of conversations made by prosecution witnesses or potential witnesses (including police and civilians) in relation to this matter;

i. Any records of interview conducted with any person in relation to this matter;

j. Requests for any telephone record and results of any requests (including call charge records, reverse call charge records, cell tower locations etc);

k. A copy of any video or listening device and any transcripts or notes relating to that device;

l. A copy of any telephone intercept and any notes or transcript relating to that telephone intercept.

17. It is always useful to include a time requirement, for example "to be produced for inspection or a copy given to the defendant one month prior to the committal hearing". This will provide adequate time to consider and receive further instructions, and also to decide whether further requests are necessary.

18. Form 32 requests, and time limits, are often not complied with. Practitioners should ensure they are followed up well prior to the committal occurring.

Examination at committal

19. A further opportunity to determine whether relevant sources of material exists arises when cross-examining witnesses at the committal.

20. By way of example in relation to civilian witnesses:

a. Were there any draft statements / changes to the statement they first made;

b. Were any notes provided to police at any time;

c. Was there every any record of the events in a diary or in any other form;

d. Have they spoken to other people about the matter, and if so, what did they tell them;

e. Have they suffered any mental health conditions or were they on any medication at the time;

f. Have they been compulsorily examined – eg. IBAC, OCE, ACC, ASIC;

21. Practitioners should make sure that relevant details are obtained in the event it is decided that a subpoena is required. If 'confidential communications' are likely to be involved the practitioner should ask questions bearing in mind the more stringent processes involved in obtaining such material (see below).

22. In relation to the informant and police witnesses:

a. Seek to establish if all relevant notes have been provided -

   i. Sometimes if no statement from a police member, then no notes provided;

   ii. Could be that police member was first on scene and had relevant conversations;

b. Explain or clarify matters contained in police notes;

c. Obtain undertakings to provide further material where it exists.

23. Sometimes the greatest reward from the police notes, and in follow up cross-examination, will be in establishing what hasn't been done that should have been done:

    a. Have they failed to door knock?

    b. Have they failed to check for fingerprints or other forensic evidence?

    c. Have they failed to obtain telephone records?

24. A forensic decision will have to be made about whether to deal with such matters at committal or to leave it for trial. This may well depend upon whether the failure can be rectified.

C. SUBPOENAS

25. Documents held by third parties may be extremely useful in the presentation of the defence case.

26. A subpoena is the only practical mechanism for an accused to compel production of material in the possession of a third party.

27. In some cases it may also be necessary to issue a subpoena to obtain documents from the investigating agency:

    a. If it is thought they are being less than diligent in disclosing material;

    b. If they have indicated that what is sought by defence is outside their obligation to disclose;

    in this way the agency must provide a formal response to a Court order.

Consideration

28. Think carefully about whether documents from third parties should be sought under subpoena, remembering that any documents released to the Court will be provided to both parties:

    a. Prior inconsistent statements will obviously assist;

    b. But may also reveal material previously unknown to the prosecution and which may assist their case (eg. prior consistent representations which may be admitted pursuant to the *Evidence Act 2008*).

29. It is very important to issue the subpoena in a timely manner:

    a. You may find that information gleaned will lead to further possible sources of material;

b. It may be particularly useful in cross-examination at the committal.

The law

30. Once decision is made to seek material you will need to:

    a. Identify expressly and with precision the legitimate forensic purpose for which access to the material is sought;

    b. Satisfy the Court that it is either "on the cards"[2] or there is a "reasonable possibility"[3] that the documents sought will materially assist the defence;

31. Mere relevance is not enough – relevant documents might not materially assist the defence. Documents may be of material assistance for a variety of reasons, for example bank records or telephone records to indicate a possible alibi; records which might bear on the credibility or reliability of witnesses important in the prosecution case.

32. The Courts have held that a relatively liberal approach should be adopted:

    a. *R v Mokbel* (Ruling No 1)[4] – Gillard J approved of NSW decision where the question of legitimate forensic purpose was discussed and it had been said that "In particular, in a criminal case special weight has to be given to the fact that documents or information gleaned from them may assist and accused person."

    b. *Ragg v Magistrates Court of Victoria* – Bell J spoke of it being necessary to give a "broad interpretation" to the issues in the case or, not analysing the party's respective cases in a restrictive way. He acknowledged that defence lawyers are in a better position than a judge to make an appraisal of the value of the information contained. He quoted another case where it was said "the courts should be careful not to deprive the defence of documents which could be of assistance to the accused".

33. That does not give defence free reign by any means – courts will set aside a subpoena if they consider a legitimate forensic purpose has not been established. However, the importance of the requested documents to an accused's ability to establish a defence can inform the application of the test of reasonable possibility. In this respect, it is often useful and sometimes necessary to disclose some of the defence case in order to satisfy that test.[5]

34. Common objections which might be made to subpoena include:

    a. Impermissible fishing expedition – ie. not a legitimate forensic purpose.[6]

    b. Oppressive – the terms are too broad and compliance would require such an extraordinary amount of work.[7]

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[2] *Alister v The Queen* (1984) 154 CLR 404, 414.
[3] *DPP v Selway* (Ruling No 2) (2007) 16 VR 508, [10]; *Ragg v Magistrates' Court of Victoria* (2008) 18 VR 300, [96].
[4] [2005] VSC 410, para [46] and [51].
[5] *State of Victoria v Lane & Anor* [2012] VSC 328, paras [16] to [21]; *Holloway v State of Victoria* [2015] VSC 526.
[6] *Alister v The Queen* above.
[7] *Commissioner for Railways v Small* (1938) 38 SR (NSW) 564, 573.

c. Public Interest Immunity – for example, it will disclose the existence of a confidential source of information; it may disclose confidential police methodology (such as surveillance techniques) and thereby impede or frustrate police in there capacity to investigate and detect criminal activity.[8]

35. The test to be applied by the court:[9]

    a. First, the body resisting disclosure must satisfy court that disclosure would potentially cause damage to the public Interest;

    b. Then the court must weigh up two competing interests – the harm that would be done by production of documents *vs* whether administration of justice would be frustrated or impaired if the documents are withheld.[10]

36. In order to weigh the merits of the competing claims, the Court may be required to inspect the documents to form a view about whether any damage might result from their disclosure.[11]

Procedure

37. *Supreme Court* – Supreme Court (Criminal Procedure) Rules 2009, Rule 1.12 -> Supreme Court (General Civil Procedure Rules) 2005, Order 42 applies to criminal proceedings -> sets out procedures for issuing of and compliance with subpoena

38. *County Court* – County Court Criminal Procedure Rules 2009, Rule 1.09 -> County Court General Civil Procedure Rules 2008, Order 42 applies to criminal proceedings

39. *Magistrates' Court* – Magistrates' Court Act 1989, s.43 -> Magistrates' Court Criminal Procedure Rules 2009, Rule 24[12]

Confidential Communications

40. Disclosure of this material is governed by *Evidence (Miscellaneous Provisions) Act 1958.* More detail about these provisions is contained on the Judicial College of Victoria website in the Victorian Criminal Proceedings Manual.

41. In short, it is much harder to obtain material deemed to be a 'confidential communication' which can be crucial in preparing a case for trial. Leave is required at a number of stages – to issue the subpoena, to produce the material, then to adduce the material into evidence.

Is it a confidential communication?

42. It should not be automatically assumed that a record held by a doctor or counsellor is a confidential communication.

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[8] See *Evidence Act 2008*, ss. 130 and 131A, includes non-exhaustive list of matters to be taken into account in the balancing exercise; Attorney-General for NSW v Stuart (1994) 34 NSWLR 667, 674, 675.
[9] *State of Victoria v Brazel* (2008) 19 VR 553
[10] See Evidence Act 2008, ss.130 & 131A
[11] *Ahmet v Chief Commissioner of Police* [2014] VSCA 265, para [28]
[12] See also *Criminal Procedure Act 2009*, s.336

43. Consider whether the communication was made in confidence. If it was a communication to a doctor or counsellor for the purpose of that treater writing a report for VOCAT, then arguably it does not fall within the ambit of this Act.

44. Consider whether the communication was made in the course of a treating relationship. If it was a communication to a doctor or counsellor who happened to be a family member or friend, then arguably it does not fall with the ambit of the Act.

45. It should be noted that records of communications between a complainant and DHHS are NOT confidential communications.

    a. These records may include invaluable material such as:

        i. Communications from complainant;

        ii. Communications about the complainant;

        iii. Communications by other witnesses in the case.

    b. They should be obtained as soon as possible:

        i. They may be used in cross-examination at the committal;

        ii. They may in turn lead to information enabling confidential communications to be obtained.

    c. Such records are a particularly invaluable source of information when you are not able to cross-examine a complainant at committal.

46. There have been some grey areas about whether certain material might constitute a confidential communication. It is often better to err on the side of caution and at least raise the issue with the court at an early time, or to make application pursuant to these provisions in case such a determination is made.

Test to obtain leave

47. The Court must not grant leave unless satisfied on the balance of probabilities:

    a. Evidence will by itself or in combination with other evidence have substantial probative value to a fact in issue;

    b. Other evidence of similar or greater probative value is not available;

    c. Public interest in preserving confidentiality is substantially outweighed by public interest in admitting the material into evidence (taking into consideration a non-exhaustive list of factors) –

        i. Likelihood and nature of harm caused to complainant;

        ii. Extent to which evidence necessary to make full defence;

        iii. Whether release of material would discourage victims seeking counselling;

        iv. Whether the material is being sought on the basis of a discriminatory belief or bias;

        v. Whether the complainant objects;

vi. Nature and extent of the reasonable expectation of confidentiality and potential prejudice to privacy of any person.

48. These provisions place a very difficult burden on defence practitioners, particularly where there is no knowledge of the content, if any, of communications held by the treaters. Practitioners will need to demonstrate the relevance of potential evidentiary material to live facts in issue.

49. Many times the basis for an application will be from material disclosed in the prosecution brief, or other disclosure, or as a result of answers provided at the committal. Committal cross-examination should be conducted bearing in mind the relevant factors which need to be demonstrated in order to obtain this material.

50. For the purpose of determining an application the Court may order that the document be produced for it to inspect pursuant to section 32C(6).[13] This is entirely discretionary and generally there will need to be something to indicate the possibility or likelihood of substantially probative material within.[14]

51. Section 32F deals with ancillary orders which might be made upon the Court granting leave which include hearing evidence in camera and suppression orders. Pointing out these powers may assist in an application by reducing the weight given to factors against disclosure.

Time limits

52. Section 32C of the Act provides that:

    a. There must be at least 14 days' notice before evidence proposed to be compelled, produced or adduced;

    b. Court may shorten notice period or waive requirement for notice.

53. Don't give up if you are out of time – the court can waive the time requirements if it is in the interests of justice (but better not to test them deliberately).

54. The County Court Practice Note indicates that the party seeking a subpoena which is likely to contain a confidential communication must list an application to obtain leave. This involves contacting the Associate to the Sexual Offences list at least 8 weeks before the trial date, filing the application 14 days before the hearing, including a brief outline of submissions in support and a draft of the proposed subpoena, and serving those documents on each party, the treater and the informant.

55. This Practice Note also deals with requirements involved in then producing the evidence.

56. Sometimes this might be dealt with at the earlier hearing if relevant arrangements have been made with all those involved.

57. It is in the interest of accused that if material is to be reviewed and possibly redacted, it is done by the relevant tribunal rather than by the OPP, Informant, or CASA representative as has sometimes occurred.

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[13] *DPP and Furness (Ruling 1 CR-15-01197)* [2015] VCC 1567; *DPP v Matthews* [2015] VCC 1982

[14] *Todd (a Pseudonym) v The Queen* [2016] VSCA 29

Limitations on privilege

58. Section 32E establishes that production is not prevented by these provisions in a number of instances, including where:

    a. Consent of complainant if under 14, with the consent of any person whom the court regards as being an appropriate person to give that consent;

    b. Information acquired by registered medical practitioner by physical examination, including communications during examination by complainant in relation to the commission or alleged commission of the offence.

59. This latter exception is particularly important when seeking notes of forensic examiners or other medical practitioners with respect to complainant's narrative.

D. DEFENCE OBLIGATIONS OF DISCLOSURE

60. Expert Evidence – s.189 Criminal Procedure Act:

    a. If intend to call a person as an expert witness at trial – must serve and file copy of statement at least 14 days before trial; or if not then in existence as soon as possible after it comes into existence

    b. Statement must contain details outlined in section (name, business address, qualifications, substance of evidence, opinion of witness, basis of opinion)

61. Alibi – s.190 Criminal Procedure Act:

    a. Ability to adduce alibi evidence may be denied (unless get leave) without giving notice.

    b. Notice must be given within 14 days after committal

    c. Notice must contain details outlined in section (particulars as to time and place of alibi, name and last known address of any witness (or information which might be of assistance in finding witness)

    d. Obligation to take reasonable steps to ascertain name and address

    e. Prosecution / police must not communicate directly or indirectly with alibi witness without the consent and presence of defence – penalty applies (s.191)

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Holmes' List