The Prosecution's Duty of Disclosure

The prosecution's duty of disclosure is based on the common law, the relevant legislative framework and ethical obligations.

In the criminal law there does not exist the same right of discovery that applies in the civil jurisdiction. It is a fact of modern prosecutions that the obligation on the prosecution to disclose material bearing on the charges has become more onerous in recent decades. [1]

This paper will review the statutory framework and common law obligations of disclosure upon the prosecutor. Several examples will be used to illustrate some of the boundaries of disclosure.

The Victorian Statutory Framework

In many jurisdictions there have been statutory inroads into this area.[2]

In Victorian summary hearings, s24 (a) of the *Criminal Procedure Act 2009* ("CPA)" mandates that the informant must serve a preliminary brief on the accused within 21 days after the day on which the charge sheet is filed. The contents of a preliminary brief are detailed in s37. It can, but does not require, disclosure of witness statements.

The procedure for disclosure of a full brief is set out in s39 CPA. A full brief is available on request. The contents of a full brief are detailed under s41.That section covers everything we have come to expect in a properly prepared prosecution brief of evidence. Section 43 allows an accused to request additional material initially not provided. Section 45 provides a list of grounds under which the informant may refuse to disclose information. It covers matters that are known under the common law as

[1] Various statutory provisions also exist both at State and Commonwealth level relating to disclosure. For an extensive review of these see Corns C. "*Public Prosecutions in Australia*" Lawbook Co. Thomson Reuters, 2014 [4.460]
[2] C. Corns. Ibid.

public interest immunity. Section 46 allows the accused to apply for an order requiring disclosure if the informant has refused disclosure under s45. Section 42 creates an ongoing duty of disclosure on the informant. This means that anything that has come into the possession of the informant or comes to his or her notice that should have been disclosed with a preliminary brief or full brief of evidence must be disclosed.

Part 4.4 of the CPA sets out the statutory obligations on the informant in respect of disclosure for committal hearings. The contents of the hand-up brief to be disclosed mirror those in the summary brief of evidence. Section 111 creates an ongoing obligation of disclosure.

Under Division 2 of the CPA, the obligations of disclosure at the trial stage are to be found. Under this Division is s182 - the obligation on the prosecution to serve on the accused the Summary of Prosecution Opening. Two aspects of that are worth noting. The section requires the prosecution to disclose:

(a) "the manner in which the prosecution will put the case against the accused; and
(b) The acts, facts, matters and circumstances being relied upon to support a finding of guilt."

The same duty of ongoing disclosure to be found elsewhere in the CPA is here, at s185. Prior convictions of prosecution witnesses can be requested under s187. This does not include all LEAP records.

For Commonwealth offences your best reference is Commonwealth Director of Public Prosecutions, *"Statement on Prosecution Disclosure"* (CDPP 1998).

The Common Law

The disclosure principle is said to be a duty to the court rather than to the accused. Failure to disclose relevant material can lead to a stay of proceedings until the relevant material is produced. It can, if material evidence has not been disclosed,

lead to a conviction being overturned on the basis that the trial was unfair and deprived the accused of a realistic chance of acquittal.

Not everything in the hands of the police or prosecutor must be disclosed as the principle is subject to common law privileges such as legal professional privilege, public interest immunity (formerly known as Crown privilege) and various statutory privileges such as confidential communications in the context of counselling for sexual offences.

Public interest immunity, when successfully raised, prevents disclosure to the defence of material that might, for example, hinder other police operations, disclose operational tactics employed by investigators in fighting crime, the identity of informers or activities of organs of the state such as cabinet documents or documents gathered by intelligence agencies.[3] It is generally raised by the police, independently of the prosecutor, in response to a subpoena directed to the Chief Commission of Police. In those circumstances, the prosecutor may argue that the subpoenaed material is irrelevant to the issues in dispute in the proceedings. However, the actual objection, and claim of privilege, is made by the police who should be independently represented in a separate subpoena hearing.

The prosecution must be pro-active in exercising its disclosure obligations. It is no answer to say that the defence failed to ask. The rules governing disclosure are guided by common sense in the context of the issues in dispute. The guiding principles to keep in mind are threefold:

1. Has the accused has been sufficiently apprised of the case he or she has to meet?

2. Has any important document that would be of material assistance to the defence, in relation to the issues in dispute, been disclosed (subject to claims of privilege)? and

[3] *Alister v R* (1984) 154 CLR 404; *Sankey v Whitlam* (1978) 142 CLR 1. The privilege is explicitly recognised in s130 UEA

3. The duty of disclosure is an ongoing one.

The following represents the type of material that must usually be disclosed:

- Witness statements relevant to the proceedings;[4]
- Notes made by investigators;
- Records of interviews of witnesses, suspects or the accused – in digital format and transcribed if available;
- Any expert reports obtained and relevant to the proceedings whether of assistance or otherwise;
- Prior convictions of witnesses that are germane to the proceedings;
- Significant matters reflecting adversely on the credibility of a prosecution witness that might undermine their veracity;[5]
- Prior convictions of the accused;[6]
- Details of any grants of immunity by a Director of Public Prosecutions ;
- Letters provided to witnesses by police to assist in influencing courts on sentencing outcomes such as those relating to assistance provided to authorities;[7]
- CCTV footage relied upon;
- Photos relied upon;
- Copies of exhibits (in photographic or documentary form);
- Details of any reward given to a witness for assistance;[8]
- Telephone records or copies of telephone intercepts relied upon.

Memoranda, emails etc. between passing between the instructing solicitor and the prosecutor and the police are generally privileged and should not be disclosed. Working notes are in the same category.[9]

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[4] Where the names of the witnesses the prosecutor intends to call are printed on the indictment those witness statements must be provided.
[5] Such as a prior signed statement casting doubt on the disclosed statement. See also *AJ v R* [2011] VSCA 215
[6] *R v Lewis-Hamilton* (1998) 1 VR 630; *R v Garofalo* (1999) 2 VR 625.
[7] *R v Farquharson* [2009] VSCA 307
[8] *R v Roberts* (2004) 9 VR 295
[9] *R v TSR* (2002) 5 VR 627.

It has been said that the prosecutor is not required to indiscriminately provide to the accused at the outset of proceedings all possibly relevant papers within the possession or control of the prosecutor.[10] Nor does everything in the possession of the prosecutor that might reflect on either the accused's credit as a witness, or other witnesses called by the defence, have to be disclosed.[11] For example, if a witness were to reveal to the prosecutor that they were being treated for a psychiatric condition that did not affect their capacity to give evidence, it would not generally be a matter required to be disclosed.

The High Court of Australia in *Mallard v R* (2005) 224 CLR 125 illustrates the consequences of a serious failure to disclose relevant material.

The accused (the appellant in the High Court) was convicted at trial of the murder of a jewellery shop proprietor. Death to the victim was caused by being bludgeoned with a heavy instrument. At trial, evidence was led (in unrecorded interviews) that the accused had confessed to killing the victim with a wrench. The High Court found that the conviction was unsafe due to non-disclosure. What had not been revealed pre-trial to the defence was:

- Experiments had been conducted on a pig's head that had sought to replicate the type of injuries said to have been inflicted with the wrench. The injuries resulting did not match the type of injuries found on the deceased;

- The accused had said he had, following the killing, gone to a river and washed his clothes in salt water. A forensic report found no significant traces of salt in his clothes but this had been deleted from the report provided;

- Evidence that conflicted with the prosecution case concerning a cap said to have been worn by the appellant at the time of the killing was not divulged.

[10] Ibid.
[11] Ibid.

In the case of *R v Robert Farquharson* [2009] VSCA 307, following the accused's conviction on three counts of murder, the appellant argued, in the appeal (among numerous other grounds) that the prosecution had failed to disclose that a witness, King, had indictable charges pending. Mr King was a very important witness for the Crown. He gave evidence of a conversation with the accused outside a fish and chip shop that revealed possible premeditation by the accused for the murders. The non-disclosure was said to be compounded because the police were prepared and did provide a letter of support upon King's plea and sentence. It was said this non-disclosure amounted to a significant disadvantage to the defence in that they were deprived of a basis on which to challenge his testimony. Ultimately the court upheld this ground saying that the prosecution had to disclose this material albeit that it might have been of limited value. The court found that this material would have enabled the defence to attack King on the basis that he had an incentive to maintain what the defence alleged was a false account.

Ethical Obligations

The ethical obligations upon the prosecutor in this area arise from the statements found in the common law cases and the professional conduct rules. The Victorian Bar Good Conduct Rules contain rules applying to prosecutors. Rule 9.2 (and following) affirms the common law obligation upon the prosecutor to provide adequate disclosure.

Summary

The obligations of disclosure on the prosecution do not end with the service of a brief of evidence. They are ongoing. Both the statutory framework and common law principles endorse this. It is important that defence practitioners know the broad boundaries of disclosure. They should seek any material they are entitled to in order to properly assess the merits of a Crown case. They can then advise their clients accordingly.

Less than timely disclosure is a fact of life. Trials are a dynamic process. However, where necessary, ask for time to consider the late arrival of any material evidence that may affect the outcome of a proceeding.

Key Points

1. Disclosure obligations are based on statute, common law and ethical rules.
2. Accessing the relevant prosecution agency's website, in order to see what guidelines or policies are in place, will pay dividends in dealing with the agency.
3. The obligation of disclosure is an ongoing one and is not satisfied once the brief of evidence has been served.

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