THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: CLC:JvdPrg141022

14 October 2022

The Hon Mark Speakman MP
Attorney General
GPO Box 5341
Sydney NSW 2001

Dear Attorney,

Prosecutorial Disclosure in Criminal Cases in New South Wales

As you are aware, prosecutorial disclosure is essential to the integrity of criminal justice in an accusatorial system. The attached submission from the Law Society's Criminal Law Committee raises concerns about prosecutorial disclosure in the NSW criminal justice system. Feedback from our Criminal Law Committee is that there are systemic and ingrained problems with disclosure.

Drawing on the extensive experience of members of the Criminal Law Committee, the submission outlines the current state of prosecutorial disclosure in NSW from a defence perspective. The Criminal Law Committee explores reasons for ongoing problems in disclosure and canvasses a number of potential solutions that, in the face of flaws in the practical application of the current disclosure regime, justify serious consideration.

Late or incomplete disclosure is inefficient, costly and has the potential to cause unfairness to both the accused and complainants. It results in unnecessary adjournments and delay, potential stay applications and resulting additional costs for all court participants. Trials are delayed, or lengthened, due to late or insufficient prosecution disclosure. At worst, inadequate disclosure may lead to miscarriages of justice manifesting as inappropriate pleas of guilty, loss of statutory sentencing discounts and unsafe convictions. These consequences are antithetical to the interests of justice in NSW.

The objective of the submission is to prompt thorough consideration about measures to improve prosecutorial disclosure in criminal proceedings. In our view, the NSW Law Reform Commission should be tasked with such an important inquiry. We would obviously be happy to discuss possible terms of reference for such an inquiry, including the scope of disclosure to be considered by the Commission.

We thank you for your consideration of this important issue, and look forward to hearing from you. The Law Society contact for this matter is Rachel Geare, Senior Policy Lawyer, who can be reached on (02) 9926 0310 or at rachel.geare@lawsociety.com.au.

Yours sincerely,

Joanne van der Plaat
President

Encl.

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Prosecutorial Disclosure in Criminal Cases in New South Wales

Criminal Law Committee of the Law Society of New South Wales

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Table of Contents

EXECUTIVE SUMMARY

Prosecutorial disclosure is essential to the integrity of criminal justice in an accusatorial system. Conversely, inadequate prosecutorial disclosure compromises the system's efficiency and undermines the fundamentals of accusatorial justice, where the accused should be required to answer criminal charges "according only to the strength of the prosecution's case as revealed by the material provided by the prosecution before trial" (*X7* [2013] HCA 29; 248 CLR 92, [124] Hayne and Bell J).

Drawing on the experience of the Law Society's Criminal Law Committee, this paper highlights concerns with prosecutorial disclosure in New South Wales (NSW) from a defence perspective. We explain how current legal safeguards and ethical obligations around disclosure may be inadequate. Lessons from other jurisdictions, and our own, including high profile cases where failures to disclose have led to wrongful convictions, provide a timely opportunity to review and reform disclosure in NSW criminal proceedings.

This submission urges action by the NSW Government to remedy gaps in legislation, common law and policy that allow systemic disclosure problems to undermine a fair and just criminal justice system in NSW. As discussed further in the submission, we consider this will best be achieved by a referral to the NSW Law Reform Commission.

INTRODUCTION

This submission documents the Criminal Law Committee's concerns about prosecutorial disclosure in the NSW criminal justice system, many of the causes of which, in the Committee's view, are systemic and ingrained. They require a genuine commitment by stakeholders in the criminal justice system, including the NSW Police Force and the NSW Office of the Director of Public Prosecutions (ODPP), to address them.

Drawing on the extensive experience of members of the Criminal Law Committee, the submission outlines the current state of prosecutorial disclosure in NSW from a defence perspective. The submission explores reasons for ongoing inefficiencies in disclosure and canvasses a number of potential solutions that, in the face of flaws in the practical application of the current disclosure regime, justify serious consideration. The objective of this submission is to prompt consideration of measures to improve disclosure in criminal proceedings. In our view, the NSW Law Reform Commission should be tasked with such an important inquiry.

In recent years, the collapse of a number of high-profile prosecutions in the UK and Victoria due to failed disclosure has impacted on public confidence in the administration of criminal justice. Valuable lessons can be learnt from those jurisdictions to prevent a similar situation arising in NSW.

Late or incomplete disclosure is inefficient, costly and has the potential to cause unfairness to both accused and complainants. It results in unnecessary adjournments and delay, potential stay applications and resulting additional costs for all court participants. Trials are delayed, or lengthened, due to late or insufficient prosecution disclosure. At worst, inadequate disclosure may lead to miscarriages of justice manifesting as inappropriate pleas of guilty, loss of statutory sentencing discounts and unsafe convictions. In some cases, expensive prosecutions can fail, or finally fail after years of appellate intervention at considerable expense, alerting the public to such failure in the administration of justice. These consequences are antithetical to the interests of justice in NSW.

Despite the promise of the Early Appropriate Guilty Plea (EAGP) scheme to promote full and timely disclosure in indictable proceedings, non-compliance with disclosure obligations remains of fundamental concern. Our concerns are not limited to disclosure in EAGP matters. They extend also to the commonly neglected area of disclosure in summary proceedings.

BACKGROUND

Modern obligations for prosecutors to 'play fair' and to disclose the prosecution case evolved in the latter part of the 20th century and, more recently, are seen as crucial to the requisite circumstances for a negotiated early guilty plea:[1]

> Today, the principle of equality of arms, a dimension of ensuring a trial is fair, requires equipping the accused to be able to meet and challenge the prosecution case effectively, including ensuring prosecutors fulfil their obligations of disclosure. This reflects the view that a fair process requires equipping an accused to meet the might of the state and, for this reason, the duty of disclosure is a duty to the court, not merely to a party.[2]

The last line of this quote – that the duty of disclosure is a duty to the court - is supported by *Marwan v DPP*[3] and is explained by Leeming JA at [29] in the following terms:

> So too is what may loosely be described as the "right" of the accused to disclosure (both illustrate the way in which legal usage commonly departs from Hohfeldian exactness). For it is quite plain that the "duty" to disclose is not owed directly to an accused, so as to enforce the production of documents as might occur in civil litigation through discovery and interrogatories, or pursuant to freedom of information legislation. To the contrary, an accused person cannot ordinarily obtain an order that the prosecution disclose documents which have been withheld. Rather, the accused is entitled to a fair trial, and can insist that the trial be stayed, permanently or temporarily, if it can be established that that will not occur, absent adherence by the prosecution to that duty.

Courts take a broad approach to the prosecution's duty of disclosure in criminal proceedings. In *R v Jenkin* Hamill J explains why:

> I agree with the observations of Gillard J in R v Mokbel (Ruling No 1) [2005] VSC 410 at [71]:
>
> > "It follows that any document or thing which impinges upon a witness's credibility is important to the accused's defence. Defence lawyers are in a far better position than a judge to make an appraisal of the value of information contained. There is a fine line between fishing for information and knowing or suspecting that there is information in the documents relevant to the credibility of a witness. A more liberal approach to the question is required in a criminal proceeding. Experience shows that full examination of documents by defence counsel sometimes produces relevant material for cross-examination, material which may to others not fully conversant with all the factual matters, be not important."
>
> The suggestion that the records could be produced to the Court but not disclosed to the defence until "the groundwork was laid" and/or it "became relevant" is, generally, unworkable in a criminal trial. The trial Judge (especially in a trial being conducted without a jury) cannot be placed in the position of making such determinations, which are, at their core, forensic choices. The Judge is not privy to all of the material in the prosecution and defence briefs. The Judge cannot predict, or influence, the course that counsel might choose to take in examining a witness. Equally, the forensic choices that counsel might take may be influenced by their knowledge of the criminal history of the witness they are examining. While Hunt J in R v Saleam acknowledged at [18D] that the forensic purpose may "not become apparent (even to counsel for the accused who had advised the issue of the subpoena) until the trial has been under way for some time", this is a different thing to suggesting that the trial Judge might determine the issue for themselves as the trial progresses.[4]

Common law

The High Court has recently considered the content and extent of common law disclosure obligations. In *Edwards v The Queen* (*Edwards*)[5] the Court examined whether the verdict at trial

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[1] Hunter et al, '*The Trial: Principles, Process and Evidence'*, 2021, p41.
[2] Ibid, some citations omitted.
[3] *Marwan v DPP* [2019] NSWCCA 161, [29] (Leeming JA, with RA Hulme and Adamson JJ agreeing).
[4] *R v Jenkin (No 2)* [2018] NSWSC 697 [21], [22].
[5] *Edwards v The Queen* [2021] HCA 28.

was a miscarriage of justice because the prosecution did not provide "full and proper" disclosure of a Cellebrite Download to the appellant prior to trial, contrary to the requirements of s142 of the *Criminal Procedure Act 1986* (NSW)(CPA).[6] Edelman and Steward JJ[7] in plurality observed:

> The common law required, and still requires, disclosure of all material that, on a sensible appraisal by the prosecution: (i) is relevant or possibly relevant to an issue in the case; (ii) raises or possibly raises a new issue that was not apparent from the prosecution case; and (iii) holds out a real (as opposed to fanciful) prospect of providing a lead in relation to evidence concerning (i) or (ii). Further, since the disclosure can occur prior to any crystallisation of the defence case, or any refinement of the prosecution case, expressions in relation to common law disclosure rules, such as "an issue in the case" or "all relevant evidence of help to the accused", must be given a broad interpretation.[8]

These powerful statements of principle and practice from the highest criminal courts in Australia are becoming a recurring topic for judicial and appellate consideration. They reflect that in criminal cases the Crown is able to engage the resources of police, other investigatory agencies and experts which are significantly superior to those available to even the most affluent accused. With the possible and rare exception of prosecution of large corporate entities, the state has vastly greater resources at its disposal than are available to accused persons. This unequal access to resources and information creates the potential for injustice, even for the wealthiest of accused persons.

Does the duty to disclose extend to a duty to investigate?

There is legal uncertainty whether the prosecution's duty of disclosure also embraces a duty to carry out relevant enquiries and investigations. In NSW, the jurisprudence on this point is somewhat confused and inconclusive.

On the one hand, the decision of the Court of Criminal Appeal in *Lipton v R* [2011] NSWCCA 247 suggests that such a duty exists. At [81] McColl JA stated:

> *"*The obligation to disclose includes, in an appropriate case, an obligation to make enquiries: AJ v R [2011] VSCA 215 (at [22]) per Weinberg and Bongiorno JJA (Buchanan JA agreeing)."

However, more recently the correctness of this dictum has been called into question. In *Marwan v DPP* [2019] NSWCCA 161 Leeming JA made the following observations regarding this passage (at [47]):

> "That statement was obiter, concerned an issue which did not arise in that case, and was unelaborated. One member of the Court agreed, generally; the other expressly distanced himself from it. The Victorian decision cited, AJ v R (2011) 32 VR 614; [2011] VSCA 215 is of the same character. I mean no criticism, but neither decision provides any assistance as to what is an "appropriate case".

His Honour went on to articulate a number of difficulties he perceived with the argument for a positive duty to investigate the circumstances of the case he was dealing with but ultimately concluded (at [60]) that it was not necessary to form a concluded view on this issue.

The result of these decisions is that there is an unsatisfactory uncertainty as to whether the prosecution's duty of disclosure extends to a duty to conduct a proper investigation into the allegations, including any matters which may tend to exculpate the accused.

We suggest that a consideration of the policy underpinning the duty of disclosure suggests that it ought to include a duty to investigate.

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[6] *Edwards v The Queen* [2021] HCA 28, [2].
[7] Applying the principles expressed by Adamson J in *Bradley v Chilby* [2020] NSWSC 145, [48] quoting from *Gould v Director of Public Prosecutions (Cth)*, [2018] NSWCCA 109; 359 ALR 142, [65] per Basten JA (Johnson and Adamson JJ agreeing). For an outline of the case, see Annexure A.
[8] *Edwards v The Queen* [2021] HCA 28, [48] (footnotes omitted).

As noted at the outset, the duty of disclosure is rooted in the requirement for a fair trial. It is self-evident that a fair trial requires that all relevant evidence be available to the tribunal of fact to enable it to arrive at the correct verdict.

Second, the absence of a duty to investigate risks corrupting the function of investigatory authorities such as the police. The function of such authorities is to investigate crime in order to bring the perpetrator before the court and assist the court in arriving at a true verdict. If such a function is not reflected in a duty to conduct a full and unbiased investigation, there is a risk that a culture could develop whereby investigators perceive their role as one of simply making a case against the accused.

Lastly, a duty to investigate is essential to address the unequal access to resources and information between the state and citizens. Investigatory bodies such as the police also have coercive powers (such as powers of search and seizure) which can be used to gather evidence, and which are not available to accused persons. A duty to conduct a proper investigation is essential to remedy this disparity.

Statutory provisions

New South Wales

In NSW, common law disclosure obligations of both investigating police and prosecutors are supplemented by s15A(1) of the *Director of Public Prosecutions Act 1986* (NSW), which provides that law enforcement officers investigating alleged offences have a duty to disclose to the Director "all relevant information, documents or other things obtained during the investigation that might reasonably be expected to assist the case for the prosecution or the case for the accused person*."*

Section 15A(1), together with case management provisions in the CPA introduced in 2012, were intended to enliven "a general duty of disclosure upon police officers involved in the investigation of an offence" and a corresponding obligation upon the prosecution to disclose to the defence "copies of any relevant information [only if][9] provided by the police to the prosecution".[10]

The ODPP's 'Prosecution Guidelines', issued under s13(1) of the *Director of Public Prosecutions Act 1986* (NSW), also provide that prosecutors are under a *continuing* obligation to fully disclose to the accused all material known to them in a timely manner that on their sensible appraisal:

- is relevant or possibly relevant to an issue in the case,
- raises or possibly raises a new issue that is not apparent from the evidence the prosecution proposes to rely on, and
- holds out a real as opposed to the fanciful prospect of providing a lead to evidence that goes to either of the previous two situations. [11]

Since 2001, Division 2A, Pt 3 of the CPA has required pre-trial disclosure by both the prosecution and the defence. A prosecuting authority is required to give an accused person a "notice of the case for the prosecution". These reforms were intended to reduce delays in complex criminal trials.[12] The scope of the NSW pre-trial disclosure scheme was expanded in 2009 and again in 2013. Further amendments in 2018 focussed on the expansion of defence disclosure obligations.

[9] Inserted for emphasis.
[10] See Explanatory Note to the Criminal Procedure Amendment (Pre-trial Disclosure) Bill 2000.
[11] ODPP Prosecution Guidelines, Chapter 13. Disclosure, March 2021.

[12] Second Reading Speech, Criminal Procedure Amendment (Pre-Trial Disclosure) Bill 2000 – Legislative Assembly – 16 August 2000.

Section 142 of the CPA currently requires prosecution disclosure, inter alia, of (relevantly):[13]

> (i) a copy of any information, document or other thing provided by law enforcement officers to the prosecutor, or otherwise in the possession of the prosecutor, that would reasonably be regarded as relevant to the prosecution case or the defence case, and that has not otherwise been disclosed to the accused person,
>
> (j) a list identifying—
>
> (i) any information, document or other thing of which the prosecutor is aware and that would reasonably be regarded as being of relevance to the case but that is not in the prosecutor's possession and is not in the accused person's possession, and
>
> (ii) the place at which the prosecutor believes the information, document or other thing is situated,
>
> (k) a copy of any information in the possession of the prosecutor that is relevant to the reliability or credibility of a prosecution witness,
>
> (l) a copy of any information, document or other thing in the possession of the prosecutor that would reasonably be regarded as adverse to the credit or credibility of the accused person.

Timetables for disclosure obligations in the NSW District and Supreme Courts are set out in relevant Practice Notes.[14] Section 146 of the CPA provides for sanctions for failures to disclose evidence, including powers for the court to refuse to admit evidence (s146(1) and (2)) or to adjourn the proceedings (s146(3)). Notably, an adjournment of a trial is frequently contentious and requires court time to be allocated to hearing such an application. It results in an expenditure of Crown resources and defence resources as well as uncertainty and stress to complainants and witnesses, and may significantly extend the time an accused person spends in remand custody. In this context, s146 is not a sanction solely against the Crown, but impacts all stakeholders and individuals involved.

Commonwealth Prosecutorial Guidelines for Disclosure

The Commonwealth Office of the Director of Public Prosecutions' (CDPP) disclosure obligations are found in the 'Statement on Disclosure in Prosecutions Conducted by the Commonwealth' (2017). The overarching principle guiding the CDPP is the accused's right to a fair trial followed by adequate notice and satisfying local statutory obligations. In addition, 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

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[13] In their 2018 Paper *Prosecution disclosure (and non-disclosure) in criminal matters* Barristers Felicity Graham & Stephen Lawrence outline a non-exhaustive list of what material must be disclosed by the prosecutor:

- statements of witnesses proposed to be called
- advance notice of discrepancies between a statement and the evidence proposed to be led
- statements of witnesses not proposed to be called
- prior convictions of prosecution witnesses and other material relevant to credit
- other material which could reasonably be seen as capable of assisting the defence case
- all material relevant to the admissibility of evidence sought to be led by the prosecution, including for example material relevant to whether evidence has been obtained
- improperly or in consequence of a contravention of any law
- all material relevant to mitigation of sentence. See https://legalaidnsw.podbean.com/e/prosecution-disclosure-and-non-disclosure-in-criminal-matters-june-2018-paper-by-felicity-graham-stephen-lawrence/

[14] District Court Criminal Practice Note 18 (Criminal trials) sets out the timeframes that apply to pre-trial disclosure in the District Court. Supreme Court Practice Note SC CL 2 sets out the timeframes that apply to pre-trial disclosure in the Supreme Court. The notice of the prosecution case should be filed and served on the accused person no later than eight weeks before trial. In addition to the requirements of s142 of the CPA, the notice is to include a statement as to the basis upon which the prosecution will contend that the accused is criminally responsible in respect of the alleged offence(s). Practice Note SC CL 2 further states that, in the event of non-compliance by a party, the court may contact the offending party directly, or list the matter for mention, either of its own motion or at the request of either party.

- might reasonably be expected to undermine the credibility or reliability of a material prosecution witness.[15]

The starting position is the common law duty owed to the court. In this regard, the CDPP also acknowledges that "at common law there is no distinction between the prosecuting agency and the investigative agency".[16] This confirms that disclosable material that is not in the immediate possession of the prosecutor is nevertheless within the prosecutor's duty of disclosure.[17]

A common feature of prosecutorial disclosure guidelines for the ODPP and CDPP is that the guidelines are modelled on the common law and that they exist to fill the gaps in disclosure standards not covered by statutory requirements. It is important to emphasise that these are guidelines and there is no formal mechanism by which prosecutors declare their disclosure obligations have been met to the common law standard.

Early Appropriate Guilty Plea reforms and disclosure

Full and early prosecution disclosure is a key component of the 2018 EAGP reforms. The reforms aimed to address the inefficiencies, costs, and distress for victims of crime and witnesses associated with late guilty pleas. Late service of prosecution evidence had been identified by the NSW Law Reform Commission as a common obstacle to early guilty pleas.[18] The resulting reforms identified the early disclosure of the brief of evidence as one of six key interdependent elements to maximise the opportunity and incentives for defendants to enter early appropriate guilty pleas. Other key elements are charge certification; mandatory criminal case conferencing; continuity of legal representation; statutory sentencing discounts; and Local Court case management.[19]

As part of the reforms, the CPA was amended to provide for the service of a brief of evidence in a simplified form so that it can be provided to the accused person earlier in proceedings, thus encouraging expeditious progress of matters. Section 61 of the CPA made clear that the new division does not affect the operation of existing ongoing disclosure obligations of both the investigator and the prosecutor in respect of any other law or obligation, including laws concerning privilege and immunity.

Simplified briefs were intended to provide prosecutors with the necessary information to determine and certify charge(s) earlier in the process and to equip the defence early with the opportunity to make informed decisions about pleas without delays. Since briefs of evidence are crucial to early charge advice, they must reflect a robust investigation and be sufficient to support a reasonable chance of conviction.[20]

Notably, the brief service requirement in EAGP matters is broader than that originally recommended by the NSW Law Reform Commission. The new s62(1) of the CPA, therefore, provides a wide definition that extends to evidence relevant to the defence case and to the strength of the prosecution case, consistent with the current duty of disclosure expressed in the ODPP Guidelines. As stated by the Attorney General when introducing the EAGP amending legislation:

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[15] Statement on Disclosure | Commonwealth Director of Public Prosecutions (cdpp.gov.au) page 3 citing *Cannon and Anor v Tahche* (2002) 5 VR 317 at 340.
[16] Statement on Disclosure | Commonwealth Director of Public Prosecutions (cdpp.gov.au) page 4 citing *R v Farquharson* (2009) 26 VR 410 at [212].
[17] *R v Jenkin (No 2)* [2018] NSWSC 697 [32] even in instances of omission to enquire where no criticism is levelled at the prosecutor, the duty still arises.
[18] NSW Law Reform Commission, *Report 141: Encouraging early guilty pleas*, pxix-xx.
[19] Ibid., p xviii-xix.
[20] Trimboli, L. (2021). *Early Appropriate Guilty Plea reform program - Process evaluation* (Crime and Justice Bulletin No. 238). Sydney: NSW Bureau of Crime Statistics and Research, p3, available at: https://www.bocsar.nsw.gov.au/Publications/CJB/2021-Report-Early-Appropriate-Guilty-Plea-Reform-program-process-evaluation-CJB238.pdf

> The intent of this expanded definition of a brief of evidence is to ensure sufficient disclosure for the prosecution to properly assess a case and to certify the charges, and for the defence to make informed decisions about the case and to determine whether to enter a guilty plea.
>
> Proposed section 62(2) provides that material in the brief need not be in an admissible form. There will not be a less robust investigation, nor will there be changes to best practice for the collection of evidence. The reforms are about ensuring that the brief can be served earlier by reducing some of the formal requirements around how evidence is to be presented that currently contribute to delay in criminal cases.[21]

Complementing this philosophy was the introduction of efficient committal processes and strict statutory sentencing discounts for early guilty pleas to promote consistent application of sentencing discounts. These reforms aimed to provide strong incentives for an accused to enter a guilty plea before the matter is committed for trial. We address the role of disclosure in the sentence discount scheme further below.

The specific content of the brief of evidence in EAGP proceedings is not prescribed. Instead, it is subject to guidelines set out in the *Agreement between NSW Police Force and the Office of the DPP (NSW) Concerning the Content and Service of an Early Appropriate Guilty Plea Brief and Charge Certification* (dated 27 April 2018).[22] While the Agreement provides helpful guidance as to the disclosure obligations of the ODPP prosecutor and NSW Police officers, each case turns on its own facts, such that some categories of evidence will be more relevant than others. The categories of evidence outlined in Appendix A to the Agreement as to the evidence to be included in the Brief should guide, but not replace, proactive and critical analysis of each case by the prosecutor and investigator to ensure that disclosure obligations are properly met. Prosecution and police disclosure are too central to the obligation to ensure that the accused person receives a fair trial and/or has a fair opportunity to review his or her position prior to a guilty plea, to be permitted to be downgraded, and risk becoming entrenched, as a superficial box-ticking exercise.

Ethics and disclosure

Finally, Rule 87 of the *Legal Profession Uniform Conduct (Barristers) Rules 2015* provides:

> A prosecutor must disclose to the opponent as soon as practicable all material (including the names of and means of finding prospective witnesses in connection with such material) available to the prosecutor or of which the prosecutor becomes aware which could constitute evidence relevant to the guilt or innocence of the accused other than material subject to statutory immunity, unless the prosecutor believes on reasonable grounds that such disclosure, or full disclosure, would seriously threaten the integrity of the administration of justice in those proceedings or the safety of any person.

CONCERNS WITH DISCLOSURE IN NSW

Despite the extensive common law, statutory and prosecutorial guidelines canvassed above, the experience of defence practitioner members of the Criminal Law Committee is that there are regular occurrences of unsatisfactory disclosure.

These members regularly see cases where evidence that undermines the strength of the prosecution case or is exculpatory of the accused is requested by the defence, but not provided. In some cases, disclosure only follows a defence subpoena, which is regularly contested by the police. The following examples are not isolated:

[21] Second Reading Speech, 11 October 2017.
[22] Available at: https://www.odpp.nsw.gov.au/sites/default/files/2021-08/Agreement-between-NSWPF-and-ODPP-EAGP-brief-charge-certification_1.pdf

- Footage from a taser camera was not served. When pressed by subpoena, the taser footage was contrary to evidence of the police statement evidence, and contrary to an earlier email by the Officer in Charge (OIC) about what it showed. The matter was withdrawn.

- Police conducted an interview with a domestic violence complainant via a Domestic Violence Evidence in Chief (DVEC) recording. Police did not disclose the record of a prior interview leading up to the DVEC, as well as a lengthy history of the complainant assaulting the accused. The outstanding material was only provided after defence raised the prospect of a stay of proceedings.

- In a trial involving identification evidence, police did not disclose communication between police officers to the effect that the accused was included in the photo line-up "because he's a grub", even though another person was suspected of committing the offence.

- A COPS Event entry about a home invasion that occurred on the same night the accused was alleged to have committed a (different) offence was not disclosed. This COPS Event entry was entirely consistent with the version of events the accused had given in evidence about events leading up to his alleged offending, which the Crown had not accepted.

- A defendant was charged with importation of a commercial quantity of a border controlled drug and possession of a commercial quantity of unlawfully imported border controlled drug. In respect of both charges, the pure weight of the drug was an essential element of the charge. However, the brief contained no evidence of weight at all in the case of one charge and in the other, there was an analyst certificate as to the weight and nature of the drug, but no purity (and therefore no pure weight). Despite this lack of disclosure, the charges were certified by the Crown.

In a recent trial where the key evidence was voice identification, the OIC did not write their statement until a few weeks before the trial, after the s143CPA notice had been filed, noting that identification evidence was in issue and after a guillotine order had been made. When pressed by the Court as to the reasons for delays in disclosure, the OIC acknowledged that they had known for at least a year that a voice identification statement would be required, that it was the crucial difference between being able to proceed and that the main issue if the matter did proceed to trial was voice identification.

Yet as the OIC explained to the Court:

> "I was sitting on a fence to see what would happen in respect to that voice ID statement…".

And despite the clear Supreme Court authority of *Bradley*[23] and *Jenkin*s[24], police commonly do not disclose the criminal history of complainants, as illustrated by the following example:

> Chad was charged with stealing a bike. He told police that he had bought the bike. The complainant had a history of drug use and offences of dishonesty, and a conviction for influencing a witness conviction. Police did not disclose the complainant's history of dishonesty until pressed by subpoena.

In another matter involving charges of theft/fraud matter, a complainant's convictions for swearing false documents and larcenies were only obtained by subpoena.

[23] *Bradley v Chilby* [2020] NSWSC 145.
[24] *R v Jenkin* [2018] NSWSC 978.

EAGP reforms and disclosure

> *Briefs of evidence are the fundamental ingredient in the committal process. Any difficulties with the timing of their service, their quality or completeness have a compounding effect and can delay or disrupt subsequent stages.*
>
> Bureau of Crime Statistics and Research Early Appropriate Guilty Plea reform program Process Evaluation (2021)

The recent Bureau of Crime Statistics and Research (BOCSAR) evaluation of the EAGP reforms bears out the experience of our defence practitioner members. The evaluation not only underscores the critical role played by early disclosure in the EAGP scheme but finds that problems with disclosure continue to prevent or delay early guilty pleas. At least 60% of the stakeholders interviewed for the evaluation considered the early disclosure of briefs of evidence to be critical in achieving four of the reform's five expected outcomes – an increase in guilty pleas overall (67.6%), an increase in early guilty pleas (88.6%), a reduction in the time taken to finalise indictable matters (80.0%) and an increase in trial readiness (61.8%). As stakeholders observed:

> The early disclosure of the brief of evidence is crucial so that the accused knows the case they will face at trial and is not making a decision on partial information. One of the most important things the accused wants to know is, 'how strong is the case against me? Am I going to win my trial or not?' A defence lawyer cannot properly advise on that without the full brief of evidence and not knowing what the jury will see.
>
> A full and early brief is pivotal to achieving an increase in trial readiness and all the other factors flow on from the brief being available.[25]

Stakeholder responses also reported delays in the Local Court due to lack of timely charge certification can be attributed to delays in preparation of the brief of evidence.[26]

According to the BOCSAR evaluation, examples of the material not provided in briefs of evidence and which would be relevant to the accused's defence include Forensic and Analytical Science Service (FASS) certificates; statements from crime scene investigators, other police officers and other witnesses; criminal histories of witnesses; police video interviews (rather than only transcripts) with the accused persons; triple 0 phone calls; DNA evidence; material (e.g. telephone intercepts) translated in languages other than English; expert evidence; analyses from ballistics experts; transcripts of phone calls; tendency notices and/or coincidence notices; exculpatory evidence; probative evidence.[27]

In the common experience of criminal defence practitioners, there is a disconnect between brief service prior to charge certification and continuing and proactive efforts to disclose relevant material. One of the secondary purposes of an EAGP case conference is 'to facilitate the provision of additional material or other information which may be reasonably necessary to enable the accused person to determine whether or not to plead guilty to 1 or more offences' (s73(3)(a), CPA). Ideally, the investigator for the past five months and the prosecutor for at least the past three months,[28] will have already turned their mind to whether or not the brief as at charge certification could be improved in respect of disclosure, or be in a position to respond to a disclosure request made during a case conference. However, this often does not occur in practice.

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[25] Trimboli, L. (2021). *Early Appropriate Guilty Plea reform program - Process evaluation* (Crime and Justice Bulletin No. 238). Sydney: NSW Bureau of Crime Statistics and Research, p23.
[26] Ibid, p15.
[27] Ibid, p14.
[28] Assuming there has been no delay whatsoever in accordance with the Local Court Practice Note.

In our view, this aspect of the EAGP process causes a delay that could be avoided if prosecutors and investigators were actively taking steps to complete their disclosure obligations, rather than defence practitioners using the case conference as a means to persuade the Crown to meet disclosure obligations or worse, to fossick for information when such requests for disclosure have been resisted.

The impact of technology on disclosure

Electronic evidence presents additional challenges for investigators to meet disclosure obligations. The advent of electronic evidence and 21st-century technological developments has fundamentally altered the landscape of disclosure in both State and Commonwealth criminal proceedings. Over the last decade, prosecutions have become more complex and rely increasingly on voluminous digitally recorded evidence (surveillance, listening devices, encryption etc). Smartphones and computers hold vast amounts of material that can be completely irrelevant or highly relevant. The contents of electronic devices have become its own, almost standard class of evidence, in criminal briefs of evidence.[29]

Frequently, the entire download will be disclosed late in the trial process. This causes the trial to be adjourned to enable the parties to understand what material is available. Searching through this material can lead to the discovery of relevant information for either party, but there are also risks, including the exposure to material that is protected by legal professional privilege (e.g. correspondence with lawyers about the charges in the *De Belin* case).[30] More fundamentally there is a concern about the legality of the device owner's private information being open for inspection by investigators and the parties, in circumstances where there has been no adjudication about whether there is a legitimate forensic purpose, as would be the case if the material was subpoenaed, or whether the investigator has demonstrated grounds to issue a search warrant or an interception warrant.

Establishing a preliminary judicial process to determine what material could be searched or used on a device could substantially reduce the amount of information that the parties have to consider. Importantly, it would save resources, create efficiencies, and facilitate early and proper disclosure by the investigator.

Reforms to disclosure processes in the UK have highlighted the resulting strain on the capacity of prosecuting agencies to consider disclosure. The need for more advanced technology could help the disclosure process by providing advanced search tools, improved document management and process management, content analysis, and assessing relevance of material.[31] The ODPP and police face similar challenges in NSW.

Disclosure by the ODPP

In our experience, disclosure requests of the ODPP are met with consideration and a willingness to facilitate disclosure. However, there is no uniform approach. Disclosure will vary on a case-by-case basis and is impacted largely by how proactive ODPP solicitors are to ensure police serve a brief of evidence to the requisite standard. Among the challenges that defence representatives encounter is the disjuncture between the prosecuting agency and the investigative agency. This can delay or prevent the disclosure of evidence that is requisitioned or subpoenaed.

Last year's case of *R v Hannah Quinn (No 2)*[32] highlighted some concerns around the ODPP's approach to its disclosure obligations. In that case, the trial judge granted a defence application for

[29] Whether this is appropriate is a separate issue.
[30] See *De Belin v R; Sinclair v R* [2020] NSWDC 487.
[31] Indictable Process Review Issues Paper, p33.
[32] [2021] NSWSC 494.

a directed verdict of not guilty in relation to the murder charge against the accused, who was ultimately convicted of accessory after the fact to manslaughter. In a subsequent costs determination, the Supreme Court of NSW identified numerous instances of improper or dubious exercises of prosecutorial discretion in this case. Specifically, there was a significant failure to disclose by the ODPP and Crown Prosecutor.

R v Hannah Quinn (No 2) [2021] NSWSC 494

Hannah Quinn was charged with murder. The Crown case was that she was part of a joint criminal enterprise to murder the deceased. A critical crown witness, PHS, who was ultimately not called to give evidence, had made three police statements. The first two statements were internally inconsistent and contradicted the evidence of multiple other eyewitnesses. Although PHS's statements had conflated events and had apparent errors, they were largely exculpatory, supporting Ms Quinn's defence. PHS's third statement - which departed significantly from her first two statements - was made after she attended a lengthy conference with the Crown Prosecutor and a DPP Solicitor. During this conference, further concerns emerged regarding PHS developing severe mental health conditions and experiencing suicidal thoughts as a result of previous questioning by the Crown Prosecutor and police.

None of the conferences were disclosed to defence nor to the court. The trial commenced. Following the Crown opening, Quinn's lawyers served a subpoena on the DPP seeking, inter alia, all conference notes from the conferences between the DPP and PHS. The Crown Prosecutor made a statement to the Court to the effect that all materials had been disclosed and that there was nothing else to disclose from the DPP. Only after further interrogation from the Court did the Crown admit that there was additional material, but the Director claimed client legal privilege over them. The conference notes were ultimately found to be relevant, that there was legitimate forensic purpose for their production, and that privilege had been waived on the basis that the Crown in its opening address had relied on PHS's evidence and had revealed the fact that she had made different statements.

Disclosure of sensitive evidence

Various statutory protections limit and/or tightly monitor the service or duplication of material deemed to be of a sensitive nature. These supplement common law public interest immunity and legal professional privilege protections and have been increasingly expanded over recent years: see Annexure B. These classes of evidence include child abuse material, prior sexual experiences of complainants, recorded sexual assault testimony, photos of deceased people, DVEC recordings, sensitive health records and designated materials held by government agencies. Under s 281C of the CPA, if a prosecuting authority reasonably considers evidence to be *sensitive evidence*, it is not required, and cannot be required, whether by subpoena or other means, to provide a copy to an accused person.

Such provisions provide important legal protections in respect of what and how materials should be disclosed. We are concerned, however, with cases where:

(i) the DPP or police resist disclosing material that it determines is sensitive evidence when in fact that evidence falls outside the scope of the statutory definition; and

(ii) the prosecutor refuses to use protective measures to facilitate disclosure (such as undertakings) that are specifically provided for in the legislation. This is despite clear judicial authority that the ODPP is obliged to disclose sensitive evidence where the solicitor for the defendant has signed restrictive undertakings with the ODPP.[33]

[33] *DPP v SW* [2009] NSWSC 524 per Adams J.

The following examples highlight these concerns:

Case Study: Aides are not satisfactory substitutes for actual evidence that is disclosable

In a recent matter, the police and ODPP refused to produce video of an interview with a child, in circumstances where there was real and demonstrable concern about evidence of errors in the transcript, the transcript being an aide memoir only and the recording being the actual evidence in admissible form.

The solicitor offered the required undertaking, both orally to the ODPP and in writing. The ODPP said the material was not theirs to produce, despite having possession of the material and being subject to the duty of disclosure.

The police were offered the same protections in the form of a defence undertaking but refused outright to disclose the video.

A subpoena was issued and was contested. The court applied *DPP v SW* and required production of the material. Arguably, thousands of dollars were wasted in this process.

Case Study: Large evidential items with portions of 'sensitive evidence'.

In a similar matter, a Cellebrite Download of the complainant's phone was not disclosed to the defence. When disclosure was requested, the ODPP advised that it did not have the material. On being reminded of their obligation, objection was taken to providing it to the defence on the basis that it was 'sensitive evidence'. In a process that used considerable court time, the material was eventually produced, after much argument, on the basis of a signed undertaking not to show certain images to the accused. The phone records were highly relevant.

The ODPP has recently introduced a new system for disclosure of sensitive evidence, via a Secure Time Box viewing system. Under this system, practitioners have secure web access to the material for a determined period. It is hoped that over time this may promote improved compliance and efficiency regarding the disclosure of sensitive evidence by the ODPP, but it leaves unresolved the problem of non-disclosure by investigators.

NSW Police and disclosure

Police are inextricably connected to the prosecution process. Their role in facilitating the fair disclosure of evidence to the defendant is integral to a fair trial of an accused, who may lack the resources to investigate for him or herself. The duty of prosecutorial disclosure extends to police and meeting that duty in a timely fashion is vital to the interests of justice.[34]

Unfortunately, there are many examples of incomplete police investigations, or problems in disclosing all relevant material to the DPP. Where there are concerns with disclosure, defence practitioners frequently resort to subpoenas to compel disclosure. The following section outlines concerns with the police response to the subpoena process.

Subpoenas against NSW Police

Increasingly in our members' experience, NSW Police engage legal representatives to resist subpoena production on the basis that the NSW Police Commissioner has no duty to disclose, as they are not the prosecutor. This practice is common, even in matters prosecuted by NSW Police and not by the ODPP.

[34] *R v Farquharson* (2009) 26 VR 317; [2009] VSCA 307 [212].

When a subpoena is issued against a prosecutorial agency such as NSW Police, matters of prosecutorial disclosure are enlivened and this factor ought to be a predominant factor in the disclosure policy. Nevertheless, informal and formal objections are routinely taken that the subpoena lacks legitimate forensic purpose, it is oppressive or broad, or that the material is subject to public interest immunity. Despite these objections, in our members' experience, the material is frequently produced without the need for a contested hearing, albeit production is late. It is the experience of defence lawyers, including those beyond the Criminal Law Committee, that NSW Police frequently demand the identification of the legitimate forensic purpose of every item called for in a subpoena schedule. The procedure frequently followed by police prosecutors or representatives from NSW Police is at odds with the prescribed process for compliance with a subpoena.[35]

It is common for an adjournment to be sought by police prosecutors at the first return date, simply because an objection has been raised in respect of the subpoena. In this regard, it is also common that the defence is notified that an objection is being taken within days before the return date, even in cases where police have been given weeks to comply with the subpoena before the return date. Further, it is a frequent practice that after an objection is noted on the record and the subpoena is pressed, material starts to be produced by NSW Police, even though there was once an objection to producing that material.

In some cases, the objection is maintained, and the matter must be set down for hearing. In many of these instances, the objection is withdrawn prior to the hearing, by which stage significant costs and delays have occurred.

In conclusion, objections to subpoenas issued to the Commissioner of NSW Police through her delegates are being taken so frequently that they are becoming an ingrained part of the criminal justice process in NSW. Such objections invariably result in adjournments for police to comply with a subpoena and are a source of persistent and avoidable delay in criminal cases across NSW. Such an approach is inconsistent with High Court authority and may be inconsistent with the burden of proof in criminal proceedings.

A different approach: crash investigations

We highlight the approach of the Crash Investigation Unit (CIU) as a positive example of disclosure. The CIU are charged with investigating the most complex and more serious motor vehicle collisions. They are, to all intents and purposes, detectives of the motor vehicle collision arena. These investigations can involve highly complex reconstructions, scientific calculations and high emotions. Yet, in our experience, CIU officers fulfil their disclosure obligations by producing material that is both inculpatory and exculpatory.

In a recent CIU matter, for example, there was a full chain of disclosure of medical material from history prior to a collision, to a roadside blood sugar test, to a full and documented history of tests performed at the hospital, without one document having to be requested by the defence.

THE CONSEQUENCES OF NON-DISCLOSURE

Late or incomplete disclosure is inefficient, costly and has the potential to cause great unfairness to an accused. It can result in unnecessary adjournments and delays, risks of proceedings being stayed and/or withdrawn and wasted costs for the parties and courts owing to additional court appearances and hearings. In some circumstances, failure to disclose promptly (or at all) increases avoidable remand and/or leads to wrongful conviction and imprisonment. It compounds the stress of criminal proceedings experienced by complainants and witnesses.

[35] See Division 4, Part 6, *Local Court Rules 2009*.

Unfair trials and miscarriages of justice

Miscarriages of justice generated by the failure of police or prosecutors to disclose material evidence in their possession are the subject of consideration in a number of comparable jurisdictions. Notoriously, the Western Australian case of Andrew Mallard[36] illustrates the tragic failure of justice from non-disclosure by police and by prosecutors. The most compelling example of failure of disclosure by police - in the context of failure of police judgement more broadly - is found in the Victoria Police's reliance on Melbourne criminal barrister Nicola Gobbo as a registered police informer. The case of *Roberts*,[37] arising from the Victoria Police/Gobbo affair, involved police manipulating evidence, perjury and police non-disclosure, amounting to "a gross and fundamental corruption of the trial process … impropriety and unfairness permeated and affected the trial to an extent that it ceased to be a fair trial according to law."

As well as undermining the fundamentals of accusatorial justice and severely threatening the integrity of the Victorian criminal justice system, it has generated numerous complex appeals that will thread through the Victorian courts for many years to come. The McMurdo Royal Commission into Ms Gobbo and Victoria Police revealed that this undisclosed informant relationship impacted just under 1300 matters in the Victorian criminal justice system.

Annexure C provides other examples of where disclosure failures have led to miscarriages of justice.

The following cases of JB and TWL demonstrate the impact of these failures in NSW, revealing the human, court resource and other financial costs arising from failure on the part of prosecution and police to disclose exculpatory evidence:

Case summary: *JB v R (No 2)* [2016] NSWCCA 67

In 2008, two large groups of young men were fighting in the early hours of the morning. JB was a 15-year-old boy in one of the groups, and Mr S was part of the other. It was dark, and many people were fighting at once. In a second confrontation, someone in JB's group produced a knife and stabbed Mr S, who later bled to death. It was the Crown case that this person was JB. As the witness evidence at trial was largely contradictory and circumstantial, the Crown case relied heavily on supposed admissions by JB made to A107, a prosecution witness. JB's statements to A107 were made after his arrest in the context of A107 acting as a support person to JB while at the police station.

JB was convicted of murder and sentenced to imprisonment for 23 years with a non-parole period of 16 years. After JB had exhausted his avenues of appeal, it was discovered that A107 was a registered police informer. Unbeknownst to the defence or to the ODPP, A107 also received an affidavit of assistance from a Chief Inspector of Police for his own trial, which referred to his assistance in JB's matter. Further, A107's record of the interview had been 'edited' to remove reference to A107's informer status. Another central prosecution witness, Ringo, who was part of JB's group, agreed to give evidence against JB after being threatened by police with a murder charge. Ringo received a discount for his assistance to police when sentenced for his role in the lethal melee.

On a new appeal, after the matter was referred by the Attorney General, JB was finally acquitted. The Court found that without A107's evidence, the Crown case was weak and that a jury would be unlikely to accept Ringo's evidence at a retrial. JB spent almost 7 years in jail.

Case study: *TWL v R* [2012] NSWCCA 57

TWL and his friend AB were both 15 years old when they attended the Maitland Show on a Friday evening in 2009. While there, they were aggressively confronted by a group of young adult men.

[36] *Mallard v R* [2005] HCA 68; 224 CLR 125.
[37] [2020] VSCA 277, [259]-[260] (T Forrest and Osborn JJA and Taylor AJA).

One of the men, Mr Purdon, tried to pick a fight with the boys. After being "roughed up" by the men, TWL told AC – an older 17-year-old friend that he ran into at the Show – about what had happened. AC was worried about the boys being bullied. The Crown contended that TWL then became involved in a joint criminal enterprise with AB and AC to physically assault Mr Purdon in revenge, with AC throwing the fatal blow which caused Mr Purdon's death after hitting his head on the ground.

However, the prosecution failed to disclose an account in which AC described the night of the incident. AC described how he had approached Mr Purdon to tell him off for picking on his younger friends after someone spotted him in the crowd. AC put a hand on Mr Purdon's shoulder to get his attention. When Mr Purdon, surrounded by his friends, turned around and grabbed AC's hand, AC became afraid that Mr Purdon was going to hit him. AC then threw the punch first. In the reports, unlike the Crown case at trial, AC punched Mr Purdon out of fear rather than in a planned attack on Mr Purdon leading to his death.

At trial, TWL was convicted of manslaughter and was sentenced to 5 years imprisonment with a non-parole period of 2 years and 6 months. He spent almost a year in jail before his conviction was quashed and a retrial ordered.

Delay

In our defence practitioner members' experience, avoidable delay in EAGP processes is caused by late or incomplete disclosure. Mandatory case conferences are commonly adjourned as a result of disclosure issues. This leads to EAGP processes in the Local Court commonly being extended by 3-4 months, including where prosecution disclosure must be compelled by subpoena. Late disclosure persists post-committal. Notably, a sample of trials surveyed by the Department of Communities and Justice in 2019 found that the issue of outstanding evidence was raised in approximately a quarter of readiness hearings.[38] Trials are often adjourned or vacated due to late prosecution disclosure, including on the eve of the trial and even mid-trial.

A chronology of delays in EAGP matters in the Local Court is provided in Annexure D.

Delays can result in one or more of the following:

- Waste of court time for adjournment and hearings to vacate trial.
- Loss of court time, especially in regional courts in which a set number of trials are listed in a sitting or which jury panels are only available for the first part of the week.
- Longer periods of time for accused persons to remain in remand custody. In regional court locations, this may include being remanded at a police station for the duration of a trial.[39]
- Additional costs are borne by an accused person or their publicly funded defence agency such as Legal Aid NSW or the ALS NSW/ACT, especially if a trial is vacated.
- Stress and anxiety for the accused, complainant and witnesses (see further below).

Loss of statutory sentence discount

Due to the strict and inflexible statutory discount scheme in EAGP matters, late or incomplete disclosure can mean an accused loses their opportunity to plead guilty before proceedings are committed to the District Court when the statutory discount for an early guilty plea reduces from 25% to 10%. BOCSAR's recent evaluation of the EAGP scheme found that while statutory sentencing discounts are being strictly applied, defence legal practitioners and judges observe that the scheme is too rigid and inflexible. They noted that the scheme is "unfair to, or has a negative impact on, the

[38] Indictable Process Review Data Analysis, p19.
[39] For example, Queanbeyan District Court trials require accused persons to be housed at the Police Station during a trial.

accused",[40] with some comments noting that this was due to "an inadequate brief of evidence or the late service of key material".[41]

The impact of disclosure failures on complainants

Failed disclosure compounds delays and stress experienced by complainants in criminal proceedings. This is illustrated by the following example:

Case study: failed disclosure in sexual assault proceedings

The accused was charged with a historical sexual assault. The trial, proceeding judge alone in a regional circuit court, had an estimated length of four days. On day seven of the trial, the complainant was still in evidence. The complainant had attended court for six days. She had been examined, cross-examined, and partially re-examined.

On day seven, ten additional statements, together with an Electronic Record of Interview of a Suspected Person (ERISP) from the accused, COPS entries, and a copy of a police notebook were served in Court. This evidence was not encapsulated in the Crown case statement. The statements served in court included a body of evidence from other witnesses which recorded the complainant telling people that she was in a relationship with the accused approximately two years after the alleged sexual assault the subject of the proceedings in addition to saying various things that undermined the complainant's credit.

The OIC was in possession of this material prior to the accused's arrest. This material had not been disclosed to the ODPP. The OIC, a Detective Senior Constable, did not think that this material needed to be disclosed because it related to another complainant. The matters were interrelated, with the complainant in the current proceedings being a support person for the complainant in the undisclosed proceedings, and the complainant in the undisclosed proceedings being a reluctant witness to the current proceedings. The accused was directly asked about the current proceedings in the ERISP for the undisclosed proceedings. The material was clearly relevant and ought to have been disclosed.

Following the accused sending written no bill representations, the ODPP ordered no further proceedings on day eight of the trial. The accused had been on remand for over twenty months.

Thorough and timely full disclosure by investigators and the prosecution is vital to achieving the objectives of the Child Sexual Assault Evidence Program (the Program) proceedings in the District Court in Sydney and Newcastle. The Program represents a key initiative by the NSW Government to strengthen the criminal justice response to child sexual abuse. Pre-recording of the entire evidence of a child witness before the balance of the trial aims to reduce the difficulties and stress for such witnesses in matters involving alleged child sexual offences, and to improve the accuracy and quality of their evidence without impinging upon the defendant's right to a fair trial.

Safeguards for the Program were based on recommendations by the 2015 NSW Child Sexual Assault Taskforce, including that pre-recording of the child's evidence was not to be undertaken until full disclosure of prosecution evidence has occurred.[42] However, an independent evaluation of the Pilot in 2018 noted ongoing defence counsel concerns about fairness to the accused, where cross-examination of the main prosecution witness may be required before the balance of the trial and before all of the evidence had been served. Gaps in initial investigation and disclosure can result in further police investigation, leading to late and/or fragmented disclosure. This not only risks unfairness to an accused but risks a child witness being recalled for further cross-examination.

[40] L. Trimboli, '*Early Appropriate Guilty Plea reform program - Process evaluation*' (August 2021), p22. These comments were 15.6% (or 12) of the comments received.
[41] Trimboli, *Ibid*, p22.
[42] J Cashmore & R Schackel, *Evaluation of the Child Sexual Offence Evidence Pilot Final Outcome Evaluation Report* (August 2018) (Victims Services, NSW Department of Justice), p65.

POTENTIAL SOLUTIONS

In England and Wales, the collapse of a number of high-profile cases as a result of prosecution disclosure failures has led to a number of inquiries and reforms which provide valuable lessons for NSW. Such reforms have included:

- The College of Policing and the Crown Prosecution Service's commitment to a joint action plan, called the National Disclosure Improvement Plan, in January 2018. The plan includes measures to:
    - Create disclosure experts in every police force and CPS area;
    - Create a network of champions in every police force to make sure that advice and support are available to all who may need it;
    - Introduce improvement plans for every police force and CPS area;
    - Provide all multimedia evidence from the CPS to the defence digitally;
    - Update training; and
    - Set up a system for the CPS and police to better identify and deal with cases with significant and complex disclosure issues.[43]

- The Attorney General's *Review of the efficiency and effectiveness of disclosure in the criminal justice system* made a series of practical recommendations, crucially recognising that the systemic nature of the problem would demand a system-wide approach to improve disclosure obligations. These recommendations included: earlier engagement between the prosecution and defence, harnessing the use of technology, and cultural change.[44]

- Publication of a revised version of the Attorney General's Guidelines on Disclosure and *Criminal Procedure and Investigations Act 1996* Code of Practice.[45]

Johnston has observed that ongoing disclosure failures in the UK arise from inadequate sanctions for the prosecution:

> The pressure to enter a plea is often given in circumstances where the defence lawyer is not in full possession of the relevant evidence and so timely disclosure by the prosecution would vastly improve the legal advice offered by the defence. However, there is no suitable stick that the court can level at the prosecution, should they fail to disclose evidence in a timely manner.[46]

As has been outlined above, there are extremely limited sanctions for non-disclosure or late disclosure in NSW which are largely confined to s146 CPA. In our experience, evidence is rarely excluded under the CPA for late service and the most frequently used sanctions are adjournments into the trial listing for hours or days to permit the defence to review material served late. In some instances of late service, the only fair and just option is to vacate the trial because it would be too prejudicial for the defence to be required to digest or investigate further voluminous or significant material or establish their case in reply to that material. As we have argued above, the punitive impact of these sanctions is not limited to the prosecution.

There may be some danger in 'cherry picking' from the UK reforms which have built on formal and structured disclosure processes with a much greater degree of input from the Crown Prosecution Service at the charge and brief stage. It is also notable that although the prosecution still bears the

[43] Disclosure | The Crown Prosecution Service (cps.gov.uk).
[44] UK Attorney General's Guidelines on Disclosure.
[45] Available here: https://www.gov.uk/government/publications/attorney-generals-guidelines-on-disclosure-2020.
[46] Ed Johnston '*The adversarial defence lawyer: Myths, disclosure and efficiency—A contemporary analysis of the role in the era of the Criminal Procedure Rules*' (2020) 24 *International Journal of Evidence & Proof* 35–58.

onus of proof, there has been some abrogation of the right to silence in England and Wales (which we strongly oppose).

In our view, the current status of prosecutorial disclosure in NSW nevertheless requires fundamental and systemic reform that clearly codifies the common law on disclosure. Full, proper, and continuing disclosure requires greater legislated checks and balances to ensure that prosecutors have discharged their disclosure obligations in each case. These forms of checks and balances should be derived from statute and declared to the court at critical junctures in the court proceedings.

Due to the present culture and attitudes towards disclosure, clear legislated obligations, not merely guidelines, are essential,[47] as is comprehensive education and training to support them. Strengthened statutory disclosure obligations should also be accompanied by statutory sanctions that appropriately penalise the investigators or prosecutors responsible for late or non-disclosure. This could be by cost orders and/or disciplinary reports by judicial officers who preside over trials that are vacated by reason of late disclosure. Greater oversight and case management of disclosure obligations in the Local Court is also required.

The following measures would go a significant way towards improving compliance with existing EAGP requirements as well as the *Director of Public Prosecutions Act 1986* and ODPP Prosecution Guidelines:

(1) Introducing a power in the Local Court to require the Crown to serve evidence prior to adjourning a matter for case conference.

This proposal would act as an incentive for issues to be canvassed before the actual case conference occurs, instead of leaving these issues to the case conference as is contemplated by s70(3)(a) CPA. It would provide a safeguard for defendants to avoid engaging in premature case conferences where the statutory discount is at stake and would encourage earlier attention to issues in a case and move delay associated with late service of evidence forward in the committal phase.

(2) Introducing flexibility in the Local Court Practice Note for EAGP proceedings to allow proceedings to be adjourned or stayed in the Local Court if the defence has requested access to material for the purpose of case conference discussions.

A Practice Note that highlights the importance of full disclosure as being a central component in the committal will encourage prosecutorial attention and cast the burden on the prosecutor and investigator to efficiently meet disclosure obligations within the prescribed timetable as opposed to the defendant seeking to depart from the timetable to enforce disclosure.

(3) Amending the Local Court Practice Note to provide a process and timetable for filing objections and supporting documents in respect of subpoenas in committal matters.

Objection to subpoenas is frequently taken by NSW Police but can be resolved before a hearing occurs. Nevertheless, these objections have the potential to substantially delay committal proceedings. A timetable dictating how long before a return date an objection must be filed, including with the proper process and supporting documentation, will assist

[47] Jill Hunter and Kathryn Cronin, '*Evidence, Advocacy and Ethical Practice: A Criminal Trial Commentary*'. 1995. Butterworths p. 213. In 1995 Hunter and Cronin made observations about the culture of prosecutorial disclosure and wrote "The attitudes of prosecutors revealed to the Law Reform Commission and displayed in cases such as *Alister, Anderson, Apostilides* and *Lawless* indicate that the Australian prosecution culture is essentially adversarial".

parties to identify issues quickly, negotiate, or obtain hearing dates sooner to resolve contested subpoenas.

(4) Greater education for the judiciary about the powers available to ensure the efficient conduct of proceedings.
Education and training material could include discussion of the court's power under s68(2) of the CPA to dismiss proceedings for failure to certify charges in the requisite time.

(5) Greater education for police, including the training of disclosure experts ("disclosure champions") on their legal obligations.
Such measures would facilitate a culture of proactive disclosure, consistent with legal requirements.

(6) Involve charge certifiers earlier in proceedings.
This would both identify issues in discussion with defence that can become focus points and support investigators to compile a brief that is appropriate to the case.

(7) Adjust the statutory discount regime when evidence that has a substantial impact on the strength of the prosecution case is served late.
We support a further exception to the strict statutory sentencing discount scheme in the *Crimes (Sentencing Procedure) Act 1999* to apply where:

a) evidence is served after committal which significantly strengthens the prosecution case; and

b) the accused person pleads guilty as soon as practicable after service of the material.

(8) Concrete statutory provisions that identify the contents of a brief of evidence required before committal.

(9) A provision to allow costs to be awarded in appropriate circumstances arising from non-disclosure or late disclosure.
Costs orders are more accessible in the Local Court pursuant to the CPA. However, unless an accused has been arraigned, they have extremely limited access to such orders. Costs orders are traditionally a means by which parties can keep each other accountable. Without such a measure, unpreparedness or inattention, including conduct amounting to late disclosure, can easily go unchecked. Adverse costs orders made against an organisation have a ripple effect, triggering reporting lines to open, explanations to be sought and internal review – all of which would support the systemic reform we seek.

Enshrining the duty to investigate in legislation

In addition to the above measures to improve compliance with existing legislative disclosure provisions, longer-term cultural change and fundamental fair trial principles could be facilitated by an amendment to the CPA to provide that the prosecution's duty of disclosure includes the duty to carry out proper investigations, including pursuing lines of enquiry that may undermine the prosecution case and/or assist the defence. This would resolve the present ambiguity in the common law as to the existence of such a duty. A legislative recognition of a duty to investigate should be accompanied by a mechanism for the Court to enforce it. One such mechanism could be a power of the Local Court to order, on application by an accused person, that particular further investigations be carried out by the prosecution, where the Court is satisfied that they are necessary to ensure that the prosecution has adequately complied with its duty to investigate.

CONCLUSION

As this submission has shown, disclosure is a pressing issue that we consider requires review, law reform and education.

The *Criminal Procedure Amendment (Pre-trial Disclosure) Act 2001* introduced reciprocal disclosure requirements to NSW. It also introduced s15A into the *Director of Public Prosecutions Act 1986* which diminished the oversight powers of the ODPP in relation to investigators' disclosure. Given the potential complexity of the issues at play, we consider a comprehensive review should be undertaken, in the form of a reference to the NSW Law Reform Commission. Given that issues also exist at the Commonwealth level, subject to some separation of jurisdiction-specific issues, it may be suitable to combine aspects of the review with the Australian Law Reform Commission.

It is to be remembered that at the end of the twentieth century the philosophical background informing NSW's early attempt at legislating a disclosure regime was dominantly adversarial.[48] Since that time, protection of vulnerable witnesses with pre-recording evidence, the sexual assault communications privilege and the impact of the Royal Commission into Institutional Responses to Child Sexual Abuse, combined with strong High Court statements on the importance of accusatorial justice have changed the landscape. Instances such as those described in this submission, including the Victorian experiences with Lawyer X, and the extensive consideration of similar issues in England and Wales, present an important and timely opportunity to undertake such a review now.

[48] See footnote Hunter and Cronin.

ANNEXURE A

Bradley v Senior Constable Chilby [2020] NSWSC 145 (27 February 2020): case summary

On 28 April 2018, Harley Bradley bit the finger of Katie O'Connor to the extent that it cut to the bone. On the advice of a community caseworker, she subsequently reported the incident, which had led to hospitalisation.

Bradley was arrested on 17 June 2018 in relation to the matter, suspecting that he had committed assault occasioning actual bodily harm under s59 of the *Crimes Act 1900* (NSW).

During his police interview, Bradley admitted having bitten O'Connor's finger but asserted that he had done so in self-defence, as O'Connor's Dad had him in a headlock and would not let go. Following the interview, Bradley was charged and served with a court attendance notice on 3 September 2018. He subsequently appeared, where he pleaded not guilty.[49]

Duty of disclosure

The defendant's lawyer wrote to the senior Wollongong police prosecutor on 4 April 2019, reminding him of the prosecution's duty of disclosure. The letter requested disclosure of Katie O'Connor's criminal history, NSW police 'fact sheets' relating to her criminal past and any local criminal proceedings against her, any other relevant police materials, entries about her in the COPS database, conversations between the prosecutor and other officers and prosecutors in relation to the case, her custody management record, and any other materials that could assist the defence.

The prosecutor responded to the letter in writing on 11 April 2019 assuring that the requested criminal history and COPS entries would be supplied. However, she denied there was a custody management record (prior to it being handed over a month later). She refused the defence requests for the rest of the material.

Bradley's lawyer then filed a notice of motion in the Local Court requesting the sought materials and a temporary stay of proceedings until such time as the prosecution had complied with its duty of disclosure.

The Magistrate's reaction

At the hearing of the notice of motion, the Magistrate referred to the defence's request as a "classic fishing expedition", making remarks to the effect that it was already well known that O'Connor had an extensive criminal record, which could be addressed during her cross-examination. The Magistrate added that some of the documents requested might be problematic, as they could include wrong facts and therefore be detrimental. His Honour ultimately ruled against the defence because, according to him, it was merely searching for anything it could get rather than having a legitimate forensic purpose for the request.

The Magistrate referred to the requests as a "catchall", designed to cause the prosecution to engage in additional work and waste its time. His Honour said that if such information was requested in all cases, the NSW justice system could come to a "grinding halt".

[49] Section 268 of the *Criminal Procedure Act 1986* (NSW) lists assault occasioning actual bodily harm as a Table 2 offence, which means it is to be dealt with summarily in a NSW Local Court, unless the ODPP elects to take the matter to the District Court. If the case remains in the Local Court, the offence carries a maximum penalty of 2 years imprisonment and/or a fine of $5,500.

Supreme Court appeal

Mr Bradley appealed the Magistrate's decision to the NSW Supreme Court. There were three grounds to the appeal: that his Honour erroneously found that certain requested items were not in keeping with a duty of disclosure, mistakenly finding that the materials were requested in order to frustrate the prosecution, and taking into account "perceived resource and timing considerations".

During the appeal proceedings, NSW Supreme Court Justice Adamson considered the common law authorities, including the NSW Court of Criminal Appeal case *R v Reardon (No 2)* [2004] NSWCCA 197, in which Justice Hodgson made clear that "the correct view is that a decision by the Crown concerning what to disclose should take a broad view of relevance and of what are the issues in the case" (at [58]).

Appeal Successful

The appeal was allowed. Justice Adamson rejected the prosecutor’s submission that there was no reason to provide all the requested materials, as there was no need as long as it was possible to conduct a fair hearing without them. Her Honour found this submission to be "legally unreasonable".

Her Honour further found the Magistrate's concerns over police time and resources to be unfounded, as there was nothing to show that the resources were not readily available, nor that they were outside the scope of *Reardon*.

Her Honour found the first two grounds had been made out and was unsure as to whether the third fell within the Court's jurisdiction, which is limited to considering questions of law in such appeals.

"I consider that the document emailed to police prosecutors... accurately summarises the authorities," Her Honour remarked, adding that "the conduct of the prosecutor in the present case falls far short of the duty required of her".

The orders made

On 27 February 2020, Justice Adamson ordered that the appeal be allowed, and the Local Court matter be stayed until a police prosecutor satisfied the duty of disclosure as properly required.

Significance of decision

The judgment makes clear that the duty of disclosure is not confined to ODPP solicitors but extends to investigating police officers and police prosecutors.

ANNEXURE B

Restrictions on disclosure of evidence under NSW legislation

Evidence class	Restriction	Provision
Child abuse material	Should not be disclosed to defence or prosecution, controlled viewing permitted by the legal representatives if required.	s281B, s281C, ss281D-F *Criminal Procedure Act 1986*
Sexual assault communication privilege (SACP)	The starting position is that this material is not disclosable and is prohibited from being produced under force of subpoena without leave of the court.	Part 5, Div 2 *Criminal Procedure Act 1986*
Photos of a deceased person	When a sensitive evidence notice is issued, cannot be copied except for legitimate purpose of a criminal proceeding and an accused must not be given possession.	s281B, s281C, 281D-F *Criminal Procedure Act 1986*
Terrorism materials	Designated terrorism evidence, by notice cannot be copied except for legitimate purpose of a criminal proceeding and an accused must not be given possession.	ss281G–281N *Criminal Procedure Act 1986* Practitioners criminally liable 100 penalty units, or 2 years imprisonment, or both
Domestic violence evidence in chief (DVEC)	Must not be copied except for legitimate purpose of a criminal proceeding and an accused must not be given possession.	s289P *Criminal Procedure Act 1986* Practitioners criminally liable 100 penalty units, or 2 years imprisonment, or both
	Legal representative entitled to a copy of the DVEC.	s298L *Criminal Procedure Act 1986*
	Unrepresented accused entitled to audio only with controlled viewing facilitated by the prosecution.	s298M *Criminal Procedure Act 1986*
	Prosecutor entitled to DVEC being returned.	s289O *Criminal Procedure Act 1986*
Sexual assault oral testimony recorded evidence	Accused and their representatives not entitled to possession of this evidence but are entitled to reasonable access which may include on multiple occasions.	s306F *Criminal Procedure Act 1986*
Evidence held by health authority	Sensitive material held by a health authority is not required to be produced under subpoena, supervised access may be given.	ss281FA-281FC *Criminal Procedure Act 1986*
Family and Community Services	Restriction on use of subpoena to produce or give evidence regarding contents of risk of significant harm reports.	s29(1)(e) *Children and Young Persons (Care and Protection) Act 1998* *Secretary, Department of Family and Community Services v Hayward (a pseudonym)* [2018] NSWCA 209

NSW Police misconduct investigation	Complaints about the conduct of police officers.	Part 8A, s170 *Police Act 1990*

ANNEXURE C

Key caselaw on prosecution failure to disclose leading to miscarriage of justice

Overview

Jurisdiction	Citation	Outcome
High Court	Grey v R [2001] HCA 65; (2001) 184 ALR 593 Mallard v R [2005] HCA 68; (2005) 224 CLR 125http://classic.austlii.edu.au/au/cases/cth/HCA/2021/28.html	Allowed Allowed
NSWCCA	TWL v R [2012] NSWCCA 57 JB v R (No 2) [2016] NSWCCA 67	Allowed Allowed
WA	Button v The Queen [2002] WASCA 35	Allowed
Vic	AJ v The Queen [2011] VSCA 215 Roberts v The Queen [2020] VSCA 277	Allowed Allowed
Qld	R v Ernst [2020] QCA 150	Allowed

Grey v R [2001] HCA 65; (2001) 184 ALR 593

Facts

Grey was convicted of offences relating to stealing and dishonestly disposing of motor vehicles. A key prosecution witness, Reynolds, was the operator of a motor vehicle wrecking yard who provided several wrecked vehicles to Grey, which Grey then sold. Reynolds later pleaded guilty to similar theft and conversion offences. In the defence case, Reynolds was responsible for the thefts and the conversions and Grey re-sold the stolen vehicles innocently. Reynolds' credibility was a central issue at trial.

Failure to Disclose

While the defence was aware of Reynolds' convictions, the prosecution failed to disclose a letter of comfort provided by a detective to Reynolds for his assistance to police for the charges against Grey, which directly resulted in a reduction in Reynolds' sentence. The same detective was the informant in the charges against Grey. The prosecution had presented Reynolds not only as a reliable witness who had no involvement (or non-innocent involvement) in the events concerning Grey's charge but as a witness who did not participate in the inquiry relating to Grey.[50]

Reasoning

The prosecution had a common law duty to disclose all relevant matters to the defence. The letter of comfort which significantly affected Reynolds' credibility was relevant material. The prosecution conceded that it had breached this duty in failing to disclose the letter.

Reynolds' evidence had overarching importance at trial, and the prosecution had placed significant weight on his reliability. Had the letter been produced, (i) the defence would have had an opportunity to extensively cross-examine Reynolds on these representations of him as a reliable witness, and (ii) the trial judge likely would have, at the request of defence, given a s165 unreliable evidence direction to the jury.[51] If this material had been available to the jury, there was a definite possibility that Grey would not have been convicted.[52] The Court further found that the defence should not be obliged to "fossick" for information of the kind that concerns the role of a central prosecution witness as a police informant.[53] The Court rejected the Court of Criminal Appeal's finding that with

[50] *Grey v R* [2001] HCA 65, [16]-[17].
[51] Ibid [18]-[21].
[52] Ibid [27], [72].
[53] Ibid [23].

"reasonable diligence" before or during the trial, the defence could have unearthed the letter or discovered the special relationship between Reynolds and police.[54] As such, Grey lost a fair chance of acquittal, and there was a miscarriage of justice. The s6(1) proviso[55] did not apply.

Outcome

Appeal allowed and new trial ordered.

Mallard v R [2005] HCA 68; (2005) 224 CLR 125

Background

Mallard was convicted of the murder of a jewellery shop proprietor. During interviews with the police, most of which were unrecorded, Mallard supposedly gave confessional and inculpatory evidence, including his drawing of a Sidchrome brand spanner which police believed to be the murder weapon. The actual weapon was never found. However, Mallard claimed that he did not tell police that the victim had been killed with the spanner, but that the drawing formed part of his theory of how events transpired when interviewed by the officer. While evidence about the spanner was a central plank of the prosecution case, there were several inconsistencies at trial suggesting that it was not in fact the murder weapon.

Failure to Disclose

The prosecution failed to disclose numerous exculpatory pieces of evidence to the defence at trial. These included an experiment conducted by police and forensic experts where it was found that a spanner could not have produced wounds consistent with that of the victim. The prosecution also excluded two pages of a report which concluded that, contrary to Mallard's supposed 'confession'/theory, his clothes did not show signs of being submerged in river water (the prosecution case was that Mallard had washed his clothes in the river, which was why the victim's blood was not found on him). A number of other pieces of evidence, consistent with an alibi were not disclosed to the defence.

Reasoning

The prosecution, as it had conceded, breached its duty under common law and WA statute[56] by failing to disclose the above material, which was relevant to the central issue of whether a spanner was the weapon used to kill the victim, as specified in Mallard's 'confession'.[57] The majority found that the forensic value of the undisclosed evidence was such that had the proper approach been applied by the Court of Criminal Appeal, being to consider the "whole case", the jury verdict would be found unreasonable. The High Court further found that it was not for the Court of Criminal Appeal to "seek out possibilities, obvious or otherwise, to explain away troublesome inconsistencies which an accused has been denied an opportunity to explore and exploit forensically".[58] Mallard lost a fair chance of acquittal.

Kirby J (minority) reached the same conclusion but emphasised the cumulative effect of the multiple instances of non-disclosure depriving Mallard of a fair trial.[59] There was a miscarriage of justice, and the proviso[60] that the Court can sustain a conviction where the verdict was unreasonable if no substantial miscarriage of justice had occurred should *not* be applied here. However, despite the

[54] Ibid [23], [49].
[55] *Criminal Appeal Act 1912* (NSW) s6(1).
[56] *Director of Public Prosecutions Act 1991* (WA) ss57-59.
[57] *Mallard v R* [2005] HCA 68 [23].
[58] Ibid.
[59] Ibid [56]-[58].
[60] *Criminal Code* (WA) s689(1).

non-disclosures, the prosecution case otherwise had its strengths, and the Court would thus not enter an acquittal but rather direct a retrial.

Outcome

Appeal allowed, and a retrial ordered.

TWL v R [2012] NSWCCA 57

Background

TWL was convicted of manslaughter arising from an incident where he and two others were allegedly involved in a joint criminal enterprise to physically assault the victim, who died after a fatal blow by one of the other offenders, AC. TWL was 15 at the time of offence. The incident allegedly arose due to AC being informed by TWL that there were young men who were being bullied by adult men, one of whom was the victim.

Failure to Disclose

The prosecution conceded that it had inadvertently breached its duties of pre-trial disclosure.[61] The prosecution failed to provide copies of reports concerning AC's descriptions of the relevant incident, which conflicted to some extent with AC's account at trial. The reports provided that when AC approached the victim, he was planning to verbally abuse the victim but that he became fearful of being assaulted by the victim, which may have given rise to an argument that he had hit the victim in self-defence rather than hitting the victim for the purpose of the alleged joint criminal enterprise.

Reasoning

Pursuant to *Grey*, there were two reasons why the non-disclosure resulted in a miscarriage of justice in this case. First, the contents of the reports would have provided a "fertile area of cross-examination"[62] which could have considerably changed the defence case put for TWL. Second, this case was one where the credibility of AC, a key prosecution witness, was in issue and the jury's assessment of AC's truthfulness may have been important for their verdict. However, the reports, being relevant and significant evidence going to his credibility, were unavailable.[63] TWL was significantly disadvantaged due to the non-disclosure of the reports, and there was a miscarriage of justice.

Outcome

Appeal allowed and conviction quashed. Retrial ordered.

JB v R (No 2) [2016] NSWCCA 67

Background

JB was convicted of murder after allegedly stabbing the victim leading to his death. This incident arose in the context of altercations between two groups, to one of which JB belonged. After the first altercation, it is alleged that JB had a motive for revenge and returned to act upon it. The core issue at trial was whether it was JB who had done the stabbing. The core issue on appeal was whether a retrial should be ordered.[64]

Failure to Disclose

[61] *Criminal Procedure Act 1986* (NSW) ss137-138 (now repealed).
[62] *Grey v R* [2001] HCA 65, [18].
[63] Ibid [55].
[64] *Criminal Procedure Act 1986* (NSW) s8(1).

The critical non-disclosure by the prosecution at trial was the fact that a key prosecution witness, A107, was a registered police informer. In such circumstances, A107 was also acting as a support person for the then 15-year-old JB at the police station following his arrest, when JB made alleged admissions. Furthermore, the prosecution failed to disclose an affidavit of assistance by a Chief Inspector of Police that had been provided for A107's own trial, which referred to his assistance in relation to JB's matter. Police officers gave evidence during trial of their conversations with A107 but did not disclose his identity as a police informer.

Reasoning

The question on appeal was whether in the interests of justice a new trial should be ordered, which is a discretionary consideration.[65] The retrial would not rely on A107's evidence. The public interest in the due prosecution and conviction of offenders, especially for serious charges such as murder,[66] was balanced against the relative weakness of the prosecution case without A107's evidence.

The remaining evidence consisted primarily of evidence of JB's possession of a knife, JB's alleged admissions to another member of his group, Ringo, and interaction between JB and the deceased. There was contrary evidence in relation to each of those propositions, and notably, there were numerous reliability issues with Ringo's evidence: (1) there was evidence directly implicating Ringo in the murder; (2) Ringo agreed to give evidence for the prosecution and received a sentence discount; (3) Ringo's account of JB's supposed admissions apparently occurred after police threatened to charge him with murder (unrecorded); (4) JB's solicitor at trial was also Ringo's solicitor for unrelated charges; (5) A107 gave evidence that he and Ringo had contact before Ringo attended the police station, although this was denied by Ringo. The Court found that a jury was unlikely to accept Ringo's evidence in a retrial.[67] The remaining evidence as a whole, without that of A107, was not capable of establishing JB's guilt beyond reasonable doubt. JB's trial miscarried in the first place because of prosecution failures to disclose.[68]

Outcome

Appeal allowed and conviction quashed. JB acquitted.

Button v The Queen [2002] WASCA 35

Background

In 1964, Button was convicted of manslaughter for driving his car into the victim, after she left his home following an argument. This was an appeal by reference from the Attorney-General of petition by Button. One of the grounds of appeal was the fresh evidence of Condren, who was a police officer and a Fatal Accident Vehicle Examiner at the time of trial. A critical issue at trial was whether Button's vehicle struck the victim. Unrelated to this ground of appeal, a few months after Button's conviction, another man, Cooke, claimed to be the killer of the victim in a hit-and-run incident. Cooke was the perpetrator of a number of other similar hit-and-runs involving women at night.

Failure to Disclose

At trial, Condren was asked to give expert evidence of his examination of the vehicle in terms of its mechanical condition and damage. While he noticed that the damage to the vehicle was not consistent with it having collided with a pedestrian in the purported way, he conveyed his opinion to other detectives but did not express the opinion at trial. Condren claimed that he was not "qualified

[65] *JB v R (No 2)* [2016] NSWCCA 67, [70]-[73].
[66] Ibid [72].
[67] Ibid [97]-[109].
[68] Ibid [118].

to give that sort of evidence"[69] then. However, he was allegedly giving evidence in the present appeal based upon his accumulated experience during his service, for some 22 years after the original trial.

Reasoning

The Court found that duty of disclosure extended to material available to prosecution on the basis that it was known to the police, whether or not its existence was known to prosecuting counsel.[70] The non-disclosure of Condren's evidence may be characterised as an "innocent" non-disclosure. However, even an "innocent failure to disclose relevant material may nonetheless constitute a miscarriage of justice…if the availability of the material might have influenced the result of the trial".[71] Condren's opinion about the damage to the vehicle being inconsistent with collision with a pedestrian was relevant and admissible.[72] In combination with the other evidence on appeal, there was a significant possibility that the jury or the Court of Criminal Appeal would have acquitted Button of the charge.

Outcome

Appeal allowed. Conviction quashed.

AJ v The Queen [2011] VSCA 215

Background

AJ was convicted of committing an indecent act with or in the presence of a child under the age of 16, being his daughter, XN. XN had denied when giving evidence on the voir dire that she sent a text message to AJ's de facto wife to the effect that her allegations were false. For unknown reasons, defence counsel did not pursue cross-examination after this denial and this particular ground of appeal was not made out. Another ground of appeal was the failure to disclose.

Failure to Disclose

The prosecution failed to disclose to the defence at trial that XN was the complainant in a previous rape trial involving a different defendant. During that trial, XN's credibility was demonstrated to be "at best, suspect", in that she repeatedly denied having sent a number of pornographic or sexually explicit text messages where it was not in issue that she had sent them.[73]

Reasoning

The prosecution conceded that it had breached its duty of disclosure in failing to provide the material on the previous rape trial to the defence. However, the prosecution submitted that there was no miscarriage of justice. The Court found that in the circumstances where the credibility of XN was central to the prosecution case and that "[t]he Crown was in possession of information which was of such cogency that it satisfied its own prosecutor that the complainant had lied on oath in an earlier trial",[74] the material should have been disclosed. Had it been disclosed, it would have been used to create in the minds of the jury a doubt as to XN's credibility. AJ was deprived of a fair chance of acquittal, and there was a miscarriage of justice. The proviso does not apply. Further, the Court added that it was the personal responsibility of the prosecutor to ensure that the duty of disclosure had been discharged, including where a brief is subsequently delivered to a different prosecutor.[75]

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[69] *Button v The Queen* [2002] WASCA 35, [45].
[70] Ibid [58], citing *Bradshaw v The Queen* (unreported) CCA SCt of WA.
[71] Ibid.
[72] Ibid [59].
[73] Ibid [20].
[74] Ibid [29].
[75] Ibid [39].

Outcome

Appeal allowed and conviction quashed. New trial ordered.

Roberts v The Queen [2020] VSCA 277

Background

In 2002, Roberts and a co-accused were both convicted of two counts of murder, relating to the shooting of two police officers. A critical issue at trial was whether there was one or two offenders. Both Roberts and the co-accused alleged that they were not the offenders, and that the other person was acting alone. A central plank of the prosecution case at trial was that one of the deceased police officers made a 'dying declaration' to the effect that there were two offenders. By 2005 Roberts had already exhausted his avenues of appeal after leave to appeal to the High Court was refused.

Failure to Disclose

Fresh evidence that came to light in an Independent Broad-based Anti-Corruption Commission ('IBAC') inquiry revealed that an officer or officers of Victoria Police fabricated evidence relating to the dying declarations made by the deceased officer. One critical failure to disclose in this case was the fact that a written statement by a senior constable was made 10 months after the shootings as opposed to 4 hours after the shootings as indicated on the statement.[76] This statement included material matters that were not in the initial statement that was actually made 4 hours after the shootings. However, the second statement (with additions and amendments) was put forward in the prosecution brief without disclosure of its falsity as to the stated date of its making and without disclosure of the existence or contents of the original statement. The trial proceeded on the basis that the second statement was a contemporaneous recollection of the senior constable. The defence was not aware that the senior constable's evidence might be susceptible to allegations of invention or unreliability as a result of delay in its making.[77]

Reasoning

The Crown conceded it had breached its duty of disclosure. However, it submitted that the non-disclosure regarding the senior constable's statement and the other evidence from the IBAC inquiry had no substantial impact on the reliability of the dying declaration (there was other evidence going to the content of the dying declaration). Alternatively, the Crown argued that even if it had, the other evidence was overwhelming such that conviction was inevitable irrespective of the dying declaration (i.e. no substantial miscarriage of justice).[78]

However, the Court found that the senior constable's undisclosed dishonest conduct bore directly on the weight of the dying declaration, and thus on a critical issue, namely whether there was more than one offender. This amounted to a "gross and fundamental corruption of the trial process".[79] This conclusion was fortified by the cumulative force of the other evidence of police misconduct in the brief preparation process.[80] "The defence were precluded from properly exploring a central plank of the prosecution case in respect of dying declaration evidence. It was not possible to trace the evolution of relevant police statements, expose those matters which were not included in initial contemporaneous statements, and identify other material changes in the evidence."[81] Had the disclosed material been available at trial and absent the police misconduct / procedural irregularities,

[76] *Roberts v The Queen* [2020] VSCA 277, [143]-[144].
[77] Ibid [147].
[78] Ibid [152]-[155].
[79] Ibid [259].
[80] Ibid [262]-[264].
[81] Ibid [264].

it is not inevitable that Roberts would have been convicted.[82] Accordingly, the Court was satisfied that there had been a substantial miscarriage of justice.

Outcome

Appealed allowed and convictions quashed. Retrial ordered.

R v Ernst [2020] QCA 150

Background

Ernst was convicted of 11 of 15 charges of sexual offences against the same complainant, where counts 1-3 allegedly occurred when the complainant was under 16 and counts 4-15 when she was over 16. Ernst was 16 years older than the complainant and was known to the complainant's family. The complainant admitted also during cross-examination that she had falsely accused others of rape, including her father and a former sexual partner. Ernst denied any sexual contact with the complainant. On appeal, there was fresh evidence from a former acquaintance of the complainant, from the time that they were acquainted, in 1995 (counts 4 to 13 took place in 1993 and counts 14 and 15 in 1994).

Failure to Disclose

When the acquaintance approached the police prior to Ernst's trial, she told a police officer that the complainant spoke in positive terms about having an "affair" with Ernst, and in terms that seemed like the relationship was current and had been ongoing for a significant period. The acquaintance also said that the complainant had, when confronted, admitted to her own propensity to lie. Specific examples of such conduct were given. However, the police officer noted none of it down and communicated nothing to the prosecution authorities. As a result, none of this information was disclosed to the defence pursuant to the prosecution's duty of disclosure.[83] The acquaintance swore the evidence in two affidavits.

Reasoning

The acquaintance's evidence was significant for two reasons – the first was that it went to the fact in issue, being non-consensual sexual acts (in relation to counts 4-15). Her evidence would not only contradict non-consent, but was direct evidence of an alternative fact, that the complainant and Ernst were in a consensual sexual relationship. If denied by the complainant, it could also be a prior inconsistent statement. The second way in which her evidence was significant was that it went to the complainant's credibility, upon which the prosecution case depended. Had the non-disclosed evidence been available to the jury, it might have led the jury to conclude that it would be unsafe to convict on the complainant's evidence despite the evidence of a preliminary complaint.[84] The failure of the police officer led to a substantial miscarriage of justice. The proviso[85] did not apply.

The Court also found that in this case, the ODPP's actions were beyond reproach, but emphasised the importance of comprehensive investigation and disclosure, whether it is inculpatory or exculpatory: "sometimes a prosecution case can gain unassailable strength in the eyes of a jury if it is evident that the evidence that has been put forward has been the result of an utterly objective investigation and one in which, having regard to the truth of the Crown case, the investigators did not fear to find and put forward evidence that might exculpate an accused person."[86]

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[82] Ibid [270]-[271].
[83] *R v Ernst* [2020] QCA 150, [33].
[84] Ibid [32].
[85] *Criminal Code Act 1899* (Qld) s668E(1A).
[86] Ibid [35].

Outcome

Appeal allowed and conviction quashed. Retrial ordered.

ANNEXURE D

Delays in the Local Court Caused by Non-Disclosure in EAGP matters

Event	Commentary
Brief Service is complete, and charges have been certified.	The brief of evidence is "compliant" for the purposes of charge certification.
Case Conference occurs but is adjourned to allow requests for disclosure to be met.	The OIC is either not available at the case conference or the ODPP have not already made enquiries about the topic which the disclosure request stems from. The case conference is an opportunity for the defence to obtain further and better particulars about the charges against the accused person.
ODPP cannot meet the disclosure request, the disclosure must be compelled by force of subpoena.	The defence are not able to engage in negotiation until material has been disclosed due to the need to protect the statutory discounts tied to offers made during committal.
Defence cause a subpoena to be issued to NSW Police by the Local Court.	Subpoena is issued in accordance with the requisite times for service and associated conduct money is paid.
A few days prior to the return date the defence are notified that the Commissioner of NSW Police is represented and seek an outline of Legitimate Forensic Purpose	The ODPP have little to no involvement in enforcing the subpoena and from this point forward, it becomes an issue for the defence to drive.
Subpoena is returnable The subpoena is: a) complied with; b) there is no appearance from NSW Police and subpoena is not complied with; or c) appearance on behalf of NSW Police and an objection is noted but there are discussions on foot to identify LFP or attempt to resolve the issue.	If the subpoena is complied with, little to no delay ensues.

If b) or c) the subpoena is adjourned for a further return date.	
Substantive matter is listed for committal and effectively stayed pending the subpoena being met or decided. Substantive matter is adjourned for a further case conference to occur once the subpoena is met.	Delay starts to materialise.
Substantive matter is listed along with the subpoena: a) subpoena is now complied with/objection withdrawn or not pressed, access orders are made, and the substantive matter is adjourned to return to the case conference; or b) The "objection" has not been resolved and a Notice of Motion is filed and a timetable for submissions is set.	Delay continues.
Both subpoena and substantive matter return to the list four weeks later: a) subpoena is now complied with/objection withdrawn, or not pressed access orders are made, and the substantive matter is adjourned to return to the case conference; or b) A hearing date for the subpoena is set down and substantive matter is delayed.	Delay continues.
Hearing of the subpoena: **a)** subpoena is now complied with/objection withdrawn, or not pressed access orders are made, and the substantive matter is adjourned to return to the case conference; or **b)** The subpoena is decided, and the committal process resumes.	The committal process has now been delayed by about 3 months depending upon the availability of Local Court hearing dates.
Case conference is completed	The case conference is finalised about 4 months later than it could have been if disclosure was addressed earlier.