

Prosecutorial Disclosure Webinar

Webinar materials

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Contents

1. Disclosure seminar handout.....	3
2. Letter to Police Prosecutor/DPP re disclosure template.....	6
3. Notice of Motion example.....	10
4. 'Credibility', Tom Quilter	13

1. Disclosure seminar handout

When a prosecutor falls far short of the duty to disclose

A panel discussion and Q&A - 2 July 2020

Audience Handout

1. Title of webinar: *Bradley v SC Chilby* [2020] NSWSC 145 at [80]
2. Source, nature and scope of duty
 - (a) *R v Reardon (No 2)* (2004) 60 NSWLR 454 at [46]ff; also *R v Spiteri* (2004) 61 NSWLR 369 at [20], [25]; *R v Livingstone* [2004] NSWCCA 407 at [44]-[45]; *Cornwell v R* [2010] NSWCCA 59 at [210], [297]-[298], [340]; *R v Lipton* [2011] NSWCCA 247 at [77]-[81] and [119]-[120]; *Potier v R* [2015] NSWCCA 130 at [549]-[552]; *Gould v CDPP* [2018] NSWCCA 109 at [65]; *Marwan v DPP* [2019] NSWCCA 161 at [27]-[28], [35]; *Bradley* at [46]-[49]; *CDPP v Kinghorn* [2020] NSWCCA 48 at [125]-[128]; *Grey v The Queen* [2001] HCA 65; (2001) 75 ALJR 1708; *R v Mokbel (Ruling No 1)* [2005] VSC 410 at [71]-[76]; *Mallard v R* (2005) 224 CLR 125; *R v Farquharson* (2009) 26 VR 410 at [212]
 - (b) Statutory provisions such as in *Criminal Procedure Act 1986*
 - (c) ODPG guideline 18; CDPP Statement on Disclosure
 - (d) Duty owed to court not defendant/accused: *Marwan* at [28]-[29]
3. What should be disclosed in practical terms, especially for Local Court hearings and especially upon request – cannot be stated exhaustively
 - (a) All material obtained or generated through investigation
 - (b) Criminal histories and facts sheets for convictions of contentious witnesses, at least to extent of convictions for dishonesty, administration of justice offences, drug use (at relevant times), violence (if his/her own conduct could be in issue), outcomes relating to being dealt with under mental health diversions (as relevantly bearing on reliability), outcomes that reveal a witness was on condition liberty at relevant times (which might bear upon motive to lie/deflect blame)
 - (c) Advanced notice of discrepancies between a witness statement and the evidence proposed to be led – by way of conference notes or otherwise
 - (d) Other material potentially affecting the admissibility, credit or reliability of evidence, such as material held on the COPS system, material relevant to whether evidence is unlawfully/improperly obtained
 - (e) Material relevant to mitigation on sentence

4. Options for suspected or actual non-compliance with duty

- (a) Procedural requirements and orders: *Kinghorn* at [141]
- (b) Court order for disclosure not based on statutory pre-trial disclosure provisions – some contrasting views in the authorities:
 - (i) Not available or not ordinarily available: *Bradley* at [84]; *Marwan* at [29]; *Gould* at [60]-[64].
 - (ii) Available in exercise of implied power to safeguard a fair trial; if interests of justice so require: *Noack v General Motors-Holdens Ltd* (1985) 11 FCR 122 at 125; *Sobh v Police Force of Victoria* [1994] VR 41 per Brooking J at 47; *R v Brown* [1998] AC 367 Lord Hope of Craighead at 380; *Carter v Hayes* (1994) 61 SASR 451 King CJ.
 - (iii) Magistrates possess power to make order for disclosure. Ross on Crime cites the following authorities for this proposition: *Gaffee v Johnson* (1996) 90 A Crim R 157 and *Rice v Chute* (1995) 119 FLR 181.
- (c) Temporary stay to ensure fair hearing/trial: *Gould* at [60]-[64]; *Bradley* at [51]; *Kinghorn* at [139]
 - (i) Preferable course to subpoena
 - (ii) Although obligation on prosecution, maybe some obligation on defence to set parameters in issue
- (d) Subpoena to check or enforce compliance: *Gould* at [18]; *Bradley* at [52]; *Kinghorn* at [140];
 - (i) Should not be necessary
 - (ii) Difficulty of establishing legitimate forensic purpose, if could not able to request disclosure anyway
 - (iii) Tension between *Bradley*, *R v Jenkin (No 2)* [2018] NSWSC 697 and *Mann v Commissioner of Police* [2020] NSWSC 369 (ALS is intending to appeal Mann decision.)
- (e) Permanent stay if the substantive hearing, absent production of the documents, would likely be unfair or if there is a tangible risk that it would be unfair: *Bradley* at [51]; *Marwan* at [29]; *R v Lipton* (2011) 82 NSWLR 123; [2011] NSWCCA 247 at [120]; *Dietrich v The Queen* (1992) 177 CLR 292 at 311; *Re K* [2002] NSWCCA 374 at [9]-[10].

- (f) Conviction quashed: *Grey v The Queen* [2001] HCA 65; *Mallard v The Queen* (2005) CLR 125

5. What to do in practice?

- (a) Think about disclosure early on
- (b) Always have in mind hearing/trial is for the prosecution to prove the charges beyond reasonable doubt, not an inquiry into truth
- (c) Ascertain issues from the brief and instructions
- (d) Do your own investigating
- (e) Work out what you want and why
- (f) Write to the prosecutor requesting disclosure early, especially setting out the parameters of the issues at hearing and putting obligation on prosecutor – build it into your case management practices after entering a plea of not guilty
- (g) Check compliance with procedural requirements and orders; raise issue with court; request court direct compliance
- (h) If not satisfied with the result, apply for a temporary stay
- (i) If refused/otherwise appropriate, request a subpoena be issued

6. Questions from attendees

2. Letter to Police Prosecutor/DPP re disclosure template

Our Ref: XXX

DATE

NAME

Senior Police Prosecutor / DPP Solicitor with carriage

ADDRESS

Emailed to:

CC: OIC Name

Emailed to: Email

[If police matter] CC: The Area Commander, [X] LAC Police

Faxed to: Number

[If applicable] CC: Name of lawyer for Commissioner of Police

Emailed to: EMAIL

Dear Senior Sgt Name / Ms/Mr Name

Re: Police / R v Accused

H Number: HXXX

Case No.: XXXX

Next listed: Location LC/DC on Date for [subpoena / disclosure hearing]
Location LC/DC on Date for [criminal defended hearing / trial]

I act for the accused Name in these proceedings.

[If prosecuted by Police: I ask that this matter be brought to the attention of the Police Prosecutor allocated to appear in the defended hearing on Date. Where no Prosecutor allocation has occurred yet, I ask that you or another Police Prosecutor review the matter.]

Background to the Matter

Accused is charged with an offence of [eg. assault occasioning actual bodily harm of COMPLAINANT], alleged to have occurred on DATE at PLACE. S/he was subsequently charged with the offence on DATE. The central allegation of the proceedings against ACCUSED is that [eg. he bit the complainant's finger causing injury].

ACCUSED appeared before the Local Court at PLACE on DATE and entered a plea of not guilty to the charge.

A brief of evidence was served on the defence on DATE.

It contains, amongst other things, a statement from the COMPLAINANT/WITNESS A/WITNESS B dated DATE. COMPLAINANT/WITNESS A/WITNESS B is required for cross-examination at the defended hearing listed on DATE.

During the course of the investigation, it is apparent that the Officer-in-Charge **NAME** consulted with **POLICE OFFICERS X AND Y**: cite brief reference.

*[If applicable, noting that disclosure should be made without a subpoena to Police being necessary/appropriate: On **DATE**, the Local Court issued a subpoena on behalf of the accused to the Commissioner of Police, NSW Police Force (**the Commissioner**) compelling the Commissioner to produce certain documents relating to the proceedings.]*

The matter is listed on **DATE** in relation to compliance with the subpoena by the Commissioner. **NAME**, appears for the Commissioner in relation to the subpoena.

A copy of the subpoena to the Commissioner is attached.]

Issues in the Matter

The events as alleged by **COMPLAINANT / WITNESS A / WITNESS B** are disputed.

[As appropriate, set out issues as they emerge from brief of evidence, why credibility and reliability of complainant and/or other witnesses is in issue and/or other contested matters in the case. If appropriate include a summary of the accused's instructions, (noting waiver of privilege issues if instructions not revealed in an ERISP or otherwise on police brief). If not appropriate to include nature of instructions, PNG can be relied upon to indicate dispute.]

For example:

[The **ACCUSED** disputed the allegations from the outset, when he was confronted by police with the allegations on **DATE**. **ACCUSED** denied in his interview with police [certain conduct]... (QA## ERISP).

As set out in the summary of the interview with police in the Facts Sheet, the accused stated [set out self-defence account].

In the course of the ERISP, **ACCUSED** explained how **COMPLAINANT** physically attacked him [set out questions and answers which give rise to self-defence account].

It will be readily apparent that self-defence arises as one of the issues in the proceedings.

It was also obvious, from before proceedings were even commenced against **ACCUSED**, that the credibility and reliability of the complainant is in issue.]

[As appropriate, set out any other basis on which issues of credibility/reliability or other matters for disclosure arise, eg. information obtained through your own investigations on Facebook, the court list etc.]

For example:

[Attached is an affidavit by the writer annexing documents obtained via publicly available searches on the NSW Online Registry. Those **searches** appear to reveal that in recent times there have been at least three separate prosecutions brought by the NSW Police Force in the Local Court against the complainant. It is anticipated that this affidavit will be relied upon by **ACCUSED** in these proceedings

in the event that it is necessary to litigate the issue of the prosecution non-compliance with its disclosure obligations and/or the Commissioner's failure to comply with the subpoena.]

Disclosure Obligations

As you are no doubt aware, the prosecution's duty of disclosure is one that must be honoured without the need for prompting by the accused or any onus on the accused to obtain the material [him/herself](#) (for example, by way of a subpoena [such as the one referred to above](#), or this letter): *Grey v The Queen* [2001] HCA 65; (2001) 75 ALJR 1708. A failure to disclose may cause a miscarriage of justice: see for example *JB v R* [2015] NSWCCA 182; and *JB v R (No 2)* [2016] NSWCCA 67.

The duty to disclose material to the accused extends to material in the prosecution's possession, or available to it, that is 1) relevant or possibly relevant to the contested issues in the case; 2) raises a new issue, the existence of which is not apparent from the prosecution case or 3) holds out a real prospect of providing a lead on evidence in the first two categories: see *Bradley v Senior Constable Chilby* [2020] NSWSC 145 Adamson J at [46] where her Honour cites *R v Reardon (No 2)* [2004] NSWCCA 197 Hodgson JA at [46]-[54] and *R v Spiteri* (2004) 61 NSWLR 369; [2004] NSWCCA 321. See also *Mallard v R* (2005) 224 CLR 125 per Kirby J.

At common law, for the purposes of the duty of disclosure, there is no distinction between the prosecuting agency (whether the Director of Public Prosecutions or Police Prosecutor) on the one hand and the investigative agency or investigating police officers on the other. The Police Prosecutor allocated to this matter [or the Director of Public Prosecutions] is taken to have possession of, or available to them, all the material that is in the possession of or available to the NSW Police Force and is subject to the duty to disclose. However, for practical purposes, it is acknowledged that the Officer-in-Charge or other investigating police officer may make the appropriate enquiries, collect the material for disclosure to the accused and arrange service of that material.

[In DPP matters, you could also refer to relevant parts of NSW ODPP Guidelines or Cth DPP Guidelines.]

Documents to be Disclosed

The accused requests that the following material be disclosed to him:

1. Criminal history of [COMPLAINANT](#) (DOB [###/####](#));
2. NSW Police Force Facts Sheets relating to entries on [COMPLAINANT's](#) criminal history;
3. NSW Police Force Facts Sheets relating to criminal proceedings against [COMPLAINANT](#) in the Local Court at [PLACE](#) and [PLACE](#) (Case nos. [##](#) and [##](#));
4. All other material in the possession of NSW Police Force or available to NSW Police Force that is relevant or possibly relevant to the credibility and/or reliability of [COMPLAINANT](#);
5. All COPS entries related to [HXXXXXXXX](#);
6. Any record of the conversations between [OIC AND POLICE OFFICERS X AND Y](#) contained in the COPS entries or otherwise;
7. Custody Management Record for the accused on [DATE](#); and
8. Any other material which could reasonably be seen as capable of assisting the defence case.

[Include other documents or categories of documents which are sought by way of disclosure as appropriate.]

Subpoena

The law is clear that a subpoena to the Commissioner is not required and the material referred to above should have been provided by the Police in the first instance in accordance with the prosecutorial duty to disclose. See *Bradley v Senior Constable Chilby* [2020] NSWSC 145.

I remind you it is well established that the issuing of a subpoena is a remedy for a party who is dissatisfied with a prosecutor's compliance with the duty of disclosure. It is distinct and separate to the prosecutorial disclosure obligation. See *Mann v Commissioner of Police* [2020] NSWSC 369 at [35]; *Gould v Director of Public Prosecutions (Cth)* [2018] NSWCCA 109; (2018) 359 ALR 142.

It is my view that a subpoena to the Commissioner is/was not required and the material referred to above should have been provided by the Police in the first instance. A continued failure to provide this material is unacceptable and compromises my ability to properly advise and defend my client.

If the accused is not in receipt of the above material before [DATE](#) when the matter is next listed, I foreshadow that the accused will make an application to the Local Court for a temporary stay of the criminal proceedings until such time as the prosecution comply with its duty of disclosure. [\[If necessary, in addition the accused will be pressing for compliance with the subpoena issued to the Commissioner and seeking access to the documents sought under it.\]](#) Counsel has been briefed to appear for the accused on [DATE](#).

Please confirm in writing receipt of this correspondence as soon as possible.

Please also confirm in writing as soon as possible that the prosecution has made appropriate enquiries, and has complied with its duty of disclosure.

If you refuse to serve any of the material in items 1-8 above on the accused, please confirm in writing your reasons for doing so.

This correspondence may be relied upon by the accused in the event that it is necessary to litigate the issue of prosecution compliance with the duty of disclosure [and/or the issue of the Commissioner's compliance with the subpoena](#).

This correspondence may also be relied upon by the accused in relation to any application for costs.

I look forward to your prompt response.

Yours sincerely,

[NAME](#)
SOLICITOR

3. Notice of Motion example

Form 20 (version 3)
UCPR 18.1 and 18.3

NOTICE OF MOTION

COURT DETAILS

Court Local Court of New South Wales
Division Criminal
List General List
Registry Wollongong
Case number H [REDACTED] 2018/[REDACTED]



TITLE OF PROCEEDINGS

Prosecution NSW Police Force
Defendant [REDACTED]

FILING DETAILS

Person seeking orders Defendant, [REDACTED]
Filed in relation to: H [REDACTED]
Legal representative Legal Aid NSW – Wollongong Office

Contact name and telephone Tim McKenzie, 42288299
Contact email tim.mckenzie@legalaid.nsw.go.au

PERSON AFFECTED BY ORDERS SOUGHT

Commissioner of NSW Police Force (Contact person [REDACTED] – Solicitor for
Commissioner of Police; Email: [REDACTED]).

HEARING DETAILS

This motion is listed at Wollongong at 9:30am, on

16/5/2019

ORDERS SOUGHT

In the exercise of the Court's implied power to safeguard a fair hearing and prevent injustice:

- 1 An order that the prosecution disclose to the defendant the following material:
 - 1.1. Criminal history of [REDACTED] (DOB [REDACTED]) (Ms [REDACTED]);
 - 1.2. NSW Police Force Facts Sheets relating to entries on Ms [REDACTED] criminal history;
 - 1.3. NSW Police Force Facts Sheets relating to criminal proceedings against Ms [REDACTED] in the Local Court at Port Kembla and Wollongong (Case nos. [REDACTED], [REDACTED] and [REDACTED]);
 - 1.4. All other material in the possession of NSW Police Force or available to NSW Police Force that is relevant to the credibility and/or reliability of Ms [REDACTED];
 - 1.5. All COPS entries related to H [REDACTED];
 - 1.6. Any record of the conversations between SC [REDACTED] and Sgt [REDACTED] and between SC [REDACTED] and the Lake Illawarra Prosecutors contained in the COPS entries or otherwise (see in relation to [REDACTED], statement of SC [REDACTED] at [27]) and in relation to [REDACTED] 2018, statement of SC [REDACTED] at [30]);
 - 1.7. Custody Management Record for the defendant on [REDACTED]; and
 - 1.8. Any other material which could reasonably be seen as capable of assisting the defence case; and
- 2 A temporary stay of proceedings until such time as the prosecution complies with its duty of disclosure.

SIGNATURE

Signature of legal representative

 Tim McKenzie

Capacity

Solicitor for the defendant

Date of signature

15/4/19

NOTICE TO PERSON AFFECTED BY ORDERS SOUGHT

If you do not attend, the court may hear the motion and make orders, including orders for costs, in your absence.

REGISTRY ADDRESS

Street address: Corner of Market St & Church St
Wollongong NSW 2500

Telephone 1300 679 272

4. 'Credibility', Tom Quilter

Research paper

Credibility
Tom Quilter, Public Defender

The link to this paper can be found [here](#).