



DIRECTOR OF PUBLIC PROSECUTIONS

GUIDELINES FOR PROSECUTION DISCLOSURE

GENERAL

These guidelines for prosecution disclosure in the Northern Territory recognise that:

1. There must be a full and frank delivery or exchange by the investigator to the prosecutor.
2. Not all material in the hands of the prosecutor will appear immediately relevant because there is no obligation in the Northern Territory for the defence to make pre-trial disclosure either of issues or general defence information.
3. There is a continuing obligation to disclose.
4. There may be good and sustainable public interest reasons in declining to disclose material which is either sensitive, privileged or of a type the disclosure of which may undermine the administration of justice or endanger the life or safety of any person.

Generally speaking, however, the defence is entitled to receive pre-trial particulars of the charge or charges and the Crown case in chief. Whilst there is no common law duty imposed upon the prosecution to make full disclosure pre-trial it is inconsistent with a person's right to a fair trial for the prosecution to withhold from or fail to disclose to the defence material in its possession which is relevant and admissible.

SPECIFIC MATTERS OF WHICH THERE SHOULD BE DISCLOSURE

- (1) Particulars of the accused's prior convictions.
- (2) Copies of all written statements, and an opportunity to examine electronically recorded interviews, of all witnesses to be called together with a copy of any prior inconsistent statement of those witnesses.
- (3) Copy of any written or electronically recorded statement obtained from the accused by a person in authority.
- (4) Copies of any photographs, plans, documents or other representations which will be tendered by the prosecution at trial.

- (5) An opportunity to examine exhibits which will be tendered.
- (6) Copies of proofs of statements of any expert witnesses to be called and, by appointment through the prosecution, an opportunity for a defence expert from the same or similar discipline to speak with that expert pre-trial.
- (7) Copy of any warrant or details of any other statutory authority used in the gathering of evidence to be adduced at trial.
- (8) An opportunity to inspect bank records, books of account or other records or documents relevant to the prosecution case in chief which may not be introduced into evidence but relied upon.
- (9) The prosecutor is not obliged to call a witness whom he or she does not regard as credible. In the case of any material or statement which is or may be exculpatory, on the prosecution case in chief, and which the prosecutor declines to adduce or call the defence should receive details of the evidence and the whereabouts of the witness or witnesses. If requested by the defence the prosecution should subpoena the witness.

DISCRETION TO WITHHOLD OR DELAY DISCLOSURE ON PUBLIC INTEREST GROUNDS

If a prosecutor is of the opinion that specific material or evidence should not be disclosed, or its disclosure delayed in the public interest, that material should, subject to review by the Director of Public Prosecutions and, where necessary the court, be immune from disclosure. Some, but not all, of the factors which should be taken into account in determining this public interest issue are:

- (a) the material is irrelevant
- (b) withholding is necessary to preserve the identity of an informer
- (c) withholding is necessary to protect the safety or security, including protection from harassment, of persons who have supplied information to the police or persons close to them
- (d) the material is protected by legal professional privilege
- (e) the material, if it became known, might facilitate the commission of other offences or alert a person to police investigations
- (f) the material discloses some unusual form of surveillance or method of detecting crime
- (g) the material is supplied to the police only on condition that the contents will not be disclosed
- (h) the material contains details of private delicacy to the maker
- (i) the material relates to the internal workings of the police force
- (j) the material relates to national or state security.

If after consultation with the Director of Public Prosecutions a *public interest* claim is maintained in support of immunity against disclosure the prosecutor must advise the defence that material, without specification, has been withheld on a claim of

immunity. If the defence is not satisfied with that claim or any consideration of its submissions by the Director of Public Prosecutions the matter should be submitted to the court for resolution prior to trial.

If the prosecutor considers, after consultation with the Director of Public Prosecutions, that the non-disclosure of the material could prejudice the defence at trial the Director of Public Prosecutions must consider whether the charge or charges to which the material is relevant should be withdrawn and whether the accused should be charged with an alternative or lesser offence the prosecution of which will not necessitate the production of the withheld material.

CONTINUING OBLIGATION TO DISCLOSE

The prosecutor's duty of disclosure is a continuing obligation but the continuity of that obligation should be seen as also imposing upon the defence an obligation to make timely disclosure of any defence or issue, not immediately apparent on the prosecution case, which may make otherwise irrelevant material relevant. For example:

- (a) The prosecution should not be required to provide details of prior convictions or records of police disciplinary proceedings against a Crown witness until the defence has indicated that the credibility of that witness is to be attacked and the prior convictions, etc are relevant.
- (b) The validity of a warrant or other authority should, unless an indication of challenge is given, be proved in a formal way. Any evidence establishing the correctness of the process, etc should only be provided if an indication of challenge is given.

There will be many instances where the prosecution should be entitled to rely upon the *presumption of regularity* unless a contrary indication is given. Until that indication is given the issue of irregularity should be treated as irrelevant and one upon which supporting evidence and material is not required.

The defence of insanity, once raised, and other defences or challenges requiring expert evidence, will not only broaden the field of relevant information in the hands of the prosecution but also require an understanding between prosecution and defence to enable frank pre-trial exchanges of information and access to witnesses.

DISCLOSURE OF MATERIAL ADDITIONAL TO THE CROWN CASE

These guidelines deal with disclosure of material not directly relevant to the Crown case.

DUTIES OF POLICE

Because of the dependence of prosecutors upon investigating officers or agencies for the gathering of documentation and evidentiary material in all matters in which either a prosecution is commenced in the summary jurisdiction or following committal for trial on indictment, police, if requested, must disclose to the Director of Public Prosecutions, as soon as possible after the commencement or proceedings or the committal, all other documentation, material and any other information held by any police officer concerning the investigation including information held concerning any proposed prosecution witness, which the prosecution considers might be of assistance or interest to either the prosecution or the defence.

The police officer-in-charge of the investigation shall, if required by the Director of Public Prosecutions, certify, on delivery of that information, that to the best of that officer's knowledge, information or belief all such documentation, material or information has been disclosed to the Director of Public Prosecutions.

Should any of the documentation, material or information additional to the Crown case be either sensitive or of a nature which requires protection or limited disclosure the officer-in-charge of the investigation shall identify that information at the time it is made available to the Director of Public Prosecutions.

OBLIGATIONS OF THE PROSECUTION CONCERNING MATERIAL ADDITIONAL TO THE CROWN CASE

The prosecution, upon request by the defence, shall, upon sufficient reason being given and subject to any claim for immunity on the grounds of public interest (appearing earlier in these guidelines) allow inspection of all such documentation, material or information.

DEFENCE DISCLOSURE

The prosecution should, wherever it is consistent with the court's practice, encourage defence counsel to make an opening address to the jury following the Crown opening which is not argumentative but merely opens the defence case and identifies or discloses the issues in the trial thereby defining the issues so that questions of relevance and issues of disclosure are clearly identified at the commencement of the trial process.