The prosecutor's duty of disclosure

By Catherine Gleeson

A number of particular ethical obligations are imposed on prosecuting counsel in a criminal trial. The rationale for these obligations has been described in the following terms:[1]

> *Prosecuting counsel in a criminal trial represents the State. The accused, the court and the community are entitled to expect that, in performing his function of presenting the case against an accused, he will act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one.*

One of the ethical obligations particular to prosecutors is the duty of disclosure. It has been described as an incident of the entitlement to a fair trial, analogous to the right to legal representation, to be protected by the grant of a stay or discharge on appeal where a failure to comply with the duty will or has compromised the fairness of the trial.[2]

The content of the prosecutor's duty of disclosure is informed by various obligations sourced at common law and in statute. Sections 141(1)(a) and 142(1) of the *Criminal Procedure Act 1986* (NSW) (**CPA**) require service of notice of the prosecution case in proceedings on indictment, including all material that the prosecutor proposes to adduce at trial and, relevantly:

(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 …

Section 15A of the *Director of Public Prosecutions Act 1986* (NSW) (**DPP Act**) imposes a duty on law enforcement officers to disclose to the Director and retain all information that will enable the Director to comply with his obligations of disclosure. The Director's disclosure obligation is ongoing until verdict or termination of the prosecution: s 147 CPA. The sanctions for non-compliance include refusal to admit evidence not disclosed, and adjournment of proceedings where the non-disclosure would prejudice the defence case: s 146 CPA. There is also the possibility of a stay of proceedings in protection of the court's processes and to prevent a miscarriage of justice.

The duty of disclosure is also contained in professional conduct rules. *The New South Wales Uniform Conduct (Barristers) Rules 2015* (NSW) relevantly provide:

*87 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. [emphasis added]*

88 A prosecutor who has decided not to disclose material to the opponent under rule 87 must consider whether:

(a) the charge against the accused to which the material is relevant should be withdrawn, and

(b) the accused should be faced only with a lesser charge to which such material would not be so relevant.

Prosecution Guideline 18 issued by the Director of Public Prosecutions pursuant to s 14 of the DPP Act[3] sets out the nature of the obligation and then describes the manner in which the obligation should be discharged in practice:

Prosecutors are under a continuing obligation to make full disclosure to the accused in a timely manner of all material known to the prosecutor which can be seen on a sensible appraisal by the prosecution:[4]

- *to be relevant or possibly relevant to an issue in the case;*
- *to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use; and/or*
- *to hold out a real as opposed to fanciful prospect of providing a lead to evidence which goes to either of the previous two situations.*

The prosecution duty of disclosure does not extend to disclosing material:

- *relevant only to the credibility of defence (as distinct from prosecution) witnesses;*
- *relevant only to the credibility of the accused person;*
- *relevant only because it might deter an accused person from giving false evidence or raising an issue of fact which might be shown to be false; or*

- *of which it is aware concerning the accused's own conduct to prevent an accused from creating a trap for himself or herself, if at the time the prosecution became aware of that material it was not seen as relevant to an issue in the case or otherwise disclosable pursuant to the criteria above.*

Questions arise about the scope and content of the duty of disclosure, and how it is to be enforced. Does the duty require prosecutors to make inquiries as to potentially relevant matters?[5] Must the Crown identify potentially relevant matters in the material which has been disclosed? Does the duty of disclosure necessarily abrogate client legal privilege in advice given by the Director to investigative authorities?

Edwards v R [2020] NSWCCA 57 was an appeal against conviction on several counts of aggravated sexual intercourse with a person over ten and under 14 years of age contrary to s 66C(2) of the *Crimes Act 1900* (NSW). As part of the investigation of the offences, police seized the applicant's mobile telephone and downloaded a copy of its contents. The existence of the download was disclosed by the Crown to the defence with an offer to provide a copy on request. The Crown did not disclose that the download contained records that might lead to the identification of witnesses of possible assistance to the defence.

On the business day before the trial commenced, the Crown disclosed its intention to call a new witness whose details had been obtained from the mobile phone download. The Crown disclosed the source of the witness' details after closing addresses had concluded, which led to a request by the defence for access to the mobile phone download. It eventuated that the download contained text messages from another potential witness who could have shed light on the issues covered by the first witness' evidence. The applicant contended on appeal that the trial miscarried because of the late production of the witness and the nature and extent of disclosure of the contents of the mobile phone download.

The Court of Criminal Appeal held that it did not, observing at [49] that 'it is not uncommon in litigation for the focus on an imminent trial to lead to the identification of gaps or weaknesses in the evidence, and attempts to fill or buttress them.' It was not part of the Crown's disclosure obligation to disclose how the new prosecution witness was identified in circumstances where the Crown had already disclosed the existence of the electronic information which had been used to identify that witness: at [50]. The Crown was not obliged to tell the defence either in general terms that the information extracted from the download of the applicant's own mobile telephone might assist the defence, or specifically that there were text messages between the applicant and another witness that might be of interest to the defence: at [51].[6] It is not necessary for the Crown to interrogate electronic material which has been made available to defence or to anticipate or comment on the ways in which such material might assist the defence: at [55], [57]-[60]. Leeming JA addressed the issues that would arise from a duty with that content in the following way at [58]:

> *It is not uncommon in certain classes of prosecution for the Crown brief to include very large quantities of information: see for example the sound recordings in* Potier v R *[2015] NSWCCA 130. I do not see how a line could be drawn if it were not sufficient merely to disclose the entirety of that material, but it were instead necessary to go further and interrogate those documents so as to draw to the attention of the accused especially unfavourable documents or potentially exculpatory documents. This would give rise to a panoply of problems. How is the prosecutor to determine which documents would assist, and which documents would detract from, the defence case? One person who spends an hour interrogating a database might conclude there was*

If the prosecutor has privileged material available that is relevant in a prosecution, the Director will need to consent (or obtain consent) to the waiver of privilege in that material, or to determine that the prosecution should either not continue or proceed on a basis that does not require disclosure of the privileged material.

> *nothing useful, another who conducts different searches might reach a different conclusion, and a third who spends a day might conclude that in truth there was nothing that assisted either side. Further, the accused person may be taken to have a much better idea of any positive lines which are to be advanced in his or her defence than the prosecutor, and is much better placed to determine the significance of particular emails or text messages in a large electronic database. If it were necessary for the prosecutor to go further than disclosure, and to provide the sort of commentary about documents which are helpful or harmful, how is the sufficiency of the prosecutor's endeavours to be tested, and how is the requirement that such work be undertaken compatible with the considerations as to time and cost noted in Marwan at [56]?*

Special leave to appeal to the High Court of Australia was granted on limited grounds on 8 December 2020.

Director of Public Prosecutions (Cth) v Kinghorn; Kinghorn v Director of Public Prosecutions (Cth) [2020] NSWCCA 48[7] concerned appeals against rulings on access to documents sought by the defence in subpoenas issued to the Australian Taxation Office (**ATO**), Australian Federal Police (**AFP**) and Commonwealth Director of Public Prosecutions, over which the Commissioners of the ATO and AFP and the Director claimed privilege. At issue was whether the duty of disclosure created an inconsistency with the maintenance of privilege in advice given by the Director, either internally or to either of the investigative bodies.

The Court of Criminal Appeal summarised the principles applicable to the enforcement of the duty of disclosure at [138]-[141]:

- *First,* the performance of the duty is a matter for the prosecution and the Court will not review or enforce it other than as necessary to control its own processes (to which can be added, the duty reflected in rules of professional conduct in respect of which any breaches can form the subject of complaint and investigation by legal professional bodies);
- *Second,* a stay might be granted where a breach of the duty creates the risk of an unfair trial, and a conviction resulting from breach of the duty will be set aside on appeal if it produces a miscarriage of justice;
- *Third,* if relevant material is not disclosed a subpoena can be issued;
- *Fourth,* the court can make orders enforcing compliance with the pre-trial disclosure provisions in the CPA.

The Court rejected the contention that a refusal by a prosecutor to disclose material over which a claim for privilege is properly made is conduct inconsistent with the requirement of fairness that motivates the principle of imputed waiver[8] (at [155]). Indeed, the Court preserves fairness arising from a claim of privilege over disclosable material not by imputed waiver, but by granting a stay of proceedings: 'The duty of disclosure is 'overriding' in the sense that it permeates the performance by prosecuting counsel of their independent function, so much so that if the relevant material is not disclosed then the prosecution may be terminated' (at [163]).[9] For similar reasons, the Court rejected the contention[10] that the Crown's possession of privileged material which is subject to the duty of disclosure is affected by an implied waiver, because the choice as to what to do with the disclosable but privileged material is that of the prosecutor: 'the CDPP reserved to itself the obligation and capacity to determine whether to waive privilege or end the prosecution' (at [175]).

An appeal by the ATO and AFP Commissioners raised the question about whether the Director could by her conduct create a waiver of privilege in advice given to the ATO or AFP. The commissioners contended that they were the relevant privilege holders in that advice for the purposes of waiver, and Mr Kinghorn contended that the conferral of authority on the Director to institute and maintain prosecutions under s 6(1)(a) and (b) of the *Director of Public Prosecutions Act 1983* (Cth) involved the authority to waive privilege held by the commissioners where considered necessary for the conduct of the prosecution. The Court determined that, having regard to its finding on imputed waiver, it was unnecessary to determine this ground (at 187]).

The Court of Criminal Appeal's decision in *Kinghorn* that the prosecutor's duty of disclosure does not bring about an automatic waiver of privilege by imputation or implication is a distinction without much practical difference. The reality is that, if the prosecutor has privileged material available that is relevant in a prosecution,[11] the Director will need to consent (or obtain consent) to the waiver of privilege in that material, or to determine that the prosecution should either not continue or proceed on a basis that does not require disclosure of the privileged material, as comprehended by Bar Rule 88.

The cases discussed in this note reveal that the metes and bounds of the prosecutor's duty of disclosure are not readily defined: they are largely a product of the application of principle to specific circumstances. How a prosecutor determines how to discharge the duty of disclosure is guided by the overriding duty to ensure that the trial of the accused is conducted fairly. **BN**

ENDNOTES

1 *Whitehorne v The Queen* (1983) 152 CLR 657 at 663-664 (Deane J).

2 *Marwan v Director of Public Prosecutions* [2019] NSWCCA 161 at [29]-[30].

3 Similar guidelines are issued by the Commonwealth DPP under s 11 of the *Director of Public Prosecutions Act 1983* (Cth), being the *Statement of Disclosure in Prosecutions Conducted by the Commonwealth* (March 2017).

4 Being the test derived from *R v Keane* [1994] 2 All ER 478, adopted in *R v Reardon* (No 2) (2004) 60 NSWLR 454 at [48] per Hodgson JA; *R v Spiteri* (2004) 61 NSWLR 369 at [20].

5 The answer being, in limited circumstances, primarily concerned with the criminal history of prosecution witnesses: *AJ v The Queen* (2011) VR 614 at [22], *R v Keogh* (No 2) [2015] SASC 180 at [63], *Marwan v Director of Public Prosecutions* [2019] NSWCCA 161 at [50]-[59].

6 Contrast the highlighted portion of professional conduct rule 87, above.

7 Special leave to appeal to the High Court was refused on 11 September 2020.

8 See *Mann v Carnell* (1999) 201 CLR 1 at 13. This was because the refusal did not create a 'forensic unfairness' in the sense of placing a matter in issue which necessarily lays the privileged communication open to scrutiny: *DSE (Holdings) Pty Ltd v Intertan Inc* (2003) 127 FCR 499 at [58].

9 The Court here followed previous authority to the effect that the duty of disclosure is entirely separate from a claim for privilege: *R (Cth) v Petroulias* (No 22) (2007) 213 FLR 293 at [63]; *R v Seller; R v McCarthy* (2015) 89 NSWLR 155; [2015] NSWCCA 76 at [165], [240]-[242] and refused to follow the decision of the South Australian Supreme Court in *R v Bunting* (2002) 84 SASR 278 at [73]-[76].

10 Based on a concession by the Attorney-General in *R v Bunting* (2002) 84 SASR 278 at [55] and [61] that information ceases to be confidential once subject to the duty of disclosure or order for production.

11 And it would not be all privileged material in the hands of a prosecutor that would be so relevant, the prosecution must raise an issue that makes the privileged material so relevant that it is open to scrutiny so that its disclosure to the defence is required.