Understanding Prosecution
Disclosure Obligations

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1 Introduction

1.1 In addition to serving the evidence necessary to prove the prosecution case, prosecutors are obliged to disclose material in their possession which, broadly summarised, may weaken the prosecution case or strengthen a defence.\(^1\) Prosecutors are also obliged to make enquiries with investigators and disclose material which is available. Together, the obligations to disclose material and make enquiries are referred to in this paper as “the disclosure obligations.”\(^2\)

1.2 Non-disclosure can jeopardise a fair trial and result in convictions being set aside. Late disclosure can lead to trials being delayed, stayed or discontinued. This paper considers several examples of prosecutors breaching their disclosure obligations. A breach may occur because the scope of the disclosure obligations is misunderstood, because there is significant uncertainty regarding the exceptions to disclosure or because the serious ramifications of non-disclosure are not appreciated.

1.3 This paper reviews the nature and scope of the disclosure obligations as to which there is a need for better understanding by both prosecutors and defence. Such improved understanding along with better guidelines and legislative change would result in fewer unnecessary subpoenas and minimise appeals.

1.4 Part 2 addresses the scope, rationales, sources, timing and content of the disclosure obligations. There are various sources for the disclosure obligations. The pre-trial and pre-committal disclosure provisions only apply to some prosecutions. The\(^3\) only apply to some prosecutors. The wide terms of the common law test make it difficult to apply. Accordingly, it would be useful for prosecutors to have more specific guidance regarding when the disclosure obligations start and stop and some examples of material which is disclosable and material which is not.

1.5 Part 3 explores the three key exceptions to disclosure: legal professional privilege, public interest immunity and statutory disclosure restrictions. There

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\(^1\) The evidence required to be served on the defendant to establish the alleged offences is referred to as “the brief of evidence” and the unused material required to be provided to the defendant comply with the disclosure obligations is referred to as “the disclosure material.”

\(^2\) For ease of reference, the person conducting the prosecution (including police prosecutor, solicitor, barrister, Crown Prosecutor, advocate, instructor or regulatory prosecutor) is referred to here as “the prosecutor”, the person the subject to the prosecution (including suspect, accused, convicted offender or applicant for leave to appeal the conviction) is referred to as “the defendant” and the person conducting the investigation (including officers of the NSW Police Force, Australian Federal Police and other investigation agencies) is referred to as “the investigator.”

\(^3\) The\(^3\) are referred to here as the “Conduct Rules”.

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is uncertainty in each area. Prosecutors need assistance when making the difficult decision to withhold disclosable material and encouragement to explore the feasibility of other options, including waiving privilege, redacting sensitive material and seeking consent to disclose. Clearer guidance is needed so that prosecutors can more consistently apply the exceptions to the disclosure obligations.

1.6 Part 4 outlines the potential consequences of non-disclosure. There are a number of options available to a defendant, such as serving a subpoena, seeking an adjournment and applying for a stay. Non-disclosure also results in delay, exposes the prosecutor to criticism and adverse costs orders and poses the risk of convictions being set aside on appeal. Greater appreciation of the range of serious potential adverse consequences may encourage better compliance.

1.7 Part 5 explores the potential reasons why prosecutors fail to comply with their disclosure obligations and then suggests areas for potential improvement. Given that disclosure is only partly regulated by legislation, that decisions regarding disclosure can be difficult to locate, the large number of statutory disclosure restrictions and the practical difficulties in assessing the relevance of material to potential defences, it is not easy to know what should be disclosed. The current disclosure guidelines are inadequate and should be expanded to provide greater guidance regarding the disclosure obligations and exceptions. Consideration should be given to introducing legislation regulating disclosure for all prosecutions. To avoid prosecutors improperly delegating their disclosure obligations to investigators, consideration should also be given to conducting joint disclosure training for prosecutors and investigators. Improvements to procedures and embracing new technology may also be useful in addressing this complex problem.

4 For ease of reference, the Prosecution Guidelines issued by the Office of the NSW Director of Public Prosecutions on 1 June 2007 are referred to here as “DPP Guidelines” and the Statement on Disclosure in Prosecutions Conducted by the Commonwealth issued by the Commonwealth Director of Public Prosecutions in March 2017 is referred to as the “CDPP Statement.”
2 What should be disclosed?

2.1 What is the common law test?

2.1.1 The common law test is that the prosecution must disclose documents which are material. Documents are material if “they can be seen, on a sensible appraisal by the prosecution,

a) to be relevant or possibly relevant to an issue in the case,

b) to raise or possibly raise a new issue the existence of which is not apparent from the prosecution case, or

c) to hold out a real (as opposed to a fanciful) prospect of providing a lead on evidence going to either (a) or (b).”

2.1.2 The test first appeared NSW in 2004, in obiter remarks of Hodgson JA, and has been approved and applied in many subsequent decisions. The prosecutor must give the issues raised in the case a broad interpretation. The test has been summarised as any material which weakens the prosecution case or strengthens that of the defendant. The test is very broad because it is essentially based on “possible” relevance. Relevance is broadly defined in the Evidence Act 1995 as evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding. The phrase “possible relevance” is so broad that it does not provide sufficient guidance for prosecutors to determine whether particular material should be disclosed.

2.1.3 When determining whether material should be disclosed, it is useful to consider how the defendant could use the material: before, during and after the trial.

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5 R v Reardon (2004) 60 NSWLR 454 at [48] and [54].
6 R v Reardon (2004) 60 NSWLR 454 at [48] and [54].
8 R v Reardon (2004) 60 NSWLR 454 at [48] and [54].
9 Ragg v Magistrates’ Court (2008) 18 VR 300 at [74].
10 Ragg v Magistrates’ Court (2008) 18 VR 300 at [73].
11 Section 55(1) Evidence Act 1995. In IR v Farquharson (2009) 26 VR 410 at [218], the court accepted that material which is rationally probative should be disclosed.
2.1.4 The prosecutor should disclose material which the defendant could use in preparation for the trial, including to brief the defendant’s expert\textsuperscript{12} or to provide a lead to further enquiries.\textsuperscript{13}

2.1.5 In addition to material which could support an anticipated defence,\textsuperscript{14} the prosecutor should disclose material which the defendant could use during the trial to:

a) object to prosecution evidence;

b) cross-examine a prosecution witness;

c) attack the credibility of a prosecution witness;\textsuperscript{15}

d) implicate a prosecution witness;\textsuperscript{16}

e) explore the mental health of a prosecution witness;\textsuperscript{17}

f) test the prosecution’s expert evidence;\textsuperscript{18}

g) challenge an evidentiary certificate;\textsuperscript{19}

h) seek a direction that prosecution evidence is unreliable;\textsuperscript{20} or

\begin{itemize}
  \item \textsuperscript{12} \textit{Gaffee v Johnson} (1996) 90 A Crim R 157.
  \item \textsuperscript{13} \textit{Easterday v The Queen} (2003) 143 A Crim R 154 at [126] and [260] and [388]; \textit{Aouad and El-Zeyat v R} [2011] NSWCCA 61 at [327].
  \item \textsuperscript{14} Noting that the defendant’s case need only be proved on the balance of probabilities under section 141(2) \textit{Evidence Act 1995}.
  \item \textsuperscript{16} \textit{R v Jenkin (No 2)} [2018] NSWSC 697; \textit{Grey v The Queen} (2001) 184 ALR 593 at [22]; \textit{R v Dickson}; \textit{R v Issakidis (No 12)} [2014] NSWSC 1595 at [57].
  \item \textsuperscript{17} \textit{R v Jenkin (No 2)} [2018] NSWSC 697.
  \item \textsuperscript{18} \textit{Ragg v Magistrates’ Court} (2008) 18 VR 300 at [122]. In \textit{Rodi v Western Australia} [2018] HCA 44 at [32] the court accepted that previous inconsistent evidence regarding drug yields could have been used to cross-examine the prosecution expert witness and so strengthen the defence. Points 20-21 of the \textit{CDPP Statement} state that the prosecutor should disclose material relevant or potentially relevant to the competence or credibility of any prosecution expert witness and any expert opinion and/or scientific evidence, which differs from or casts doubt on the prosecution expert evidence.
  \item \textsuperscript{19} \textit{Gaffee v Johnson} (1996) 90 A Crim R 157; \textit{Woolworths Ltd v Dr K Chant and Anor} [2009] NSWSC 1082 at [31].
  \item \textsuperscript{20} \textit{Grey v The Queen} (2001) 184 ALR 593 at [21] and [61].
\end{itemize}
i) seek a warning.\textsuperscript{21}

2.1.6 The prosecutor should also disclose material which the defendant could use to mitigate any sentence.\textsuperscript{22}

2.1.7 Some categories of material which meet the common law disclosure test include:

a) antecedents of a prosecution witness (such as a criminal history record\textsuperscript{23} or prosecution file\textsuperscript{24});

b) information from a prosecution witness (such as a handwritten statement, sketch,\textsuperscript{25} interview note\textsuperscript{26} or conference note\textsuperscript{27});

\textsuperscript{21} Guideline 3, \textit{DPP Guidelines} states that the prosecutor should inform the defendant of warnings which may be appropriate, even where unfavourable. Material indicating that a prosecution witness was a prison informer, suffered memory loss or was criminally concerned in the offence should be disclosed so the defendant can seek a warning that the witness is unreliable under section 165(1) \textit{Evidence Act 1995}. Guideline 16, \textit{DPP Guidelines} states that the prosecutor should ordinarily disclose information about an informer’s criminal history and credibility and information about any benefit, immunity or discount on sentence. Clause 6.8, \textit{CDPP Prosecution Policy of the Commonwealth} states that information regarding any concession or undertaking to an accomplice should be disclosed. Material suggesting that potential witnesses are unable to be located or potential evidence has been lost should be disclosed so the defendant can seek a warning regarding disadvantage caused by delay under section 165B \textit{Evidence Act 1995}.

\textsuperscript{22} \textit{R v Richard Lipton} [2011] NSWCCA 247 at [82]. Point 25 of the \textit{CDPP Statement} states that any material that may affect an assessment of the moral culpability of a defendant on sentence should be disclosed.


\textsuperscript{24} \textit{Thomas v Campbell} (2003) 9 VR 136.

\textsuperscript{25} \textit{Mallard v The Queen} (2005) 224 CLR 125.

\textsuperscript{26} \textit{R v Livingstone} (2004) 150 A Crim R 117 at [51].

\textsuperscript{27} \textit{R v Tracey & Ors (No 2)} [2005] SASC 356. Guideline 18, \textit{DPP Guidelines} provides that the prosecutor should disclose any record of a statement by a witness that is inconsistent with the witness’ previously intended evidence or adds to it significantly, including any statement made in conference. In \textit{R v Dickson; R v Issakidis (No 12)} [2014] NSWSC 1595 at [29], there was said to be an expectation that prosecutors will immediately disclose new information obtained during witness conferences.
c) information about an accomplice (such as a statement,\textsuperscript{28} representations,\textsuperscript{29} details of assistance to police;\textsuperscript{30} letter of comfort;\textsuperscript{31} or sentencing discount\textsuperscript{32});

d) information about the investigation (including an investigation note\textsuperscript{33} or investigation report\textsuperscript{34});

e) information about a victim (including a victim impact statement;\textsuperscript{35} information about the victim lying in a different trial\textsuperscript{36} or the victim recanting similar allegations against a different defendant);\textsuperscript{37}

f) information about the commencement of the prosecution (including the authority to prosecute and the prosecutor’s appointment\textsuperscript{38});

g) information about how the prosecution evidence was obtained (such as a warrant\textsuperscript{39} crime scene photograph,\textsuperscript{40} speed camera device details,\textsuperscript{41} property seizure record or surveillance log\textsuperscript{42}); and

\textsuperscript{28} R v Chami, M Skaf, Ghanem, B Skaf [2004] NSWCCA 36 at [145].
\textsuperscript{29} R v Gatt (No 6) [2018] NSWSC 487.
\textsuperscript{30} R v Tracey & Ors (No 2) [2005] SASC 356.
\textsuperscript{31} Grey v The Queen (2001) 184 ALR 593 at [23]. Point 19 of the CDPP Statement states that the prosecutor should disclose any concession offered or provided to secure the evidence of a prosecution witness, any undertaking not to prosecute a prosecution witness, any benefit or inducement offered or provided to a prosecution witness, any agreement not to oppose bail for a prosecution witness, any discount on sentence received by a prosecution witness for undertaking to cooperate.
\textsuperscript{32} R v Sullivan [2003] NSWCCA 100 at [44].
\textsuperscript{33} Aouad and El-Zeyat v R [2011] NSWCCA 61.
\textsuperscript{34} Ragg v Magistrates’ Court (2008) 18 VR 300.
\textsuperscript{35} R v Lewis-Hamilton [1998] 1 VR 630.
\textsuperscript{36} AJ v The Queen [2011] VSCA 215. Point 18 of the CDPP Statement states that adverse finding regarding a prosecution witness (including a finding of dishonesty) in other proceedings (such as disciplinary proceedings, civil proceedings or a Royal Commission) should be disclosed.
\textsuperscript{37} Cannon v Tahche (2002) 5 VR 317.
\textsuperscript{38} Woolworths Ltd v Dr K Chant and Anor [2009] NSWSC 1082 at [29].
\textsuperscript{39} Ragg v Magistrates’ Court (2008) 18 VR 300.
\textsuperscript{40} Mallard v The Queen (2005) 224 CLR 125.
\textsuperscript{42} Ragg v Magistrates’ Court (2008) 18 VR 300.
h) information regarding the prosecution expert evidence (such as an expert experiment).} {43}

2.1.8 Reviewing the categories is useful but the task of determining whether material should be disclosed is still difficult. It requires consideration of the weaknesses in the prosecution case, anticipating potential defences, predicting potential objections and assessing the potential relevance of the material. For example, a previous conviction for a minor offence by a non-contentious witness may not be disclosable but previous convictions for dishonesty offences by a key witness should always be disclosed.44 Potential relevance also depends on what information is available as the matter progresses. Material which is initially considered irrelevant may become relevant at a later stage: when further information is obtained in preparation for the trial, when the defendant indicates a defence or when new issues are raised during the trial.

2.1.9 The common law test also includes an obligation to make enquiries.45 It is not sufficient to review the material in the actual possession of the prosecutor. A prosecutor should also consider material which is “available” to the prosecutor.46 That will include material which the prosecutor can request from the investigator.47

2.1.10 Examples of non-disclosure suggest that prosecutors find it difficult to apply the common law test to determine whether material should be disclosed. Given the broad terms of the test, prosecutors may be assisted by more precise guidance on what material should be disclosed including more thorough consideration of the various ways the defendant could use the disclosure material, clearer explanation of the categories of disclosure material and helpful examples of material which meets the common law test.

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43 Mallard v The Queen (2005) 224 CLR 125.
44 Point 16, CDPP Statement.
46 Rule 29.5 Conduct Rules.
47 For example, in JB v R [2015] NSWCCA 182 at [32], it was accepted that as soon as the prosecutor knew that the main prosecution witness was a registered police informant, further inquiries should have been made. In R v Jenkin (No 2) [2018] NSWSC 697 at [24] and [33], the court found that although the investigator had not provided the criminal histories to the prosecutor, they were “readily available” to the prosecutor and should have been disclosed to the defendant as soon as the prosecutor expected that the prosecution witnesses would give controversial evidence or be impugned in the events.
2.2. What is the source of the disclosure obligations?

2.2.1 The disclosure obligations arise by operation of the common law\(^{48}\) and, for indictable offences, are addressed in legislation.

**Legislation regarding summary offences**

2.2.2 For some summary proceedings in the Local Court there is no statutory requirement to serve a brief and no statutory requirement to provide the disclosure material. A prosecutor is not required to serve a brief of evidence regarding certain offences for which a penalty notice may be issued, certain traffic offences, possession of prescribed restricted drugs\(^{49}\), offensive conduct,\(^{50}\) possession of prohibited drugs,\(^{51}\) and any summary offence for which there is a monetary penalty only.\(^{52}\) When a not guilty plea is entered, the Local Court will list the matter for hearing without requiring the prosecutor to serve a brief.\(^{53}\) It is unclear whether, given there is no statutory requirement to even serve a brief, there is any obligation to provide disclosure material.\(^{54}\)

2.2.3 For all other summary proceedings in the Local Court (including proceedings for indictable offences that are being dealt with summarily), there is a statutory requirement to serve a brief but no statutory requirement to provide disclosure material.\(^{55}\) The prosecutor must serve a brief of evidence four weeks after the defendant pleads not guilty and at least 14 days before the hearing.\(^{56}\) If the defendant pleads not guilty, the prosecutor must serve a brief consisting of documents regarding the evidence that the prosecutor intends to adduce in

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\(^{48}\) *Ragg v Magistrates’ Court* (2008) 18 VR 300 at [73].

\(^{49}\) Section 16 (1) of the *Poisons and Therapeutic Goods Act 1966*. 

\(^{50}\) Section 4 of the *Summary Offences Act 1988*. 

\(^{51}\) Section 10 of the *Drug Misuse and Trafficking Act 1985*.  

\(^{52}\) Section 187(5) of the *Criminal Procedure Act 1986* and clause 24 of the *Criminal Procedure Regulation 2017*. 

\(^{53}\) Clause 5.4(b) *Local Court Practice Note Crim 1, Case management of criminal proceedings in the Local Court*, issued 24 April 2012, last amended 26 June 2017.

\(^{54}\) In *SafeWork NSW v Investa Asset Management Pty Ltd* [2018] NSWDC 173 at [35], the defendant successfully obtained an adjournment of District Court summary proceedings to allow the prosecutor to disclose statements from prosecution witnesses notwithstanding that the *Criminal Procedure Act 1986* does not expressly provide for the provision of witness statements because the duty of disclosure arises independently of statute.

\(^{55}\) In *Director of Public Prosecutions (NSW) v So* [2014] NSWLC 16 at [34], it was suggested that the Local Court has an implied power to direct the prosecutor to disclose material to the defendant, if non-disclosure would mean that the summary trial would be unfair.

\(^{56}\) Sections 170 and 183 *Criminal Procedure Act 1986*; clause 5.4(a) *Local Court Practice Note Crim 1, Case management of criminal proceedings in the Local Court*, issued 24 April 2012, last amended 26 June 2017.
order to prove the offence.\textsuperscript{57} The brief should include written statements from the witnesses the prosecutor intends to call and any proposed exhibits identified in those statements.\textsuperscript{58} To reduce the time spent by police officers in producing statements of non-material witnesses,\textsuperscript{59} the brief need not include any prescribed statements (such as the custody manager who cautioned the defendant, the police officer who conveyed the DNA to the laboratory, the police officer who operated the search warrant video, any police officer who merely corroborates another and any health care professional whose notes have been included).\textsuperscript{60} Rather than obtaining and serving such prescribed statements, it is sufficient to serve a list summarising what they would include.\textsuperscript{61} There is no statutory requirement to provide disclosure material for summary offences. It is unclear whether, given the statutory requirement to serve the brief is triggered by a not guilty plea, there is any obligation to provide disclosure material at any earlier stage to assist the defendant to decide how to plead.

### Legislation regarding indictable offences

2.2.4 For indictable offences (excluding those which are being dealt with summarily), there are statutory requirements to serve a brief and provide the disclosure material in two stages: pre-committal and pre-trial.

2.2.5 First, the prosecutor must serve the brief and provide the disclosure material before the committal in the Local Court. To allow the defendant to make an informed decision about whether to plead guilty,\textsuperscript{62} the brief of evidence contains the material relied upon by the prosecutor (the material obtained by the prosecution that forms the basis of the prosecution’s case) plus the disclosure material (material obtained by the prosecution that is reasonably capable of being relevant to the defendant’s case and any other material obtained by the prosecution that would affect the strength of the prosecution’s case).\textsuperscript{63} The material in the brief of evidence need not be in admissible statement form.\textsuperscript{64} Disclosure at an early stage allows the defendant to

\textsuperscript{57} Section 183(1) Criminal Procedure Act 1986.

\textsuperscript{58} Section 183(2) Criminal Procedure Act 1986.

\textsuperscript{59} Clause 25(1) Criminal Procedure Regulation 2017.

\textsuperscript{60} Clause 25(3) Criminal Procedure Regulation 2017.

\textsuperscript{61} Clause 25(4)(a) Criminal Procedure Regulation 2017.

\textsuperscript{62} The Honourable Mark Speakman, 11 October 2017, Legislative Assembly, Second Reading Speech regarding the Justice Legislation Amendment (Committals and Guilty Pleas) Bill 2017.

\textsuperscript{63} Section 62(1) Criminal Procedure Act 1986.

\textsuperscript{64} Section 62(2) Criminal Procedure Act 1986.
determine whether to plead guilty after the case conference.\textsuperscript{65} The pre-committal provisions do not affect any other law or obligation relating to the provision of material to a defendant by a prosecutor.\textsuperscript{66}

2.2.6 Second, the prosecutor must serve any additional brief items and provide any additional disclosure material before trial in the District Court or Supreme Court. The prosecution notice contains the material relied on by the prosecutor (including the statements from witnesses the prosecutor intends to call and the exhibits the prosecutor intends to adduce at the trial).\textsuperscript{67} The prosecution notice also contains the disclosure material, namely:

a) material provided by the investigator to the prosecutor, or otherwise in the prosecutor’s possession, that would reasonably be regarded as relevant to the prosecution case or the defence case;\textsuperscript{68}

b) a list identifying any material 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 identifying the place such material is situated;\textsuperscript{69}

c) material in the prosecutor’s possession that is relevant to the reliability or credibility of a prosecution witness;\textsuperscript{70}

d) material in the prosecutor’s possession that would reasonably be regarded as adverse to the credit or credibility of the defendant.\textsuperscript{71}

2.2.7 After receiving the defendant’s response, the prosecutor is to serve any additional material in the prosecutor’s possession that might reasonably be expected to assist the case for the defence.\textsuperscript{72} The pre-trial disclosure provisions do not limit any other obligation for pre-trial disclosure (including under the common law, the rules of court, the \textit{Conduct Rules} and the \textit{DPP Conduct Rules}).

\textsuperscript{65} Section 70(2)-(3) \textit{Criminal Procedure Act 1986}.

\textsuperscript{66} Section 61(2) \textit{Criminal Procedure Act 1986}. See the Honourable Mark Speakman, 11 October 2017, Legislative Assembly, Second Reading Speech regarding the \textit{Justice Legislation Amendment (Committals and Guilty Pleas) Bill 2017} which introduced the pre-committal disclosure provisions into the \textit{Criminal Procedure Act 1986}: the new Division “does not affect the operation of existing ongoing disclosure obligations of both the investigator and the prosecutor”.

\textsuperscript{67} Section 142(1)(c) and (f) \textit{Criminal Procedure Act 1986}.

\textsuperscript{68} Section 142(1)(i) \textit{Criminal Procedure Act 1986}.

\textsuperscript{69} Section 142(1)(j) \textit{Criminal Procedure Act 1986}.

\textsuperscript{70} Section 142(1)(k) \textit{Criminal Procedure Act 1986}.

\textsuperscript{71} Section 142(1)(l) \textit{Criminal Procedure Act 1986}.

\textsuperscript{72} Section 144(e) \textit{Criminal Procedure Act 1986}.
Guidelines) that is capable of being complied with concurrently, but the pre-trial disclosure provisions prevail to the extent of any inconsistency.\textsuperscript{73}

2.2.8 Similar pre-trial disclosure provisions apply to proceedings before the Supreme Court and the Land and Environment Court in its summary jurisdiction.\textsuperscript{74}

**Legislation regarding investigators**

2.2.9 There is legislation regarding what material investigators should provide to prosecutors but it only applies to matters involving the Director. Section 15A of the *Director of Public Prosecutions Act 1986* (NSW)\textsuperscript{75} requires the investigator to provide the prosecutor with 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 defendant. The investigator is required to provide the prosecutor with a disclosure certificate confirming that such material has been provided and advise the prosecutor of any additional material as soon as practicable.\textsuperscript{76} The provision was introduced in 2001 to “formalise” the general duty on the investigator to disclose all relevant information and material obtained during the investigation to the

\textsuperscript{73} Section 149F(5) *Criminal Procedure Act 1986*. The Honourable Barry Collier stated in the Second Reading Speech on 28 October 2009 in the Legislative Assembly regarding the *Criminal Procedure Amendment (Case Management) Bill 2009* which introduced section 149F that the provisions were not intended to replace the common law or limit any common law obligation requiring a higher level of disclosure and the provisions were only intended to prevail where it is impossible, or impracticable, to comply with both.

\textsuperscript{74} Division 2A in Part 5 of Chapter 4 *Criminal Procedure Act 1986* (regarding Supreme Court and Land and Environment Court summary trials) largely mirrors the pre-trial disclosure regime for District Court and Supreme Court indictable trials. For example, section 247E requires a prosecution notice with similar content to that required by section 142. One difference between the two regimes is that the prosecution notice for Supreme Court and Land and Environment Court summary trials need not include material in the prosecutor’s possession that would reasonably be regarded as adverse to the credit or credibility of the defendant.

\textsuperscript{75} Hereafter “the *DPP Act*”.

\textsuperscript{76} The disclosure certificate form prescribed by clause 5 and Schedule 1 of the *Director of Public Prosecutions Regulation 2015* requires the investigator to certify that material that might reasonably be expected to assist the case for the prosecution or the case for the accused person has been provided and required the investigator to provide an undertaking to advise the prosecutor as soon as practicable if the investigator becomes aware of any additional material. For indictable trials in the Supreme Court, clause 9 of the *Supreme Court Practice Note SC CL 2, Supreme Court Common Law Division - Criminal Proceedings*, issued and commenced 15 December 2016, also requires an affidavit from the investigator confirming compliance with disclosure as at arraignment.
prosecutor. The provision was urgently amended in 2011 to address the decision of Lipton, so that the investigator is not required to provide the prosecutor with relevant material that is the subject of a claim of privilege, public interest immunity or statutory immunity but need only inform the prosecutor of its existence. The provision was further amended in 2012 to allow the prosecutor, on a case-by-case basis, to request such material if the prosecutor considers it is necessary to review how it might impact on the prosecution or the defence’s case. The provision is directed at the obligations of investigators, not prosecutors, so does not cut down the prosecutor’s disclosure obligations.

Disclosure Guidelines

2.2.10 There are disclosure guidelines for prosecutors employed by the DPP and CDPP, but they do not directly apply to police prosecutors or regulatory prosecutors.

2.2.11 For offences prosecuted by the NSW Director of Public Prosecutions, Guideline 18 of the DPP Guidelines issued under the DPP Act sets out the Director’s understanding of the disclosure obligations. Guideline 18 adopts the common law disclosure test. The Guidelines were last revised in 2007 and are currently being updated. The update will presumably address the expanded pre-trial disclosure provisions, the Conduct Rules which commenced in 2015 and the pre-committal disclosure provisions which commenced in 2018. For example, Guideline 18 states that the duty of disclosure does not extend to

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77 The Honourable Bob Debus, 16 August 2000, Legislative Assembly, Second Reading Speech regarding the Criminal Procedure Amendment (Pre-Trial Disclosure) Bill 2000. Guideline 18, DPP Guidelines requires the investigator to notify the Director of the existence of, and where requested disclose, all other documentation, material and other information, including that concerning any proposed witness, which documentation, material or other information might be of relevance to either the prosecution or the defence.

78 To address the decision in Regina v Richard Lipton [2011] NSWCCA 247.

79 The Honourable Greg Smith, 17 October 2012, Legislative Assembly, Second Reading Speech regarding the Director of Public Prosecutions Amendment (Disclosures) Bill 2012.

80 R v Richard Lipton [2011] NSWCCA 247 at [80]. In R v Medich (No 6) [2016] NSWSC 1001 at [24], Bellew J held that the duty of disclosure is imposed on the prosecutor “independent of” the DPP Act.

81 Page 100 of the NSW Police Force Handbook instructs officers in charge that they have a duty to “tell the police prosecutor” about any relevant information, documents or other things obtained during an investigation, or which come into their possession, that are not contained in the brief of evidence and that might reasonably be expected to assist the case for the prosecution or the case for the defendant.

82 Section 13(1) DPP Act.

disclosing material relevant only to the credibility of the defendant but such material must be disclosed under the pre-trial disclosure provisions applicable to all District Court and Supreme Court indictable matters.\textsuperscript{84}

2.2.12 For offences prosecuted by the Commonwealth Director of Public Prosecutions, the \textit{CDPP Statement} sets out the Commonwealth Director’s expectations as to how the prosecution should fulfil the disclosure obligations. The \textit{CDPP Statement} states that the prosecutor must first fulfil any applicable state or territory disclosure provisions then, if not already required by such provisions, also disclose any material which meets the common law test.\textsuperscript{85}

\textbf{Conduct Rules}

2.2.13 There are ethical rules regarding disclosure but they only apply to solicitors and barristers. Rule 29.5 of the \textit{Conduct Rules} applies to prosecutors who are solicitors. Rule 87 of the \textit{Legale Profession Uniform Conduct (Barristers) Rules 2015} applies to prosecutors who are barristers. Both rules provide that the prosecutor must disclose to the defendant as soon as practicable all material available to the prosecutor or of which the prosecutor becomes aware which could constitute evidence relevant to the guilt or innocence of the defendant 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. The rules do not apply to prosecutors who are neither solicitors nor barristers, such as some police prosecutors and some regulatory prosecutors.

2.2.14 Given that disclosure is variously regulated by common law principles, pre-committal disclosure provisions, the \textit{DPP Guidelines}, the \textit{CDPP Statement} and the \textit{Conduct Rules}, prosecutors would clearly benefit from clearer guidance, particularly in the following respects:

\begin{itemize}
  \item[a)] The pre-committal and pre-trial disclosure obligations only apply to indictable matters. Should the same level of disclosure apply to summary matters?
  \item[b)] The common law principles regarding disclosure can be hard to locate given that they stem from decisions involving subpoenas, adjournments and appeals. The common law test has also been criticised.\textsuperscript{86} Should legislation further codify the common law principles so that prosecutors,
\end{itemize}

\textsuperscript{84} Section 142(1)(l) \textit{Criminal Procedure Act 1986}.

\textsuperscript{85} Point 3, \textit{CDPP Statement}.

\textsuperscript{86} In \textit{Secretary, Department of Family and Community Services v Hayward (a pseudonym) [2018] NSWCA 209} at [42], the “common law principles” were recently criticised as “rarely applied” and “of limited scope.”
defence and courts can more easily determine whether material should be disclosed?^87

2.2.15 These issues are discussed further below.

2.3 Why should material be disclosed?

2.3.1 There are four primary rationales for disclosure obligations, which overlap to an extent.

Fairness

2.3.2 The primary rationale for disclosure obligations is fairness. Disclosure is considered “inseparable” to a fair trial.\(^88\) The need to ensure that the defendant receives a fair trial is the “ultimate criterion” for determining what material should be disclosed.\(^89\)

2.3.3 Serving the brief of evidence does not make a trial fair. The brief of evidence shows only the admissible material which the prosecutor relies on to support the charges.

2.3.4 To ensure a fair trial, the prosecutor must also provide any disclosure material. That may include material about the credibility of prosecution witnesses, material which weakens the prosecution case and material which supports potential defences. Disclosure is necessary so that the defendant can assess the strength of the prosecution case, can decide how to plea, can test the prosecution evidence, can make available defences, can make appropriate submissions on sentence and can pursue available appeals. Non-disclosure is a significant denial of procedural fairness.\(^90\)

The role of the prosecutor

2.3.5 A second rationale for disclosure obligations is that they are part of the role of the prosecutor. The prosecutor is required to exercise the discretion to

\(^87\) This will involve considering the extent to which the pre-trial and pre-committal disclosure provisions codify the common law principles. In Rodi v Western Australia [2018] HCA 44 at [27], the High Court recently declined to consider the intersection of the Western Australian disclosure provisions with the prosecution's obligations of disclosure at common law.

\(^88\) In Potier v R [2015] NSWCCA 130 at [549], the prosecutor’s duty to disclose was described as “an incident of its duty of fairness to the accused”.

\(^89\) CDPP Statement, p 3.

\(^90\) Aouad and El-Zeyat v R [2011] NSWCCA 61 at [367].
prosecute.\textsuperscript{91} To do that, the prosecutor must evaluate the weight of the available evidence, inculpatory and exculpatory, assess potential defences and determine whether there is a reasonable prospect of conviction.\textsuperscript{92} The prosecutor is required to serve the brief of evidence.\textsuperscript{93} When reviewing the brief of evidence, the prosecutor should “look beneath the surface of the statements” including considering any potential objections to the prosecution evidence, such as any improperly obtained admissions, any witness with a motive to lie and any doubtful identifications.\textsuperscript{94} The prosecutor is required to call or make available all material witnesses.\textsuperscript{95} When calling prosecution witnesses and determining whether to seek leave to cross-examine any unfavourable witnesses, the prosecutor should be aware of any prior inconsistent statements or any material which affects their credibility.\textsuperscript{96} The prosecutor is also required to conduct charge negotiations, respond to representations, determine whether any charges should be withdrawn and, if appropriate, direct that no further proceedings be taken.\textsuperscript{97} To do that, the prosecutor needs to be aware of material which weakens the prosecution case or strengthens the defendant’s case. A prosecutor cannot properly discharge the statutory obligation to prosecute unless the prosecutor has access to all relevant information.\textsuperscript{98} In short, to fulfil the prosecutor’s role, the prosecutor needs to be aware of the disclosure material.

### The administration of justice

2.3.6 A third rationale for disclosure obligations is that they are necessary for the administration of justice.\textsuperscript{99} It is a fundamental obligation of a prosecutor to assist in the timely and efficient administration of criminal justice.\textsuperscript{100} Non-

\begin{enumerate}
\item Section 7(1) of the \textit{DPP Act}.
\item Guideline 4, \textit{DPP Guidelines}. Clause 2.6, \textit{CDPP Prosecution Policy of the Commonwealth}.
\item Excluding summary matters for which a brief is not required under clause 25 of the \textit{Criminal Procedure Regulation 2017}.
\item Clause 2.7, \textit{CDPP Prosecution Policy of the Commonwealth}.
\item Guideline 26, \textit{DPP Guidelines}. See also rule 29.7 \textit{Conduct Rules}.
\item Under section 38 \textit{Evidence Act 1995}, the prosecutor can seek leave to cross-examine a prosecution witness about evidence which is unfavourable or any prior inconsistent statement.
\item Section 7(2)(b) of the \textit{DPP Act} provides that the functions of the Director include directing that no further proceedings be taken.
\item \textit{R v Richard Lipton} [2011] NSWCCA 247 at [106].
\item \textit{R v Bunting} (2002) 136 A Crim R 539 at [80].
\item Guideline 5, \textit{DPP Guidelines}.
\end{enumerate}
Where non-disclosure means that a defendant is unable to pursue an available defence, unable to make an available objection or unable to make an available submission on sentence, the defendant has been denied justice. Non-disclosure can also cause delays. The defendant can seek an adjournment to serve a summons, further time to consider the material, further time to recall witnesses, further time to make additional enquiries and further time to make any applications arising from the material.

2.3.7 Various aspects of the administration of justice have been mentioned when disclosure provisions have been introduced and expanded. When discretionary pre-trial disclosure provisions were introduced in 2007, it was intended that increased disclosure would ensure that prosecutors disclose all available evidence (not just the evidence in their possession favourable to the prosecution case). When the pre-trial disclosure provisions were expanded beyond complex criminal trials in 2009, it was intended that increased disclosure would reduce unnecessary delays. When the pre-trial disclosure provisions where expanded to summary criminal matters in the Supreme Court and Land and Environment Court in 2011, it was intended that increased disclosure would reduce unnecessary costs and complexity. When the pre-trial disclosure provisions were made mandatory for all trials in the District Court and Supreme Court in 2013, it was intended that increased disclosure would enable the parties to focus on the real issues in dispute. When the pre-committal provisions were introduced for trials in the District Court and Supreme Court in April 2018, it was intended that early disclosure would minimise late guilty pleas and avoid unnecessary preparation time.

With the pending expansion of pre-trial disclosure provisions in the District Court and

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101 In *Mallard v R* (2005) 224 CLR 125 at [81], the majority held that non-disclosure had led to a miscarriage of justice and Kirby J, agreeing, observed that a prosecutor represents the community committed to the fair trial of criminal accusations and the avoidance of such miscarriages of justice.

102 The Honourable Bob Debus, 16 August 2000, Legislative Assembly, Second Reading Speech regarding the *Criminal Procedure Amendment (Pre-Trial Disclosure) Bill 2000*.

103 The Honourable Barry Collier, 28 October 2009, Legislative Assembly, Second Reading Speech regarding the *Criminal Procedure Amendment (Case Management) Bill 2009*.

104 The Honourable Greg Smith, 24 November 2011, Legislative Assembly, Second Reading Speech regarding the *Criminal Procedure Amendment (Summary Proceedings Case Management) Bill 2011*.

105 The Honourable Michael Gallacher, 20 March 2013, Legislative Council, Second Reading Speech regarding the *Criminal Procedure Amendment (Pre-Trial Defence Disclosure) Bill 2013*.

106 The Honourable Mark Speakman, 11 October 2017, Legislative Assembly, Second Reading Speech regarding the *Justice Legislation Amendment (Committals and Guilty Pleas) Bill 2017*.
Supreme Court in September 2018,\textsuperscript{107} which includes a mandatory requirement for the prosecutor to provide transcripts of audio or visual recordings, it is intended that trials will no longer be delayed by recorded evidence or transcripts being edited at short notice and it is inefficient for the court to resolve objections to portions of recorded evidence on the first day of a trial.\textsuperscript{108}

### Ameliorate defence disadvantage

2.3.8 A fourth rationale for disclosure obligations is that they are necessary to ameliorate the disadvantaged position of the defendant charged with a criminal offence.

2.3.9 The Crown has several advantages in a criminal prosecution. The investigator has resources to conduct the investigation, statutory powers to gather information and is aware of what material has been gathered and which leads have been pursued. The prosecutor has resources to analyse the material and can make requisitions about further enquiries.\textsuperscript{109} The prosecutor can also review files regarding co-offenders or files regarding the same victim. The prosecutor can also rely on evidentiary certificate provisions to facilitate proof.\textsuperscript{110}

2.3.10 In contrast the defendant’s solicitor may only have access to the material in the brief of evidence and the defendant’s instructions (if any). The defendant’s solicitor can obtain information under a subpoena to produce, however this option is only available if the defendant’s solicitor is aware of the nature of the material, can ascertain who holds the material and can identify a legitimate forensic purpose for seeking the material. In some cases, the defendant may only discover by chance that there may be undisclosed material.\textsuperscript{111} A defendant who is self-represented, has language difficulties or is in custody


\textsuperscript{108} The Honourable Mark Speakman, 15 August 2018, Legislative Assembly, Second Reading Speech regarding the \textit{Criminal Procedure Amendment (Mandatory Pre-trial Disclosure) Bill 2018}.

\textsuperscript{109} Under section 17 of the \textit{DPP Act}, the prosecutor may make a written request to the investigator to investigate or further investigate matters associated with the alleged commission of the offence which should be complied with so far as practicable.


\textsuperscript{111} For example, in \textit{Nash v Glennies Creek Coal Management Pty Ltd (No 2) [2013] NSWIRComm 67} a proposed Bill to retrospectively validate a prosecutor’s appointment alerted the defendant’s solicitor that there may be disclosure material regarding the prosecutor’s authority to prosecute.
will necessarily have greater difficulty in identifying whether there may be material which should be disclosed.\(^{112}\)

2.3.11 The disclosure obligations are therefore necessary to ameliorate the uneven resources, the uneven ability to obtain information and uneven forensic advantages.\(^{113}\) Any disadvantage resulting from the defendant’s inability to investigate matters as thoroughly as the investigator is lessened by the prosecutor’s obligation to disclose all relevant material, including that which may be helpful to the defence.\(^{114}\) For that reason, the court was critical of a prosecutor having unfettered searchable access to a database of potentially exculpatory evidence which the defendant could not access.\(^{115}\) The disclosure obligations are considered part of the equality of arms principle, in that the prosecutor should not have an unfair advantage by withholding material which may assist the defendant.\(^{116}\)

2.3.12 The four rationales overlap somewhat in that they seek to explain why disclosure is necessary in the context of criminal proceedings.

2.3.13 Examples of non-disclosure suggest that some prosecutors and defence may not fully appreciate the importance of the disclosure obligations. Clearer guidance on the rationales for disclosure obligations may encourage greater compliance.

2.4 When should material be disclosed?

2.4.1 There are several examples where prosecutors have been criticised for disclosing material too late. For example, disclosure minutes before a trial commenced,\(^{117}\) after a prosecution case had closed\(^{118}\) and even on day 51 of

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\(^{112}\) For example, in *Lawless v The Queen* (1979) 142 CLR 659 the majority observed that experienced defendant counsel should have realised that a neighbour may have made a statement and should have realised that the mental hospital may have clinical records but Murphy J at 683 [10], in dissent, noted the practical difficulties facing defendants in custody.

\(^{113}\) *R v Reardon* (2004) 60 NSWLR 454 at [58] per Hodgson JA.


\(^{115}\) *R v Dickson; R v Issakidis (No 12)* [2014] NSWSC 1595 at [63]; *R v Michael John Issakidis* [2015] NSWSC 834 at [37].

\(^{116}\) *Ragg v Magistrates’ Court* (2008) 18 VR 300 at [42].

\(^{117}\) In *R v Medich (No 6)* [2016] NSWSC 1001 at [28], Bellew J was critical of disclosure minutes before the trial commenced.

\(^{118}\) In *R v Chami, M Skaf, Ghanem, B Skaf* [2004] NSWCCA 36 at [126], disclosure the day after closing the prosecution case was described as “belated”.

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Prosecutors and defence require further guidance on when the disclosure obligations start, how quickly additional material should be disclosed and when the disclosure obligations stop.

2.4.2 Whether disclosure obligations start before or after the defendant enters a plea depends upon the nature of the proceedings.

2.4.3 For summary matters, the prosecutor will generally not provide the disclosure material until after the defendant enters a not guilty plea. Disclosure generally occurs when the brief is served or shortly prior to the hearing. There is no legislation specifying when disclosure should occur in summary prosecutions in the Local Court.

2.4.4 For indictable matters, the prosecutor must provide the disclosure material before the defendant enters a plea. Where the pre-committal disclosure provisions apply, the Magistrate will set a timetable for the prosecutor to serve the brief (including the disclosure material) within eight weeks of committal proceedings commencing. After committal, the court will then set a further timetable for the prosecutor to serve the prosecution notice (including any further disclosure material) at least five weeks before a District Court trial or eight weeks before a Supreme Court trial.

2.4.5 It is unclear whether, notwithstanding there is no legislative requirement to do so, disclosure for summary matters should occur before the defendant enters a plea. On one view, all prosecutors should be encouraged to provide the disclosure material before the defendant enters a plea because early disclosure can assist the defendant know how to plead. On another view, given there is no obligation to serve a brief for a summary prosecution until a not guilty plea is indicated, the finite resources to prosecute summary offences should only be spent on collating the disclosure material once the defendant pleads not guilty.

2.4.6 The timing of disclosure is affected by when the material becomes relevant, which may change as more information becomes known before or during the trial. For example,

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119 In R v Dickson; R v Issakidis (No 12) [2014] NSWSC 1595 at [1] the prosecutor did not disclose certain material until day 51 of the trial, after a defendant had completed his evidence in chief.

120 Section 61(1) Criminal Procedure Act 1986; clause 7.1 Local Court Practice Note Comm 2, Procedures to be adopted for committal proceedings in the Local Court pursuant to the Early Appropriate Guilty Plea Scheme, issued 14 March 2018, commenced 30 April 2018.

121 Sections 139(3)(c) and 141(1)(a) Criminal Procedure Act 1986; clause 1 District Court Practice Note 9, Standard Case Management Directions, issued 23 May 2017, commenced 14 July 2017; clause 11(a) Supreme Court Practice Note SC CL 2, Supreme Court Common Law Division - Criminal Proceedings, issued and commenced 15 December 2016.
a) if the material relates to a potential defence, it should be disclosed as soon as the defence becomes apparent;\(^{122}\) and

b) if the material relates to an issue for which there is prima facie proof in an evidentiary certificate, it should be disclosed once the defendant indicates that issue is in dispute.\(^ {123}\)

### 2.4.7 The timing of disclosure is also dependent on its potential use, which may be before the trial, before a certain point during the trial or before the sentencing hearing. For example,

2.4.8 if the material may assist the defendant obtain expert evidence, it should be disclosed before the hearing so the defendant can qualify an expert;\(^ {124}\)

2.4.9 if the material may assist the defendant to cross-examine a prosecution witness, then it should be disclosed before the witness gives evidence;\(^ {125}\)

2.4.10 if the material may assist the defendant on sentence, it should be disclosed before the sentencing hearing.\(^ {126}\)

2.4.11 It is unclear how quickly prosecutors should disclose additional material which becomes available as a matter progresses. Determining when material becomes available to the prosecutor involves considering when the investigator obtained it (or could have obtained it) and when the prosecutor requested it (or could have requested it).\(^ {127}\)

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\(^ {122}\) In *Peter John Reed v R* [2006] NSWCCA 314 at [34], the court accepted that the prosecutor had not disclosed a witness statement because the prosecutor had not anticipated that the defendant would deny being present at the alleged offences.

\(^ {123}\) In *Gaffee v Johnson* (1996) 90 A Crim R 157, the court held that the prosecutor should have disclosed material regarding a speed detection device once the defendant indicated that the result was contested. Similarly, in *Woolworths Ltd v Dr K Chant and Anor* [2009] NSWSC 1082 at [30], the court found that the prosecutor should have disclosed the authority to prosecute and the prosecutor’s appointment once the validity of the commencement of the proceedings was in issue.

\(^ {124}\) In *Gaffee v Johnson* (1996) 90 A Crim R 157, the court held that the prosecutor should have disclosed material regarding a speed detection device before the hearing so that the defendant could qualify an expert.

\(^ {125}\) In *R v Jenkin (No 2)* [2018] NSWSC 697, the court was critical of the prosecutor disclosing the criminal history of a prosecution witness after that witness started giving evidence. In *R v Lewis-Hamilton* [1998] 1 VR 630, the court was critical of the prosecutor not disclosing a victim impact statement until the sentencing hearing when the defendant could have used it to cross-examine the victim during the trial.


\(^ {127}\) In *R v Medich (No 6)* [2016] NSWSC 1001 at [21], the court was concerned that material which was available to the investigator weeks before the trial and provided to the prosecutor days before the trial was only disclosed approximately 5 minutes before the trial.
should be disclosed “as soon as practicable”\textsuperscript{128} but there are no expected timeframes.

2.4.12 It is unclear when the disclosure obligations end. Disclosure obligations are commonly described as “continuing”.\textsuperscript{129} The pre-trial disclosure provisions for indictable matters continue until the defendant is convicted or acquitted or the prosecution is terminated.\textsuperscript{130} That is consistent with the investigator’s obligation to provide the Director with all relevant information until the prosecution is terminated or the defendant is convicted or acquitted.\textsuperscript{131} However, the prosecutor’s disclosure obligations (and the investigator’s corresponding obligation to provide such material to the prosecutor) must last beyond conviction. The disclosure obligations at least extend until after the defendant is sentenced because disclosure material can be relevant on sentence.\textsuperscript{132} Considering that the prosecutor’s role includes acting fairly in appeals, disclosure obligations may also continue until the conclusion of any appeals.\textsuperscript{133}

2.4.13 Given that the rationales for the disclosure obligations include ensuring a fair trial, that material may later become available suggesting that a defendant is innocent and that the defendant could use such material to seek redress,\textsuperscript{134} defendants may argue that disclosure obligations could even continue after the conclusion of any appeals.\textsuperscript{135} That could pose practical difficulties given that prosecution files are routinely closed once any appeal has been determined and court criticism of late disclosure is generally confined to matters known at or before the trial.\textsuperscript{136}

\textsuperscript{128} Sections 63 and 147(2) Criminal Procedure Act 1986.

\textsuperscript{129} R v Richard Lipton [2011] NSWCCA 247 at [82]; Potier v R [2015] NSWCCA 130 at [552].

\textsuperscript{130} Section 147(1) Criminal Procedure Act 1986.

\textsuperscript{131} Section 15A(2) DPP Act.

\textsuperscript{132} In R v Richard Lipton [2011] NSWCCA 247 at [82] states that the obligation to disclose clearly encompasses disclosing material relevant to sentencing proceedings.

\textsuperscript{133} Point 26, CDPP Statement.

\textsuperscript{134} In Hunter Quarries Pty Limited v Morrison [2013] NSWIRComm 49 at [36] and [101]-[102], the defendants were granted leave to appeal almost three years out of time because they had recently obtained material that should have been disclosed which raised an arguable defence.

\textsuperscript{135} In Cannon v Tahche (2002) 5 VR 317 at [15]-[16], the defendant commenced civil proceedings against a prosecutor, including allegations that material available 18 months after the trial should have been disclosed.

\textsuperscript{136} In Perish v R; Lawton v R [2015] NSWCCA 237 at [48] and [53], one appeal ground was that the prosecutor had failed to disclose information relevant to the eligibility and intention of any prosecution witnesses claiming a reward but the court held that the prosecutor could only have been obliged to disclose matters known at or before the trial so the fact that
2.4.14 Examples of late disclosure suggest there remains some confusion as to when disclosure obligations apply. Prosecutors and defence would benefit from greater guidance on when the disclosure obligations start, when the material becomes available to the prosecutor, how material may become relevant as the matter progresses and how long the disclosure obligations can last.

someone had been paid a reward after the trial was itself not capable of sustaining that appeal ground.
3 What should not be disclosed?

3.1 Limitations on disclosure obligations

3.1.1 There are some limits on the disclosure obligations because indiscriminately providing the entire file is unnecessary\textsuperscript{137} and the extravagant supply of irrelevant material may be oppressive to the defendant.\textsuperscript{138}

3.1.2 The prosecutor need not disclose:

a) material regarding a fact which the defendant has formally admitted;\textsuperscript{139}

b) material which is already available to the defendant;\textsuperscript{140}

c) material only relevant to the credibility of defence witnesses;\textsuperscript{141}

d) material that would deter the defendant from giving false evidence or raising an issue of fact which might be shown to be false;\textsuperscript{142} and

e) material that might alert and prevent the defendant from creating a trap for himself/herself based on suspect evidence (such as a suspect alibi).\textsuperscript{143}

3.1.3 Another limit on the disclosure obligations is inconsistent. Under the common law and \textit{DPP Guidelines}, the prosecutor need not disclose material only relevant to the credibility of the defendant\textsuperscript{144} but such material must be

\textsuperscript{137} \textit{Hunter Quarries Pty Ltd v Morrison (No 2) [2013] NSWIRComm 98} at [44]: “the prosecutorial duty of disclosure does not require an indiscriminate and wholesale delivery to a defendant of every document produced or obtained by the prosecutor in the course of conducting a prosecution.”

\textsuperscript{138} \textit{R v Reardon} (2004) 60 NSWLR 454 at [95].

\textsuperscript{139} \textit{DPP v Webb} (2001) 52 NSWLR 341 at [21].

\textsuperscript{140} In \textit{Clark v R} [2014] NSWCCA 236 at [34], it was held that there would be no breach of the prosecutor’s duty of disclosure regarding the alleged failure to disclose a letter written by the defendant.


\textsuperscript{142} \textit{R v Spiteri} (2004) 61 NSWLR 369 at [23] and [28], Guideline 18, \textit{DPP Guidelines}; Point 4(c) \textit{CDPP Statement}.

\textsuperscript{143} Guideline 18, \textit{DPP Guidelines}; Point 4(d) \textit{CDPP Statement}.

\textsuperscript{144} \textit{R v Spiteri} (2004) 61 NSWLR 369 at [23]; Guideline 18, \textit{DPP Guidelines}. Point 4(b) \textit{CDPP Statement}.
disclosed under the pre-trial disclosure provisions applicable to District Court and Supreme Court indictable trials.\footnote{Section 142(1)(l) Criminal Procedure Act 1986.}

3.1.4 There are three further important exceptions to the disclosure obligations considered in this paper. A prosecutor must not disclose material if:

\begin{itemize}
    \item[a)] a court has upheld a claim that the material is subject to legal professional privilege;
    \item[b)] a court has upheld a claim of public interest immunity;\footnote{Guideline 18, \textit{DPP Guidelines} provides that where a claim of public interest immunity is to be pursued or is being pursued, then the question of disclosure will be determined by the outcome of that claim.} and
    \item[c)] a court has ordered that the material must not be disclosed.\footnote{Guideline 18, \textit{DPP Guidelines}; Point 3, \textit{CDPP Statement}.}
\end{itemize}

3.1.5 The scope of these three exceptions is discussed below. There is significant uncertainty in each area, indicating that greater guidance is needed for prosecutors and defence to properly understand and consistently apply the exceptions to the disclosure obligations.

3.2 Legal professional privilege

3.2.1 Before disclosing material, the prosecutor will need to know whether it contains any material subject to legal professional privilege.\footnote{For ease of reference, legal professional privilege is referred to here as “privilege”.}

3.2.2 Broadly summarised, privilege includes confidential communications made between a lawyer and a client for the dominant purpose of a lawyer providing legal advice\footnote{Section 118 Evidence Act 1995.} and confidential communications or documents for the dominant purpose of the client being provided with professional legal services relating to anticipated or pending proceedings.\footnote{Section 119 Evidence Act 1995.} If the defendant serves a subpoena and the client objects to production, the court will determine the objection and direct that privileged material not be produced.\footnote{Section 131A(2)(a) Evidence Act 1995.} If the defendant seeks to adduce information and the client objects, the court will determine the objection and direct that privileged material not be adduced.\footnote{Section 118 and 119 Evidence Act 1995.} Once the court has determined that privilege applies, the prosecutor cannot
disclose it to the defendant. The pre-committal disclosure provisions\(^{153}\) and the pre-trial disclosure provisions\(^{154}\) do not affect any other obligation or immunity that applies by law, including privilege.

3.2.3 Privileged material which defendants have unsuccessfully sought to obtain under disclosure or via subpoena include:

a) communications between the investigator and the prosecutor (such as a memo from the investigator to the prosecutor seeking advice,\(^{155}\) a memo from the investigator to the prosecutor with a draft investigation report\(^{156}\) and files notes of conferences and telephone calls with the prosecutor and investigators\(^{157}\));

b) legal advice (such as advice prepared by the prosecutor\(^{158}\) and advice provided to the prosecutor\(^{159}\));

c) internal communications between prosecution solicitors and counsel (such as correspondence between prosecution solicitors and counsel,\(^{160}\) a memo from a solicitor to the Director seeking instructions,\(^{161}\) file notes of conferences with prosecution solicitors and counsel\(^{162}\) and the draft Crown case document\(^{163}\));

d) communications with prosecution witnesses\(^{164}\) (although any new information arising during the conferences should be disclosed);

e) communications with prosecution experts\(^{165}\) (although briefing letters and changed opinions should be disclosed); and

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\(^{153}\) Section 61(2) *Criminal Procedure Act 1986*.

\(^{154}\) Section 149F(6) *Criminal Procedure Act 1986*.

\(^{155}\) *R v Tracey & Ors (No 2)* [2005] SASC 356.

\(^{156}\) *Morrison v Bulga Coal Management Pty Ltd* [2008] NSWIRComm 243.

\(^{157}\) *Hamilton v State of New South Wales* [2016] NSWSC 1213 at [38].

\(^{158}\) *R v Bunting* (2002) 136 A Crim R 539 at [33].

\(^{159}\) *El-Zayet v The Queen* [2014] NSWCCA 298 at [87].

\(^{160}\) *Bailey v Department of Land and Water Conservation* (2009) 74 NSWLR 333.

\(^{161}\) *R v Tracey & Ors (No 2)* [2005] SASC 356.

\(^{162}\) *R v Seller; R v McCarthy* [2015] NSWCCA 76 at [159].

\(^{163}\) *R v Seller; R v McCarthy* [2015] NSWCCA 76 at [159].

\(^{164}\) *R v Tracey & Ors (No 2)* [2005] SASC 356; *R (Cth) v Petroulias (No. 22)* [2007] NSWSC 692 at [62].

f) communications with others (such as correspondence from the co-offender to the prosecutor regarding plea negotiations\footnote{R v Gatt (No 6) [2018] NSWSC 487}.

3.2.4 In some matters, it will be straightforward for prosecutors to ascertain that privilege will be claimed, because the prosecutor knows the circumstances in which the material was prepared for an internal or external client. Where the prosecution solicitor has provided advice to an internal client\footnote{In Aouad v The Queen [2013] NSWSC 760 at [33], it was held that the NSW Director of Public Prosecutions is a client and so could claim privilege over a memorandum from the Deputy Director setting out reasons in support of the entry of a nolle prosequi which was accidentally tendered. In R (Cth) v Petroulias (No. 22) [2007] NSWSC 692 at [56], it was held that the Commonwealth Director of Public Prosecutions is a client and so could claim privilege over conference notes with CDPP lawyers and prosecution witnesses. In Bailey v Department of Land and Water Conservation (2009) 74 NSWLR 333 at [52] it was accepted that the Director-General of the NSW Department of Natural Resources was a client and so could claim privilege over advice provided by Department lawyers regarding whether to prosecute.} such as submissions to the Director, it is expected that the internal client will claim privilege.\footnote{Guideline 18, DPP Guidelines states that the Director will not disclose internal advisings.} Where the prosecution solicitor has provided advice to an external client, such as an advice provided by the DPP to the NSW Police Force, it is expected that the external client will claim privilege.\footnote{Guideline 14, DPP Guidelines states that the Director will not disclose any advice provided to police.} The prosecutor, like any solicitor, must not disclose any confidential information unless the client authorises disclosure or the solicitor is permitted or compelled by law to disclose.\footnote{See rules 9.1 and 9.2 Conduct Rules 2015.}

3.2.5 In other matters, it will be more difficult for prosecutors to ascertain whether privilege will be claimed because the prosecutor does not know how the material was prepared and does not know whether a third party client may claim privilege. The investigator may gather or seize material during the investigation over which a third party may potentially claim privilege, for example:

a) material from coronial proceedings regarding suspected homicide could be relevant to a murder prosecution;

b) material from property seizure applications regarding stolen property could be relevant to theft prosecutions;

c) material from professional discipline proceedings regarding sexual misconduct could be relevant to sexual assault proceedings;
d) material from civil proceedings regarding employer negligence could be relevant to workplace safety prosecutions;

e) material from custody proceedings could be relevant to child abuse proceedings;

f) material from family law proceedings regarding undeclared income could be relevant to social security fraud prosecutions;

g) material from parole applications regarding drug testing could be relevant to drug prosecutions; and

h) material from domestic violence applications could be relevant to assault prosecutions.

3.2.6 If the material is clearly labelled as “privileged” and clearly identifies the client and the lawyer, it can be easy to ascertain that privilege will be claimed. If it is not clear who prepared the material, who the client is, whether the material was communicated to anyone and whether the material was attached to another document, it can be difficult to determine whether privilege will be claimed.

3.2.7 Assuming the prosecutor suspects that a client (whether internal client, external client or third party client) may claim privilege over material which is otherwise disclosable, it is not clear what obligations the prosecutor has.

3.2.8 Where the privileged material would otherwise be disclosed, the prosecutor will need to determine whether proceeding without disclosing the privileged material means that the prosecution will become unfair and any conviction may be liable to be set aside. If so, the prosecutor should invite the client to waive privilege.

3.2.9 If the client declines to waive privilege, the prosecutor is placed in a difficult position because there are conflicting views on whether the disclosure obligations override privilege.

3.2.10 The first view is that the prosecutor should disclose material notwithstanding any claim of privilege. This view stems from the South Australian decision of Bunting\textsuperscript{171} which held that there is an implied waiver of privilege because the prosecutor’s conduct in commencing the prosecution, which necessarily involves complying with the disclosure obligations, is inconsistent with maintaining confidentiality.\textsuperscript{172} Some NSW decisions have applied Bunting, finding that, given the particular role of the prosecutor, the prosecutor should waive privilege over material which is otherwise disclosable.\textsuperscript{173} This is


\textsuperscript{172} R v Bunting (2002) 136 A Crim R 539 at [73]-[74].

\textsuperscript{173} In Regina v Ronen & Ors [2004] NSWSC 1305 at [17], it was accepted that waiver of privilege will be imputed in respect of otherwise privileged communications so that the duty
consistent with the practice of prosecutors claiming privilege over some material but giving undertakings that the disclosure obligations have been complied with. The first view is consistent with the primary rationale of the disclosure obligations to ensure a fair trial.

3.2.11 The second view is that the prosecutor should disclose material subject to any claim of privilege. Some NSW decisions have expressly declined to follow Bunting. It is argued that if a document is subject to a valid claim for privilege then it remains privileged. The second view is consistent with privilege being understood as an important common law right. The second view is also consistent with the general rule that privilege prevails over an obligation to produce documents on subpoena.

3.2.12 There is a clear conflict between the first view (that privileged material should be disclosed) and the second view (that privileged material should not be disclosed). The decisions which have grappled with the interaction between privilege and disclosure are also unclear. For example, in Seller, the defendants took the first view, submitting that any privilege was waived of disclosure will "prevail" over legal professional privilege. In JB v R [2015] NSWCCA 182 at [34], it was not disputed that, given the particular role of the Director of Public Prosecutions, if material is relevant, it would not be covered by legal professional privilege because that privilege, in respect to the Director, must “give way” to the duty of disclosing material which is reasonably capable of assisting the defence. In R (Cth) v Petroulias (No. 22) [2007] NSWSC 692 at [64] it was held the prosecutor ought disclose all documents to which the duty attaches, “irrespective” of whether client legal privilege applies

174 In R v Bunting (2002) 136 A Crim R 539 at [86], the prosecutor claimed privilege over proofing notes but gave an undertaking that the prosecutor would waive privilege over any disclosable material. In R v Tracey & Ors (No 2) [2005] SASC 356 at [30], the prosecutor claimed privilege over proofing notes but gave an undertaking that all material within the duty of disclosure had already been disclosed. In R (Cth) v Petroulias (No. 22) [2007] NSWSC 692 at [9], the prosecutor claimed privilege over conference notes but relied on an affidavit that the conference notes did not contain any disclosable material.


176 Bailey v Department of Land and Water Conservation (2009) 74 NSWLR 333 at [146].

177 In Daniels Corporation International Pty Ltd v ACCC (2002) 213 CLR 543 at [11] the majority held that the investigator could not require the suspect’s lawyer to produce privileged material under statutory notice because privilege is an important common law right which cannot be abrogated in the absence of clear words or a necessary implication to that effect.

178 See also Carter v Northmore, Hale, Davy & Leake (1995) 183 CLR 121 the majority held that a person who has material which is subject to privilege which is not waived cannot be compelled to produce it under subpoena served by the defendant, even though it may materially assist the defence.

179 R v Seller; R v McCarthy [2015] NSWCCA 76.
because of the prosecutor’s disclosure obligations\textsuperscript{180} and the prosecutor took the second view, submitting that the prosecutor’s duty of disclosure did not override privilege.\textsuperscript{181} Given the defence accepted the prosecutor’s assurance that any relevant material would have been disclosed,\textsuperscript{182} the court did not resolve the issue however it appears that Fullerton J took the first view, holding that material should be disclosed irrespective of its privilege status\textsuperscript{183} but Bathurst CJ took the second view, holding that courts should not compel waiver of privilege where it is legitimately claimed.\textsuperscript{184} Given the conflicting views, it would be useful for prosecutors to have more guidance on whether to seek instructions from the client to waive privilege and how to respond if the client declines to waive privilege.\textsuperscript{185}

3.2.13 Another situation where further guidance is required is when the investigator indicates on the disclosure certificate or in conference that material has been withheld subject to a potential privilege claim.\textsuperscript{186} The investigator may expect that privilege will be claimed but the court will only make a determination that privileged material should not be produced if the defendant seeks the material under subpoena. It is not clear whether the prosecutor should request a copy of the material\textsuperscript{187} to assess whether it is otherwise disclosable and assess the prospects of the potential privilege claim. Assessing the prospects of a potential privilege claim is not an easy exercise because the prosecutor does not know whether the defendant will dispute the claim and does not know how the court will determine it. Some parts of a document may be privileged but not others.\textsuperscript{188} Privilege does not apply in some circumstances, such as when the communication is fraudulent.\textsuperscript{189} Privilege can be lost when information is

\textsuperscript{180} At [134].
\textsuperscript{181} At [144].
\textsuperscript{182} At [151].
\textsuperscript{183} At [242].
\textsuperscript{184} At [168].
\textsuperscript{185} Compare Rule 19.4 of the Conduct Rules (which contains useful guidance on how solicitors should seek instructions to waive privilege over material which ought be disclosed when seeking interlocutory ex parte relief) with Rule 29.5 (which contains no guidance for whether and how prosecutors should seek instructions to waive privilege over disclosable material).
\textsuperscript{186} Section 15A(6)-(7) DPP Act provides that an investigator who withholds material which is the subject of a claim of privilege is to inform the prosecutor of the existence and nature of the material and the claim relating to it.
\textsuperscript{187} Section 15A(7) DPP Act provides that an investigator must provide privileged material to the prosecutor on request.
\textsuperscript{188} In R v Gatt (No 6) [2018] NSWSC 487, parts of letter from a co-offender’s solicitor about plea negotiations were privileged but other parts about involvement in the murder were not.
\textsuperscript{189} R v Bunting (2002) 136 A Crim R 539 at [63]. See also section 125(1) Evidence Act 1995 concerning the loss of client legal privilege for misconduct.
voluntarily provided to an investigator.\textsuperscript{190} Privilege can also be waived by conduct,\textsuperscript{191} such as:

\begin{enumerate}
  \item where the prosecutor’s conduct in partially disclosing the material (written communications) is inconsistent with maintaining privilege over the remainder (oral communications about the same topic);\textsuperscript{192} or
  \item where the prosecutor’s conduct in disclosing the substance of legal advice is inconsistent with maintaining privilege over the legal advice.\textsuperscript{193}
\end{enumerate}

3.2.14 When the investigator withholds material based on an untested assertion of privilege, the prosecutor should consider informing the defendant that there is material which has not been disclosed over which a claim for privilege may be made.\textsuperscript{194} That may prompt the defendant to issue a subpoena for the material, prompt the client to make a privilege claim and prompt the court to determine the claim.\textsuperscript{195}

3.2.15 If privilege is not waived and it appears that not disclosing privileged material may jeopardise a fair trial, the prosecutor will need to closely consider whether the prosecution should continue.

3.2.16 Given the conflicting views regarding whether privileged material should be disclosed or not, the difficulties in assessing the prospects of an untested privilege application and the serious repercussions of unauthorised disclosure

\textsuperscript{190} Amalgamated Television Services Pty Ltd v Marsden [1999] NSWCA 97 at [27].

\textsuperscript{191} Section 122(2) \textit{Evidence Act 1995}.

\textsuperscript{192} \textit{R v Bunting} (2002) 136 A Crim R 539 at [84].

\textsuperscript{193} \textit{Nash v Glennies Creek Coal Management Pty Ltd (No 2)} [2013] NSWIRComm 67 at [160] and [165]. This will involve examining the conduct in context. In \textit{Hannaford v The Royal Society for the Prevention of Cruelty to Animals}, NSW [2013] NSWSC 1708 at [143]-[144], the prosecutor called oral evidence regarding the material and tendering part of the material and privilege was waived. In \textit{DPP (Cth) v Kane} (1997) 140 FLR 468, the prosecutor sent a confidential paper to the defence solicitors and privilege was not waived because it was sent by mistake. In \textit{El-Zayet v The Queen} [2014] NSWCCA 298 at [120], the prosecutor tendered a legal advising prepared for the Director but privilege was not waived because the Director had not authorised the tender and it was not necessary or incidental to the prosecutor’s role.

\textsuperscript{194} \textit{R v Bunting} (2002) 136 A Crim R 539 at [81]. Point 23(c) of the \textit{CDPP Statement} indicates that where material has been withheld from disclosure as it is considered that privilege should be claimed, the defendant should ordinarily be informed.

\textsuperscript{195} This is consistent with the summary of the relevant principles in \textit{R v Ulman-Naruniec} (2003) 143 A Crim R 531 at [139] that if the prosecutor considers that the material is relevant, but that it should be withheld because it falls within one of the exceptions (public interest immunity, legal professional privilege or is precluded by statute from disclosure) then the prosecutor should advise the defendant of the existence of the material and the grounds upon which the defendant has determined to withhold it so the defendant can then serve subpoenas seeking production of the material and the prosecutor’s decision can be tested by the court.
of privileged material, prosecutors and defence would benefit from greater guidance in this area.

3.3. Public interest immunity

3.3.1 Before disclosing material, the prosecutor will need to know whether it relates to matters of state, such as material which would prejudice the prevention, investigation or prosecution of an offence or enable a person to ascertain the existence or identity of a confidential source.196

3.3.2 The investigator may have documents or information regarding matters of state (such as investigation methodology and informant details). The investigator will generally withhold any material which may be subject to a public interest immunity claim from the prosecutor and indicate that on the disclosure certificate.197 The disclosure certificate allows an investigator to indicate the nature of the material, the claim relating to it and suggest a conference.198

3.3.3 When a defendant serves a subpoena on the investigator to produce a document which relates to matters of state, the court determines the investigator’s objection to produce by considering whether the public interest in producing the document is outweighed by the public interest in preserving secrecy or confidentiality in relation to the document.199 If the court directs that the document not be produced, it is inadmissible.200

3.3.4 When the defendant requires the investigator for cross-examination and seeks to adduce information regarding matters of state, the court determines the investigator’s objection by considering whether the public interest in admitting the information is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information.201 If the court directs that the information not be adduced, it is inadmissible.202

196 Section 130(4) Evidence Act 1995.
197 Section 15A(6)-(7) of the DPP Act provides that an investigator who withholds material which is the subject of a claim of public interest immunity is to inform the prosecutor of the existence and nature of the material and the claim relating to it.
198 The disclosure certificate form prescribed by clause 5 and Schedule 1 of the Director of Public Prosecutions Regulation 2015 allows the investigator to tick a box to object to providing the material and request a conference with the prosecutor to discuss the issue.
199 Section 131A(1) Evidence Act 1995.
200 Section 134 Evidence Act 1995.
201 Section 130(1) Evidence Act 1995.
3.3.5 In cases where the defendant seeks documents or information about matters of state from the investigator, the investigator will seek instructions to make an application to the court. That generally involves consulting the Solicitor General, briefing the Crown Solicitor, a senior officer preparing a confidential affidavit and attending a hearing in closed court. The prosecutor is not provided with the confidential affidavit and is not a party to the application. Once the court directs that the material cannot be produced or adduced, the investigator cannot provide it to the prosecutor and the prosecutor cannot disclose it to the defendant. If the material would otherwise be disclosed, then the prosecutor will need to consider whether non-disclosure renders the trial unfair and, if so, consider withdrawing the prosecution.

3.3.6 Two difficult scenarios can arise.

3.3.7 The first difficult scenario arises when the investigator flags, in the disclosure certificate or in conference, that there may be public interest immunity concerns regarding withheld material but a public interest immunity application has not been made. An investigator cannot unilaterally determine whether public interest immunity applies because that is a determination made by a court. The court can make a direction that public interest immunity applies when there is an objection to production or an objection to adducing evidence.

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205 Point 24 of the *CDPP Statement* states that where a claim for public interest immunity is upheld by a court, then the prosecutor will need to consider whether it is fair for the prosecution to proceed without disclosure or whether the prosecution may need to be discontinued. Rule 29.6 of the *Conduct Rules* states that a prosecutor who has decided not to disclose material to the defendant must consider whether the charge should be withdrawn or the defendant should only face a lesser charge to which such material would not be so relevant. Rule 88 of the *Legal Profession Uniform Conduct (Barristers) Rules 2015* is in the same terms.

206 Page 103 of the *NSW Police Force Handbook* instructs police who consider that disclosing material would attract a bona fide claim of public interest immunity to promptly submit an application to the Office of the General Counsel and not provide such material to the prosecutor until the claim has been determined.

207 In *Sankey v Whitlam* (1978) 142 CLR 1 at [37] it was accepted that “It is in all cases the duty of the court, and not the privilege of the executive government, to decide whether a document will be produced or may be withheld. The court must decide which aspect of the public interest predominates, or in other words whether the public interest which requires that the document should not be produced outweighs the public interest that a court of justice in performing its functions should not be denied access to relevant evidence. In some cases, therefore, the court must weigh the one competing aspect of the public interest against the other, and decide where the balance lies.”
or seek to adduce the evidence, there is no occasion for a public interest immunity objection to be determined by the court. There are many factors which may inhibit a defendant’s solicitor serving a subpoena, including being unaware of the existence of the material or having insufficient time to serve the subpoena before the trial.

3.3.8 The second difficult scenario arises when the prosecutor directly or indirectly obtains material that may be subject to a claim of public interest immunity but no court order has been made. In that case, the prosecutor should consult the investigator.\(^{208}\) The investigator can assess any risk posed to witness safety, consider any other investigations which may be jeopardised and any other operational concerns regarding disclosure and suggest that it be withheld.\(^{209}\) It is difficult for the investigator to predict the outcome of a public interest immunity application.\(^{210}\) Public interest immunity is ultimately a balancing exercise of competing public interests.\(^{211}\) For example, in \(\text{JB}^{212}\) the court rejected a public interest immunity application over material which the defendant submitted should have been disclosed because disclosure of the identity and role of the informant was essential to establishing the defendant’s innocence. Even with some evidence supporting the investigator’s concerns, the court may reject a public interest immunity application.\(^{213}\)

3.3.9 The real risk stemming from both difficult scenarios is that the defendant will not know that there is withheld material, the defendant will not seek to obtain the withheld material and the court will not determine any public interest immunity application. One view is that the prosecutor should take an active approach, request the withheld material\(^{214}\) and independently consider

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\(^{208}\) Guideline 18, \textit{DPP Guidelines}. That Guideline also provides that this very difficult decision (to withhold disclosable material to protect the integrity of the administration of justice, to protect the identity of an informer or to prevent danger to life or personal safety) should only be taken with the approval of the Director or a Deputy Director.

\(^{209}\) Pages 442-443 of the \textit{NSW Police Force Handbook} includes a lengthy list of material which may attract a claim of public interest immunity.

\(^{210}\) Section 130(5) \textit{Evidence Act 1995} allows the court to consider a number of factors including the importance of the information and the nature of the offence.

\(^{211}\) Section 130(1) \textit{Evidence Act 1995} provides that if the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document, the court may direct that the information or document not be adduced as evidence.

\(^{212}\) \textit{JB v R} [2015] NSWCCA 182 at [18].

\(^{213}\) In \textit{R v Dickson; R v Issakidis (No 3)} [2014] NSWSC 1241 at [33] a public interest immunity application was rejected because the public interest in ensuring a fair trial for serious criminal charges substantially outweighed the alleged public interest immunity concerns.

\(^{214}\) Section 15A(7) of the \textit{DPP Act} provides that when an investigator withholds material which is the subject of a claim of public interest immunity it \textit{must} be provided to the prosecutor on request.
whether public interest immunity may apply.\textsuperscript{215} The other view is that the prosecutor should take a passive approach, not request the material from the investigator and rely on the investigator making a public interest immunity application if and when the defendant serves a subpoena. The preferred approach is for the prosecutor to inform the defendant that there is material over which a public interest immunity claim may be made which has not been disclosed.\textsuperscript{216} That may prompt the defendant to serve a subpoena, prompt the investigator to make a public interest immunity claim and allow the court to determine it.

3.3.10 Where a court has not determined a public interest immunity claim, the investigator and prosecutor can also consider other options to allay the investigator’s concerns, including:

a) redacting parts of the material and inserting pseudonyms;

b) seeking orders restricting the use, publication or further disclosure of the material;\textsuperscript{217}

c) permitting the defendant’s solicitor to inspect the material under supervision;

d) providing the material to the defendant’s solicitor subject to undertakings that it not be further disclosed;

e) disclosing material in a format which limits the potential for misuse;

f) delaying disclosure until the investigator’s concerns have abated;\textsuperscript{218} and

\textsuperscript{215} In \textit{R v Richard Lipton} [2011] NSWCCA 247 at [111], it was stated that the prosecutor, when independently determining whether material might be subject to a claim of public interest immunity, can take the investigator’s view into account.

\textsuperscript{216} \textit{R v Richard Lipton} [2011] NSWCCA 247 at [86]. Point 23(a) of the \textit{CDPP Statement} states that where material is withheld because it is considered to be immune from disclosure on public interest grounds, the prosecutor should ordinarily inform the defence of the nature of the withheld material and the nature of the claim unless that would compromise the claim, noting that doing so may generate a subpoena.

\textsuperscript{217} Section 149F(2) \textit{Criminal Procedure Act 1986} allows the Supreme Court or District Court to make orders regarding the use of material disclosed in accordance with pre-trial disclosure requirements.

\textsuperscript{218} In \textit{Aouad and El-Zeyat v R} [2011] NSWCCA 61 at [361] the court held that material which potentially jeopardised an ongoing investigation could have been disclosed at a later stage. In \textit{Cornwell v R} [2010] NSWCCA 59 at [209] material which raised public interest immunity concerns was ultimately disclosed after the reasons for keeping it confidential had passed. Points 26-27 of the \textit{CDPP Statement} state that it may be appropriate to delay disclosure until after the prejudice to ongoing investigations has passed or until after the risk to witness safety has abated.
g) appointing special counsel to protect the defendant’s interests.\(^{219}\)

3.3.11 Disregarding the investigator’s concerns can pose a risk to witnesses, informants and undermine other investigations. Blithely accepting the investigator’s concerns can pose a risk of undermining a fair trial. Given the risks, greater guidance is required.

3.4 Statutory disclosure restrictions

3.4.1 Before disclosing material, the prosecutor will need to know whether there is any legislation which restricts disclosure. First it is necessary to consider the investigator’s disclosure certificate.

Statutory publication restrictions

3.4.2 The investigator may withhold material from the prosecutor that would contravene a “statutory publication restriction”\(^{220}\) which is narrowly defined as a prohibition or restriction on publication that is imposed by or under only the following provisions: \(^{221}\)

a) section 176 or 177\(^{222}\) of the Law Enforcement Conduct Commission Act 2016,

b) section 45 or 45A\(^{223}\) of the Crime Commission Act 2012, or

c) section 112\(^{224}\) of the Independent Commission Against Corruption Act 1988.

\(^{219}\) R v Dickson; R v Issakidis (No 3) [2014] NSWSC 1241; Regina v Lodhi (2006) 163 A Crim R 475 at [29].

\(^{220}\) Section 15A(6)(b) DPP Act.

\(^{221}\) Section 15A(9) DPP Act.

\(^{222}\) Sections 176 and 177 Law Enforcement Conduct Commission Act 2016 allows a Commissioner to direct that examination material not be disclosed, maximum penalty: 50 penalty units and/or 12 months imprisonment.

\(^{223}\) Sections 45 and 45A Crime Commission Act 2012 allow the Commission to direct that evidence given before the Crime Commission, including evidence given by a person charged with an offence, not be published: maximum penalty: 100 penalty units and/or 2 years imprisonment.

\(^{224}\) Section 112 Independent Commission Against Corruption Act 1988 allows the Commission to direct that evidence given before the Independent Commission Against Corruption not be published, maximum penalty: 50 penalty units and/or 12 months imprisonment.
3.4.3 Such material could be relevant in a prosecution. For example, examination material from the Law Enforcement Conduct Commission could be relevant in a prosecution of a police officer or could be relevant for a defence alleging improper conduct by a police officer. When material would otherwise be disclosable, the investigator must inform the prosecutor of the nature of such material and the relevant statutory publication restriction, but only to the extent not prohibited by the statutory publication restriction.

3.4.4 Then it is necessary to consider whether there is any other legislation, not mentioned in the disclosure certificate, which may restrict disclosure. There are many more provisions which potentially restrict whether the prosecutor can disclose material to the defendant, broadly referred to here as “statutory disclosure restrictions.”

3.4.5 There are two types of statutory disclosure restrictions: court ordered and automatic. A court ordered disclosure restriction means that a court can make an order that material cannot be disclosed. An automatic disclosure restriction means that legislation provides that material cannot be disclosed.

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225 Examination material can involve information supplied by the defendant to an agency under a compulsory examination, directed interview or statutory notice. In such cases, the defendant has generally objected to providing information and there are restrictions on how the information can be directly and indirectly used in criminal proceedings. Whether the investigator should provide examination material to the prosecutor and/or the defendant requires thorough analysis of the applicable statutory regime and the principle that the prosecution must prove guilt without assistance from the defendant (the accusatorial principle). In Lee v The Queen (2014) 253 CLR 455 at [44]-[46], it was accepted that, in circumstances where disclosure would jeopardise the accusatorial principle, the investigator should withhold examination material from the prosecutor to ensure a fair trial. It does not necessarily follow that examination material should be withheld from the defendant because disclosure obligations are also designed to ensure a fair trial. The inherent tension is this. First, the investigator should not give the prosecutor examination material which could be unfairly used against the defendant. Second, the investigator should not withhold examination material from the defendant which could be fairly used to support a defence. In Gould v Director of Public Prosecutions (Cth) [2018] NSWCCA 109 at [16], the court addressed the first proposition, recognising the importance, in some circumstances, of quarantining particular material from the prosecution. For example, in Macdonald v R; Maitland v R [2016] NSWCCA 306 at [105], it was accepted that the investigator should not provide examination material to the prosecutor where the statute under which it was obtained does not, expressly or by necessary intendment, abrogate the accusatorial principle. In R v Dickson; R v Issakidis (No 3) [2014] NSWSC 1241 at [28]-[30], the court accepted the first proposition (that damage may be done to the accusatorial process by the prosecution having access to examination material) then accepted the second proposition (that the defendant is entitled to exoneratory material) then synthesized the two propositions (as two aspects of the public interest in ensuring a fair trial). Further consideration of the interaction between the principles regarding the use of examination material and the disclosure obligations is beyond the scope of this paper.

226 Section 15A(7)(b) DPP Act.

227 Disclosure certificate form prescribed by clause 5 and Schedule 1 of the Director of Public Prosecutions Regulation 2015.
Court ordered disclosure restrictions

3.4.6 A non-exhaustive list of potentially disclosable material which could be subject to a court ordered disclosure restriction includes:

a) transcript of a coronial inquest\textsuperscript{228} (potentially relevant in a murder prosecution);

b) transcript of an apprehended violence application\textsuperscript{229} (potentially relevant in an assault prosecution);

c) information about a protected confidence or information that would identify a protected confider\textsuperscript{230} (potentially relevant in a prosecution concerning injuries reported by a victim to a health practitioner);

d) information about the identity of a participant in a controlled operation\textsuperscript{231} (potentially relevant on sentence if the participant induced the defendant to commit the offence);

e) information about the identity of a person with an assumed identity\textsuperscript{232} (potentially relevant if the undercover officer has given inconsistent accounts in related proceedings);

f) information which poses a risk to national security\textsuperscript{233} (potentially relevant in a terrorism prosecution);

\textsuperscript{228} Section 74(1)(b) Coroners Act 2009 allows a Coroner to direct that evidence given in coronial proceedings not be published, maximum penalty: 10 penalty units and/or 6 months imprisonment.

\textsuperscript{229} Section 45(2) Crimes (Domestic and Personal Violence) Act 2007 allows a court to direct that the name of a person involved in domestic violence proceedings not be published, maximum penalty: 200 penalty units and/or 2 years imprisonment.

\textsuperscript{230} Section 126E(b) Evidence Act 1995 allows a court to direct that evidence of protected confidences be suppressed. That could include confidential communications made to a doctor, nurse, psychologist, counsellor, social worker, accountant or journalist.

\textsuperscript{231} Section 28(2)(b) Law Enforcement (Controlled Operations) Act 1997 allows a court, tribunal, Royal Commission or other commission of inquiry to order that information, including information derived from evidence given before it, not be published, maximum penalty: 50 penalty units and/or 12 months imprisonment.

\textsuperscript{232} Section 34(2)(b) Law Enforcement and National Security (Assumed Identities) Act 2010 allows a court, tribunal, Royal Commission or other commission of inquiry to order that information, including information derived from evidence given before it, not be published, maximum penalty: 50 penalty units and/or 12 months imprisonment. See also section 15MK Crimes Act 1914 (Cth).

\textsuperscript{233} Section 31 of the National Security Information (Criminal and Civil Proceedings) Act 2004 allows a court to order that information which poses a risk of prejudice to national security
g) transcript of Drug Court proceedings\textsuperscript{234} (potentially relevant in a drug prosecution);

h) transcript of proceedings regarding apprehension under a warrant\textsuperscript{235} (potentially relevant on sentence if the defendant has a history of non-compliance);

i) evidence in proceedings for civil remedies, pecuniary penalties or restricting orders\textsuperscript{236} (potentially relevant in a prosecution regarding stolen property);

j) information regarding surveillance device technology\textsuperscript{237} (potentially relevant in a break and enter prosecution); and

k) evidence given in any other proceedings subject to a non-publication order\textsuperscript{238} (potentially relevant in any related prosecution).

Automatic disclosure restrictions

3.4.7 Material which could be subject to an automatic disclosure restriction includes:

a) Transcript of apprehended violence application identifying children\textsuperscript{239} (potentially relevant in a child abuse prosecution);
b) transcript of bail proceedings identifying a person as a prohibited associate\textsuperscript{240} (potentially relevant to a prosecution for an offence in company);

c) information identifying a registrable person\textsuperscript{241} (potentially relevant in prosecution regarding providing false information to an employer);

d) information identifying the author of a risk of harm report about a child in need of protection\textsuperscript{242} (potentially relevant in a child abuse prosecution);

e) information identifying a child in Children’s Court care proceedings\textsuperscript{243} (potentially relevant on sentence regarding offences committed as an adult);

f) transcript of other proceedings containing disallowed questions\textsuperscript{244} (potentially relevant in a contempt prosecution);

g) submissions regarding whether a coronial inquest should be suspended\textsuperscript{245} (potentially relevant in a prosecution arising from a referral by the Coroner);

h) transcript identifying the complainant in a prescribed sexual offence\textsuperscript{246} (potentially relevant in a sexual assault prosecution);

\textsuperscript{240} Section 89 Bail Act 2013 applies to the name and identifying information of a prohibited associate, maximum penalty: 10 penalty units.

\textsuperscript{241} Section 18 Child Protection (Offenders Prohibition Orders) Act 2004 applies to the name and identifying information of a registrable person or victim, maximum penalty: 100 penalty units and/or 2 years imprisonment. See also section 121 Family Law Act 1975 (Cth) which restricts publication of family law material.

\textsuperscript{242} Section 29(1)(f) Children and Young Persons (Care and Protection) Act 1998 applies to the identity of the person who made a risk of harm report.

\textsuperscript{243} Section 105(1) Children and Young Persons (Care and Protection) Act 1998 applies to the name and identifying information of a child or young person involved in Children’s Court care proceedings, maximum penalty: 200 penalty units and/or 2 years imprisonment. See also section 15YR Crimes Act 1914 (Cth).

\textsuperscript{244} Section 195 Evidence Act 1995 applies to questions which have been disallowed, maximum penalty: 60 penalty units.

\textsuperscript{245} Section 76(d) Coroners Act 2009 applies to submissions regarding suspending an inquest, maximum penalty: 10 penalty units and/or 6 months imprisonment.

\textsuperscript{246} Section 578A(2) Crimes Act 1900 applies to the identity of a complainant in prescribed sexual offence proceedings, maximum penalty for an individual: 50 penalty units and/or imprisonment for 6 months.
i) information that a child was involved in criminal proceedings before the Children’s Court\(^{247}\) (potentially relevant in a prosecution for similar offences committed as an adult);

j) information identifying an uncharged suspect on whom a forensic procedure has been carried out\(^{248}\) (potentially relevant to a defence seeking to implicate the suspect);

k) information identifying a person as involved in Drug Court proceedings\(^{249}\) (potentially relevant in a drug prosecution);

l) information identifying a named person on a non-association order\(^{250}\) (potentially relevant to an alibi defence);

m) information about the identity or location of a person under witness protection\(^{251}\) (potentially relevant to a defence that a prosecution witness is unreliable due to benefits received to secure assistance).

3.4.8 In addition to any applicable court ordered and automatic disclosure restrictions, the prosecutor will also need to consider whether the material may be:

a) sensitive evidence,\(^{252}\)

\(^{247}\) Section 15A(1) Children (Criminal Proceedings) Act 1987 applies to the identity of a child involved in criminal proceedings, maximum penalty for an individual: 50 penalty units and/or 12 months imprisonment.

\(^{248}\) Section 43(1) Crimes (Forensic Procedures) Act 2000 applies to the identity of a suspect on whom a forensic procedure is proposed or carried out, maximum penalty: 50 penalty units and/or 12 months imprisonment.

\(^{249}\) Section 41 Drug and Alcohol Treatment Act 2007 applies to the identity of a person involved in Drug Court proceedings, maximum penalty: 50 penalty units and/or 12 months imprisonment.

\(^{250}\) Section 100H Crimes (Sentencing Procedure) Act 1999 applies to the identity of a person on a non-association order, maximum penalty: 10 penalty units. See also section 51B Crimes (Sentencing Procedure) Act 1999 which restricts publication of material identifying a person on a parole order.

\(^{251}\) Section 32 Witness Protection Act 1995 applies to the identity and location of a current or former participant in a witness protection program, maximum penalty on indictment: imprisonment for 10 years. See also section 28(2) Witness Protection Act 1994 (Cth).

\(^{252}\) Sections 281C-D Criminal Procedure Act 1986 provide that the prosecutor cannot give the defendant a copy of anything the prosecutor reasonably considers to be sensitive evidence (for example photographs of sexual assault victims, child pornography material or post mortem photographs) and must instead give the defendant a sensitive evidence notice. Detailed consideration of the interaction between the sensitive evidence provisions and the disclosure obligations is beyond the scope of this paper however it appears that the sensitive evidence provisions may prevail because the restriction applies in or in connection with any criminal investigation or criminal proceedings and despite anything to the contrary in any Act or any other law.
b) terrorism evidence, or

c) subject to sexual assault communication privilege.

3.4.9 A prosecutor faces several difficulties:

a) not knowing from the disclosure certificate whether one of the many statutory disclosure restrictions applies;

b) not knowing whether a court ordered disclosure restriction has been made, varied or revoked; and

c) not knowing whether an automatic disclosure restriction applies or if the material is exempt from such a restriction.

3.4.10 The next step, when the prosecutor suspects that there is material which is otherwise disclosable, is to request it from the investigator. Section 15A(7) of the DPP Act provides that an investigator “must” provide material to the prosecutor if the Director requests it to be provided. When that provision was introduced, it was anticipated that the prosecutor would not make requests in every case but there is no limit on when a request may be made.

3.4.11 If the prosecutor requests material which is subject to a statutory disclosure restriction, it is unclear whether the investigator should provide it to the prosecutor (to comply with a request the prosecutor may choose to make under the DPP Act) or withhold the material (to avoid breaching the statutory

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253 Pending sections 281H-1 Criminal Procedure Act 1986 provide that the prosecutor cannot give the defendant a copy of anything the prosecutor designates as terrorism evidence (such as material that relates to planning terrorist acts or violent extremism) and must instead give the defendant a terrorism evidence notice. The terrorism evidence provisions were assented to on 21 June 2018 but are not currently in force.

254 Section 298 of the Criminal Procedure Act 1986 provides that, broadly summarised, the court must grant leave before a counselling communication made by, to or about an alleged victim of a sexual assault offence can be sought under subpoena, produced or adduced in any criminal proceedings. Detailed consideration of the interaction between sexual assault communication privilege (“SACP”) and the disclosure obligations is beyond the scope of this paper however it appears that SACP material is not disclosable. In Application of Peter James Holland under s.78 Crimes (Appeal and Review) Act 2001 [2008] NSWSC 251 at [77] the defendant unsuccessfully argued that the prosecutor had breached the duty of disclosure by not providing the sexual assault counselling records (suggesting that SACP material is not disclosable). In Rohan v R [2018] NSWCCA 89 at [36], it was expressly accepted that communications by the alleged victim to investigating police would be subject to the prosecutor’s overriding duty of disclosure (implicitly acknowledging that communications by the alleged victim to her counsellor were not disclosable). See the Honourable Bob Debus, 16 August 2000, Legislative Assembly, Second Reading Speech regarding the Criminal Procedure Amendment (Pre-Trial Disclosure) Bill 2000, pre-trial disclosure provisions do not “affect any privilege or immunity that applies under the law to the disclosure of information, such as …sexual assault communication privilege.”

255 Section 15A(7) DPP Act.

256 The Honourable Greg Smith, 17 October 2012, Legislative Assembly, Second Reading Speech regarding the Director of Public Prosecutions Amendment (Disclosures) Bill 2012.
disclosure restriction which applies by force of legislation or by court order). Only one statutory disclosure restriction directly addresses the investigator’s obligation to provide disclosure material to the prosecutor.\textsuperscript{257} In all other cases, there is a clear conflict between the investigator’s obligation to comply with the statutory disclosure restriction and the investigator’s obligation to respond to the prosecutor’s request. Unless there is legislative reform, the investigator will need to resolve the conflict by interpreting the competing legislation applicable in each case.

3.4.12 If the prosecutor obtains material which is subject to a statutory disclosure restriction, a fundamental issue is whether the prosecutor is nevertheless able or required to disclose the material to the defendant. None of the statutory disclosure restrictions directly address the prosecutor’s obligation to disclose material to the defendant. The \textit{DPP Guidelines} do not address whether material which is subject to a statutory disclosure restriction should be disclosed. The \textit{CDPP Statement} states that disclosure is subject to “any statutory provision to the contrary”.\textsuperscript{258}

3.4.13 The DPP and the CDPP each have statutory functions to prosecute certain offences.\textsuperscript{259} Prosecutors have statutory immunity for actions performed in good faith for the purpose of exercising those functions.\textsuperscript{260} If the prosecutor has material which is subject to a statutory disclosure restriction it is unclear whether the prosecutor should disclose it to the defendant (because disclosure is integral to the exercise of the prosecutor’s functions) or withhold it (to comply with the statutory disclosure restriction).

3.4.14 Another option is for the prosecutor to inform the defendant that there is material which has not been disclosed due to a statutory disclosure restriction which may prompt the defendant to make further enquiries.\textsuperscript{261} General information about the nature of the material should be provided unless doing so would breach the statutory disclosure restriction. Breaching a statutory

\textsuperscript{257} Section 112(1B)(b) \textit{Independent Commission Against Corruption Act 1988} provides a direct exception to allow an investigator to provide material “to the Director of Public Prosecutions in accordance with the duty of disclosure under section 15A of the \textit{Director of Public Prosecutions Act 1986}.” Section 176(3)(b) of the \textit{Law Enforcement Conduct Commission Act 2016} and section 45A(4) \textit{Crime Commission Act 2012} provide indirect exceptions in that the investigator may provide material to the Director of Public Prosecutions for the purposes of obtaining advice in certain circumstances.

\textsuperscript{258} Point 3, \textit{CDPP Statement}.

\textsuperscript{259} See sections 7-8 \textit{DPP Act} and section 6 \textit{CDPP Act}.

\textsuperscript{260} See section 35(2) \textit{DPP Act} and section 32A \textit{CDPP Act}.

\textsuperscript{261} Point 23(b) of the \textit{CDPP Statement} suggests that when material has been withheld because disclosure is precluded by statute, the prosecutor should ordinarily notify the defendant and provide general information as to the nature of the material.
disclosure restriction is criminal offence, with some carrying significant maximum penalties.\textsuperscript{262}

3.4.15 Unless there is legislative reform, the prosecutor will need to closely consider any applicable statutory disclosure restrictions, including any exceptions, as they arise in each case. The prosecutor will need to apply the relevant principles of statutory construction in the context of each statutory scheme to determine whether disclosure is permitted. In some cases, disclosure may be permitted because the statutory disclosure restriction does not clearly abrogate the public interest in ensuring the defendant has a fair trial. In other cases, disclosure may be prohibited because careful review of the statutory scheme reveals a clear intention to maintain confidentiality in all circumstances.\textsuperscript{263} A cautious prosecutor will also consider whether disclosure of such material to the defendant would be protected by the statutory immunity or could expose the prosecutor to potential liability.

3.4.16 Finally, before disclosing material which is subject to a statutory disclosure restriction, the prosecutor should also consider:

a) seeking consent from the author of the material to disclose (some statutory disclosure restrictions allow disclosure with consent);\textsuperscript{264}

b) making a variation application to the court\textsuperscript{265} (some statutory disclosure restrictions allow disclosure with the court’s consent);\textsuperscript{266}

\textsuperscript{262} For example, disclosing material contrary to section 32 Witness Protection Act 1995 carries a maximum penalty on indictment of imprisonment for 10 years.

\textsuperscript{263} See Secretary, Department of Family and Community Services v Hayward (a pseudonym) [2018] NSWCA 209 at [38]. At [23]-[24], the Court discussed how the identity of the person who made risk of harm reports could potentially be relevant in the defence of charges regarding injuries to a child (so the defendant can cross-examine the person regarding any prior statements or secure a lead on any other eye-witnesses) but, at [90], the Court held that Parliament had chosen to override the defendant’s interest in identifying the reporter to protect the interests of vulnerable children.

\textsuperscript{264} For example, section 45(4)(b) Crimes (Domestic and Personal Violence) Act 2007 and section 105(3)(b)(ii) Children and Young Persons (Care and Protection) Act 1998 each permit publication with the consent of the young person and section 29(1)(f)(i) Children and Young Persons (Care and Protection) Act 1998 permits publication with the consent of the person who made the report.

\textsuperscript{265} In W v M [2011] NSWSC 1634, the court granted the investigator’s application to vary the non-publication order to allow the investigator to provide the disclosure material to the prosecutor. In Ashby v Slipper (No 2) [2016] FCA 550 at [13], the court made orders permitting the investigator to use material from employment proceedings which was exhibited to a forensic computer expert’s affidavit for the purposes of conducting a criminal investigation and any subsequent prosecution.

\textsuperscript{266} For example, section 195 Evidence Act 1995 allows publication with the express permission of a court and section 76 Coroners Act 2009 allows publication with the express permission of the Coroner.
c) disclosing the material with the infringing information redacted.\textsuperscript{267}

3.4.17 Clearer guidance is required to alert prosecutors to the automatic disclosure restrictions, explain how the court ordered disclosure restrictions can be varied, discuss the practical options to facilitate disclosure and the need for caution to avoid inadvertent breach.

\textsuperscript{267} For example, the address or telephone number of any living person need not be included in the brief unless materially relevant or the court otherwise orders so such material is routinely redacted: see sections 149B(1), 247S and 280 Criminal Procedure Act 1986; clauses 3.7 and 3.12 of the Local Court Rules 2009; clause 9J Criminal Procedure Regulation 2017 and Guideline 18 of the DPP Guidelines. In the same way, the prosecutor can consider redacting information which is subject to a statutory disclosure restriction.
4 What are the potential consequences of non-disclosure?

4.1 Options available to the defendant

4.1.1 If the defendant suspects, before the trial, that the prosecutor may have material which should be disclosed, the defendant has a number of potential options. The first option is to contact the prosecutor and request that the prosecutor disclose the material.\textsuperscript{268} It is useful for such requests to identify the material sought, refer to the disclosure obligations and mention any applicable pre-committal and pre-trial disclosure provisions.

4.1.2 In some limited circumstances, the defendant can foreshadow making a request to the court:

a) in a summary prosecution in the Local Court, the defendant can ask the court to order the prosecutor to serve the prescribed statements before the hearing.\textsuperscript{269}

b) in the summary jurisdiction of the Supreme Court, the defendant can seek an order that the prosecutor serve the statements and a list of documents to be tendered before the trial;\textsuperscript{270}

c) if the prosecutor has served a notice seeking to rely on a previous representation, the defendant can ask the court to order the prosecutor to disclose the addresses of the people who made and heard the representation;\textsuperscript{271}

d) if the prosecutor has served a notice seeking to rely on tendency or coincidence evidence, the defendant can ask the court to order the prosecutor to disclose the addresses of the people who observed the conduct;\textsuperscript{272}

e) if the prosecutor has served a notice seeking to rely on a previous representation, previous conviction or a document which may not be

\textsuperscript{268} In \textit{R (Cth) v Petroulias (No. 22)} [2007] NSWSC 692 at [22]-[23], the defendant’s solicitor’s request for financial information prompted the prosecutor to make enquiries and discover that the witness was a bankrupt. In \textit{Aouad and El-Zeyat v R} [2011] NSWCCA 61 at [321], the defendant’s solicitor’s request regarding a date prompted the prosecutor to make enquiries and discover an investigation note about a key meeting.

\textsuperscript{269} Clause 25(5) \textit{Criminal Procedure Regulation 2017}.

\textsuperscript{270} Clause 11(4) \textit{Supreme Court Rules 1970}.

\textsuperscript{271} Clause 4(7) of the \textit{Evidence Regulation 2015}.

\textsuperscript{272} Clauses 5(3) and 6(3) of the \textit{Evidence Regulation 2015}.
genuine, the defendant can make a request and then ask the court to order the prosecutor to produce a document.\textsuperscript{273}

4.1.3 If the prosecutor does not promptly disclose the material sought, the defendant can consider taking further steps:

a) serving a subpoena to produce on the investigator or the prosecutor;\textsuperscript{274}

b) inviting the prosecutor to give an undertaking that all disclosable material has been disclosed;\textsuperscript{275}

c) making representations that proceeding without disclosure renders the trial unfair;

d) raising the issue during the trial to encourage the prosecutor to disclose;\textsuperscript{276}

and/or

\textsuperscript{273} Section 169(1) \textit{Evidence Act} 1995. In \textit{Director of Public Prosecutions (NSW) v So} [2014] NSWLC 16 at [12], the defendant attempted to construe section 169 of the \textit{Evidence Act} 1995 as a general power to compel disclosure by the prosecutor but the court held that the provision only applies where notice has been served of an intention to adduce particular categories of documents.


\textsuperscript{275} In \textit{R (Cth) v Petroulias (No. 22)} [2007] NSWSC 692 at [78], the court invited the prosecutor to examine the conference notes and give an assurance to the defendant and the court that there was no material subject to the duty of disclosure within the notes. This invites the prosecutor to give the material close attention because undertakings must be honoured and breach of an undertaking may amount to contempt, see rule 6.1 \textit{Conduct Rules}.

\textsuperscript{276} In \textit{Ragg v Magistrates’ Court} (2008) 18 VR 300 at [76], it was suggested that a court may use its persuasive authority over the prosecution to bring about the voluntary disclosure of material to the defence. In \textit{R (Cth) v Petroulias (No. 22)} [2007] NSWSC 692 at [64]-[65], after expressly disavowing any direct power to review the prosecutor’s discharge of the disclosure obligations, the court indirectly encourages compliance by observing that the prosecutor will “have in mind potential consequences in the event of conviction, if information has not been disclosed which ought to have been disclosed, and where a conviction may be challenged on appeal upon the basis that a miscarriage of justice has flowed from a refusal or failure to disclose”. Any application to invite the court to invoke its inherent powers to ensure a fair trial by inviting the prosecutor to voluntarily disclose the material or grant a temporary stay is more likely to be successful if the defendant can identify the material sought, demonstrate that the material is available to the prosecutor and submit that the material meets the disclosure test.
e) applying for a conditional stay requiring the prosecutor to consider the disclosure obligations.\textsuperscript{277}

4.1.4 Each of those steps can be effective in encouraging prosecutors to comply with the disclosure obligations.\textsuperscript{278}

4.1.5 What steps the defendant will ultimately pursue will depend on how relevant the material is and how late it is disclosed. The later material is disclosed, the more difficult it becomes to address the potential prejudice to the defendant.\textsuperscript{279}

4.1.6 If the prosecutor does not disclose material until shortly before or during the trial, the defendant can consider:

a) inviting the prosecutor not to rely on the material;\textsuperscript{280}

b) (if pre-trial disclosure provisions have been breached) seeking an order prohibiting the prosecutor from relying on the material;\textsuperscript{281}

c) making an application to recall prosecution witnesses so they can be subject to further cross-examination arising from the material;\textsuperscript{282}

d) seeking an adjournment to consider the material;\textsuperscript{283} and/or

\textsuperscript{277} \textit{R v Richard Lipton} [2011] NSWCCA 247; \textit{Gould v Director of Public Prosecutions (Cth)} [2018] NSWCCA 109. This option has reduced utility when the defendant is in custody or is keen for the prosecution to be resolved quickly.

\textsuperscript{278} In \textit{Woolworths Ltd v Dr K Chant and Anor} [2009] NSWSC 1082 at [6], the defendant served a subpoena on the prosecutor who, after initially resisting, subsequently voluntarily disclosed the material.

\textsuperscript{279} \textit{R v Dickson; R v Issakidis (No 12)} [2014] NSWSC 1595 at [15].

\textsuperscript{280} In \textit{R v Dickson; R v Issakidis (No 12)} [2014] NSWSC 1595 at [49], the prosecutor accepted that material which was not disclosed until after the defendant’s evidence in chief was complete could not be used against him.

\textsuperscript{281} For indictable matters where there has been a failure to comply with pre-trial disclosure provisions, section 146(2)-(3) \textit{Criminal Procedure Act 1986} provides that the court may refuse to admit evidence that the prosecutor has not disclosed. For example, in \textit{R v Dickson; R v Issakidis (No 6)} [2014] NSWSC 1368, although it was not suggested that the prosecutor had deliberately or recklessly failed to comply with the pre-trial disclosure provisions, the court, on day 32 of a trial, precluded the prosecutor from relying on material disclosed late.

\textsuperscript{282} \textit{R v Jenkin (No 2)} [2018] NSWSC 697. In \textit{R v Chami, M Skaf, Ghanem, B Skaf} [2004] NSWCCA 36 at [130], the investigator was recalled for cross-examination regarding issues arising from belated disclosure material.

\textsuperscript{283} In \textit{R v Chami, M Skaf, Ghanem, B Skaf} [2004] NSWCCA 36 at [127] the defendants obtained an adjournment to consider the disclosure material and obtained a further adjournment to investigate issues arising from the disclosure material. In \textit{R v Medich (No 6)} [2016] NSWSC 1001 at [3], the defendant obtained an adjournment to read and analyse the disclosure material. For indictable matters where there has been a failure to comply with pre-trial disclosure provisions, section 146(2)-(3) \textit{Criminal Procedure Act 1986} provides that the
e) applying to vacate the trial if further time is needed to make further enquiries arising from the material.284

4.1.7 After conviction, the defendant may become aware of material which should have been disclosed. That may occur by chance if the material happens to arise during related proceedings.285 That may also occur as a result of successful enquiries by the defendant’s solicitor.286

4.1.8 If the defendant’s enquiries after conviction reveal that the prosecutor failed to disclose material, the defendant can consider commencing an appeal against the conviction. There are a number of decisions in which defendants have sought to appeal their convictions on the basis that non-disclosure has led to an unfair trial.287 A successful appeal against conviction can bring vindication for a defendant and shine harsh criticism on a prosecutor.

court may grant the defendant an adjournment if the prosecutor seeks to adduce evidence which has not been disclosed.

284 In R v Chami, M Skaf, Ghanem, B Skaf [2004] NSWCCA 36 at [132] the defendants made an unsuccessful application to discharge the jury on the grounds that inadequate disclosure had affected the fairness of the trial. In R v Medich (No 6) [2016] NSWSC 1001 at [30] the trial was vacated to allow the defendant to serve subpoenas to obtain information arising from the disclosure material, with Bell J noting that there was “obvious unfairness” visited upon the defendant as a consequence of the late disclosure. In Peter John Reed v R [2006] NSWCCA 314 at [39] the prosecutor had failed to disclose material until the last day of the trial and discharging the jury was described as “the only practical course.” In R v Dickson; R v Issakidis (No 12) [2014] NSWSC 1595 at [66]-[67], the jury was discharged because the prosecutor had not disclosed a pool of potentially exculpatory material so the trial became unfair.

285 In Lawless v The Queen (1979) 142 CLR 659 at 664 [12], the material came to light during a public inquiry. In Hunter Quarries Pty Limited v Morrison [2013] NSWIRComm 49 at [16], the material arose after the prosecutions of two co-defendants were dismissed. In Hannaford v The Royal Society for the Prevention of Cruelty to Animals, NSW [2013] NSWSC 1708 at [8], the defendants became aware of the material when the prosecutor attempted to tender it during a costs application.

286 In Clarkson v Director of Public Prosecutions [1990] VR 745, the defendant’s solicitor obtained the material after conviction via a freedom of information request directed to the prosecutor. In R v Reardon (2004) 60 NSWLR 454 at [86], the defendant’s solicitor obtained the running sheets after conviction via a freedom of information request directed to the investigator. In JB v R [2015] NSWCCA 182 at [11], the material came to light after conviction when the defendant’s solicitor made a request to the court for the file regarding charges brought against a prosecution witness and discovered an affidavit of assistance showing that the witness was actually a police informer. In Perish v R; Lawton v R [2015] NSWCCA 237 at [39], the defendants’ solicitors sought material regarding a reward after seeing a media article after conviction about a reward.

4.1.9 Other options to remedy non-disclosure include:

a) seeking an inquiry into conviction;\textsuperscript{288}

b) making an application for judicial review;\textsuperscript{289}

c) petitioning for the exercise of the prerogative of mercy.\textsuperscript{290}

4.1.10 There are other potential options which the defendant could explore with caution because they are less likely to succeed:

a) commencing civil action against the investigator or prosecutor;\textsuperscript{291}

b) attempting a private prosecution against the investigator or prosecutor.\textsuperscript{292}

4.1.11 Defence solicitors should be encouraged to explore the range of options available so that they can best protect their client’s interests to remedy late disclosure and non-disclosure. By actively pressing for prompt disclosure before the trial and by continuing attempts to obtain non-disclosed material, even after conviction, defence solicitors have a role in holding prosecutors to account.

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\textsuperscript{289} In Clarkson v Director of Public Prosecutions [1990] VR 745 the defendant’s judicial review application for certiorari to quash his conviction on the basis that material obtained via freedom of information request should have been disclosed was described by the court as arguable.

\textsuperscript{290} Lawless v The Queen (1979) 142 CLR 659; Easterday v The Queen (2003) 143 A Crim R 154; Mallard v The Queen (2005) 224 CLR 125.


\textsuperscript{292} See Potier v Magistrate O’Shane & Anor [2008] NSWSC 141 at [38], an unsuccessful attempt to commence a private prosecution against the investigator for perverting the course of justice under section 319 Crimes Act 1900 regarding alleged non-disclosure.
4.2 Adverse consequences for the prosecutor

4.2.1 Many of the options available to the defendant to remedy late disclosure or non-disclosure involve significant time for the prosecutor. If the defendant serves a subpoena seeking disclosable material, the prosecutor will need to spend time collating and producing the material to the court. If the defendant files an application for a conditional stay due to non-disclosure, the prosecutor will need to spend time responding to the application. If the defendant needs further time to consider material which is disclosed late or pursue enquiries arising from such material, court time may be wasted and witnesses may need to be recalled. When late disclosure leads to the trial being vacated, that causes considerable delay and inconvenience to the defendant, the prosecutor, the court, the witnesses, the jury and the complainant. When non-disclosure causes a miscarriage of justice resulting in a conviction being set aside, there is an enormous impact on all involved.

4.2.2 Some of the options available to the defendant to remedy late disclosure or non-disclosure also expose the prosecutor to adverse costs orders, including when:

   a) the hearing is adjourned due to late disclosure;\(^{294}\)
   
   b) charges are withdrawn or dismissed due to non-disclosure;\(^ {295} \)
   
   c) a conditional stay is granted due to non-disclosure;\(^ {296} \)

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293 In *R v Medich (No 6)* [2016] NSWSC 1001 at [31]-[34], Bellew J strongly criticised the prosecutor for late disclosure causing the trial to be vacated because that adversely affects the discharged jury members, adversely affects the victim’s family, adversely affects other defendants seeking trial dates, adversely affects the court’s resources and because there is a public interest in having trials completed within a reasonable time after the alleged offence.

294 For summary prosecutions, section 216 *Criminal Procedure Act 1986* provides that the defendant may seek costs if the prosecution is adjourned and the defendant has incurred additional costs because of the unreasonable conduct of the prosecutor.

295 For summary prosecutions, sections 213-214 *Criminal Procedure Act 1986* provide that the defendant may seek costs if the prosecution is dismissed or withdrawn and proceedings were conducted by the prosecutor in an improper manner. In *Lismore City Council v Ihalainen (No 3)* [2015] NSWLEC 53 at [33]-[34], the defendant sought costs against the prosecutor under section 257D(1)(b) of the *Criminal Procedure Act 1986* on the basis that the proceedings were conducted in an improper manner by reason of the failure to disclose nine relevant affidavits sworn by prosecution witnesses until the third day of the trial but the court, considering the prosecutor’s unreserved apology for the late disclosure, declined to exercise the discretion to award costs.

296 In *R v Ulman-Naruniec* (2003) 143 A Crim R 531 at [45], the defendant was granted a stay of her third trial until the prosecutor compensated the defendant for the costs arising from the prosecutor’s failure to comply with the disclosure obligations. In *R v Trong Ruyen Bui* (2011) 210 A Crim R 338 at [100], the defendant was granted a stay of the proceedings until the prosecutor paid the wasted costs of the defendant arising from the prosecutor’s late
d) the defendant is successful on appeal;\textsuperscript{297}

e) the defendant is acquitted due to non-disclosure.\textsuperscript{298}

4.2.3 Late disclosure and non-disclosure also expose the prosecutor to criticism by the court and reputational damage, which can be difficult to repair.\textsuperscript{299}

4.2.4 Non-disclosure in breach of the \textit{Conduct Rules} also exposes the prosecutor to a finding of professional misconduct, which can result in removal from the roll.\textsuperscript{300} In cases where the defence seeks to challenge the integrity of the investigation, non-disclosure could in fact strengthen the defence.\textsuperscript{301}

4.2.5 Greater guidance for prosecutors about the range of potential remedies available to the defence, the time and cost involved in responding to them, and the serious potential consequences of non-disclosure may encourage greater compliance.

disclosure causing the trial to be vacated. In \textit{R v Michael John Issakidis} [2015] NSWSC 834 at [86], the defendant was granted a stay of his second trial until the prosecutor paid the defendant’s costs of the first trial which were thrown away when the jury was discharged due to non-disclosure.

\textsuperscript{297} For appeals from the Local Court to the District Court, section 28(3) and 70(1) of the \textit{Crimes (Appeal and Review) Act 2001} provide that the defendant may seek costs if the prosecution was conducted by the prosecutor in an improper manner.

\textsuperscript{298} Sections 2 and 3 \textit{Costs in Criminal Cases Act 1967} provides that a defendant who is acquitted or has a conviction set aside on appeal can seek a costs certificate if the court is satisfied that if the prosecution had, before the proceedings were instituted, been in possession of evidence of all the relevant facts, it would not have been reasonable to institute the proceeding. In \textit{Gillett v State of New South Wales} [2009] NSWSC 421 at [9], the defendant was acquitted following alleged non-disclosure and successfully sought a costs certificate.

\textsuperscript{299} In \textit{AJ v The Queen} [2011] VSCA 215 at [21], the court strongly criticised the prosecutor’s non-disclosure as a “significant and most regrettable breach of her duty as a prosecutor”. The prosecutor attempted to repair the damage to her reputation by explaining her mistaken belief that another barrister had disclosed the material but the court only slightly tempered its criticism, emphasising at [38] the care required of prosecutors in carrying out their important functions.

\textsuperscript{300} Rule 29.5 sets out the disclosure obligations and Rule 2.3 provides that a breach of the \textit{Conduct Rules} is capable of constituting unsatisfactory professional conduct or professional misconduct.

\textsuperscript{301} In \textit{Lawless v The Queen} (1979) 142 CLR 659 at 682 [8], Murphy J was concerned that if the jury had known that the prosecutor had suppressed the disclosure material, that would have strengthened the defendant’s claims that he was being framed.
5 What are areas for potential improvement?

5.1 Reasons why prosecutors fail to comply

5.2.1 It is first necessary to consider why prosecutors disclose late, or not at all, and then consider what can be done about it.

5.2.2 Non-disclosure can occur when prosecutors are unaware of the material. That may be because the investigator has not provided the material to the prosecutor or because the prosecutor has not considered requesting it.

5.2.3 Non-disclosure can also be caused by prosecutors not properly considering the material. That may be because the prosecutor does not appreciate how the material could be relevant, does not anticipate the potential defences, does not understand how the material could be used in cross-examination or because the material is simply overlooked.

5.2.4 Non-disclosure can also be caused by prosecutors misunderstanding their disclosure obligations. There are four common misconceptions regarding disclosure which are explored further below:

a) an unduly restrictive approach whereby material which is unreliable, inadmissible or not sufficiently relevant is not disclosed;

b) an inappropriate deflecting of the disclosure obligations whereby the defendant is required to justify why material should be disclosed and/or serve a subpoena;

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302 In R v Garofalo [1999] 2 VR 625 at [3], the investigator did not inform the prosecutor that an important prosecution witness had pleaded guilty to dishonesty offences. In Grey v The Queen (2001) 184 ALR 593 at [4], the investigator did not provide the prosecutor with a letter of comfort given to an important prosecution witness. In R v Farquharson (2009) 26 VR 410 at [211], the investigator did not inform the prosecutor that an important prosecution was facing pending indictable proceedings. In R (Cth) v Petroulias (No. 22) [2007] NSWSC 692 at [23]-[25], the investigator did not inform the prosecutor that a key witness in a fraud prosecution was bankrupt and had a larceny conviction. In Aouad and El-Zeyat v R [2011] NSWCCA 61 at [321], the investigator did not provide the prosecutor with an investigation note about a key meeting. In R v Jenkin (No 2) [2018] NSWSC 697 at [32], the investigator did not provide the prosecutor with the criminal record for an important witness.

303 In Peter John Reed v R [2006] NSWCCA 314 at [27]-[31], the prosecutor did not disclose a witness statement because the prosecutor did not anticipate that the defendant would deny being present at the alleged offences. In Rodi v Western Australia [2018] HCA 44 at [16], the prosecutor did not disclose material because the prosecutor did not anticipate that the defendant would allege that the drugs were grown for personal use.

304 In Lawless v The Queen (1979) 142 CLR 659 at 674 [16], the court suspected non-disclosure of neighbour’s statement was an oversight. In R v Michael John Issakidis [2015] NSWSC 834 at [25] an email chain was not disclosed due to an oversight.
c) an improper shifting of the disclosure obligations whereby undue reliance is placed on the investigator to determine the scope of disclosure material; and

d) a mistaken complacency about the prosecutor’s discretion to disclose whereby the disclosure obligations are inconsistently applied.

Misconception regarding sufficient relevance

5.2.5 Some prosecutors believe that it is unnecessary to disclose material which is unreliable. That is an unduly restrictive approach to the disclosure test, which requires the prosecutor to disclose material which can be seen “to raise or possibly raise” a new issue the existence of which is not apparent from the prosecution case. While the prosecutor will need to make a “sensible appraisal” in each case, material which meets the disclosure test should be disclosed even if it may be unreliable.

5.2.6 There is a belief that it is unnecessary to disclose material which is inadmissible. That is an improperly narrow approach to the disclosure test, which requires disclosure of material which can be seen to hold out a real prospect of providing “a lead on evidence.” A prosecutor should take a cautious approach when the material is strictly inadmissible in any proceedings and carefully consider whether the (inadmissible) material could be used to provide a lead on other (admissible) material.

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305 R v Reardon (2004) 60 NSWLR 454 at [48] and [54].

306 In R v K (1991) 161 LSJS 135 at 140, intelligence suggesting that a prosecution witness had been involved in an unrelated uncharged drug cultivation some years previously was not disclosable because, on a sensible appraisal by reasonable persons conducting the prosecution, it was not sufficiently solid to elicit answers materially affecting the credibility of the witness in cross-examination.

307 In R v Chami, M Skaf, Ghanem, B Skaf [2004] NSWCCA 36 at [143]-[145], the prosecutor had not disclosed an unreliable statement from an accomplice which was considered to be “obviously false” but the court accepted that the statement should have been disclosed because it would have allowed the defendants to distance themselves from the complainant’s account and challenge her credibility. Point 22 of the CDPP Statement states that the prosecutor should disclose statements from prosecution witnesses who will not be called because they are not credible.

308 In R v Reardon (2004) 60 NSWLR 454 at [107], when considering whether running sheets listing suspicions of surveillance operatives should have been disclosed, Simpson J could see no basis on which the sheets could have been admissible because the operatives were not identified and the basis for the suspicions was unknown.

309 R v Reardon (2004) 60 NSWLR 454 at [48] and [54].

310 For example, section 20R Health Administration Act 1982 provides that a root cause analysis report is inadmissible but it may provide a lead on other evidence potentially
5.2.7 There is a belief that it is unnecessary to disclose material unless it has “sufficient” relevance. In effect, this belief inappropriately requires the defendant to establish precisely how the material could be used to defend the charge. That belief is an impermissible gloss on the disclosure test, which actually requires disclosure of material which is “relevant or possibly relevant” to an issue in the case.

5.2.8 There is a belief that it is unnecessary to disclose further material if the defendant already has ample evidence to challenge the credibility of a prosecution witness. The correct approach is that all material which meets the disclosure test should be disclosed, including evidence which can be used to strengthen the cross-examination of a prosecution witness.

relevant in a prosecution involving a hospital fatality. Section 170 Police Act 1900 provides that a report regarding a complaint against a police officer is inadmissible but it may provide a lead on other evidence potentially relevant in a prosecution involving an admission allegedly extracted under threat.

311 In Peter John Reed v R [2006] NSWCCA 314 at [58], it was suggested that material about the defendant’s presence at the alleged offence was not disclosable because it did not have “sufficient relevance” but the court accepted that the material was at least theoretically capable of being deployed to cause inquiries to be made and for purposes of cross-examination. In R v Farquharson (2009) 26 VR 410 at [216]-[218], the prosecutor suggested that material indicating that a prosecution witness was facing indictable proceedings was not disclosable because it was not “sufficiently relevant” but the court accepted that there was a likelihood that the defendant would have relied on it to establish an incentive for the witness to maintain his account.

312 In Cornwell v R [2010] NSWCCA 59 at [207], the prosecutor argued that documents regarding a drug importation were not disclosable because the defendant could not establish how the people involved were connected to the alleged conspiracy. In Kev v The Queen [2015] VSCA 36 at [52] the prosecutor argued that documents regarding another drug importation were not disclosable because the defendant could not establish how they could be used by the defence. In Gould v Director of Public Prosecutions (Cth) [2018] NSWCCA 109 at [17], the prosecutor argued that documents in support of applications for warrants were not disclosable because the defendant could not establish how they could be used to challenge validity of the warrants.

313 R v Reardon (2004) 60 NSWLR 454 at [48] and [54].

314 In Lawless v The Queen (1979) 142 CLR 659 at 674 [16], it was argued that the prosecutor need not disclose a neighbour’s statement because it covered the same ground, was “mere surplusage” and would only provide further ammunition.

315 In Thomas v Campbell (2003) 9 VR 136 at [28], material which could have added further strength to the attack on the credibility of a prosecution witness was disclosable. In R v Livingstone (2004) 150 A Crim R 117 at [43], information which could have strengthened the impact of cross-examination was disclosable. In Aouad and El-Zeyat v R [2011] NSWCCA 61 at [354], material which could have added a further serious blow to the witness’ credibility was disclosable. In Grey v The Queen (2001) 184 ALR 593, material which could have been taken into account in considering whether the witness was to be accepted as a witness of truth, was disclosable “no matter what other attacks could have been, or were mounted against” the witness. In R v Dickson; R v Issakidis (No 12) [2014] NSWSC 1595 at [58],
Misconceptions regarding subpoenas

5.2.9 Some prosecutors believe that it is unnecessary to respond to requests for disclosure unless the defendant indicates why the material is relevant. That belief is misguided.

5.2.10 When a defendant asks a prosecutor to disclose material, it is prudent for the defendant to identify the material sought and it is sensible for the prosecutor to discuss the request if the material sought is voluminous. However, the prosecutor should not require the defendant to justify why material should be disclosed and should not attempt to negotiate less than adequate disclosure by agreement. The disclosure obligations arise by operation of law and so arise regardless of whether the defendant requests particular material.

5.2.11 Some prosecutors believe that if the defendant seeks disclosure of material held by the investigator or third parties, the defendant should serve a subpoena to obtain that material. That belief is wrong.

5.2.12 The prosecutor applies the disclosure test to decide whether to disclose material to the defendant. The subpoena test, broadly summarised, requires the defendant to satisfy a court that there is a legitimate forensic purpose for the defendant to seek production of material. The disclosure test and the

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material which could have been used in cross-examination was disclosable and it was “no real answer” that that approach was open on the basis of other material.

316 In R v Jenkin (No 2) [2018] NSWSC 697 at [19]-[20], it was submitted that criminal history records need not be disclosed unless the defendant establishes knowledge, or grounds to suspect, that a prosecution witness may have a criminal history and establishes that the criminal history has some particular and direct relevance to the issue of credibility. That submission was rejected.

317 In R v Garofalo [1999] 2 VR 625 at [63]-[64], the court held that, as a matter of principle, practicality and fairness, the prosecutor’s obligation to disclose relevant criminal histories of prosecution witnesses is not subject to a qualification that the defendant must first make a specific request.

318 For example, when a defendant makes a blanket request for criminal history records for all prosecution witnesses, point 16 of the CDPP Statement recommends that the prosecutor attempt to negotiate with defence practitioners to ensure that unnecessary checks do not have to be undertaken for formal or non-contentious witnesses.

319 Ragg v Magistrates’ Court (2008) 18 VR 300 at [73].

320 In R v Richard Lipton [2011] NSWCCA 247 at [61], the prosecutor submitted that the defendant should have served a subpoena on the investigator. In Lawless v The Queen (1979) 142 CLR 659 at 673 [14], it was argued that the defendant was aware of the mental state of a prosecution witness so should have served a subpoena on the hospital.

321 In Attorney General for NSW v Chidgey [2008] NSWCCA 65 at [64], the subpoena test was confirmed so that the defendant must identify a legitimate forensic purpose for which
subpoena test have often been discussed in the same context because it is common for a defendant to serve a subpoena on the investigator to seek access to material which the defendant alleges the prosecutor should have disclosed.

5.2.13 Material which satisfies the subpoena test may well satisfy the disclosure test. For example, a court which considers a subpoena to an investigator seeking certain material can express the view that the same material should have been disclosed by the prosecutor. There appears to be some conflating of the two tests, even in the DPP Guidelines. The disclosure test and the subpoena test may have similar outcomes and may have similar rationales but it is important not to blur the separate tests.

the document is sought and establish that it is ‘on the cards’ that the document will materially assist the defendant’s case.

322 In R v Jenkin (No 2) [2018] NSWSC 697 at [32]-[34], the court dismissed objections to the defendant being granted access to criminal history records produced under subpoena, and noted that the prosecutor should have disclosed the material sought.

323 Hunter Quarries Pty Ltd v Morrison (No 2) [2013] NSWIRComm 98 illustrates some confusion regarding the disclosure test and the subpoena test. At [8], the defendant sought leave to file a subpoena on the prosecutor and an order that the prosecutor “must” disclose documents falling within the disclosure test. Instead of explaining that the court had no power to make the proposed disclosure order, the court added to the confusion by characterising the proposed disclosure order as a “fishing expedition”, a term more commonly used to describe an improper subpoena[145].

324 Guideline 18, DPP Guidelines provides that the Director will not claim privilege over witness statements in conference (which would otherwise be disclosable), “provided the disclosure of such records serves a legitimate forensic purpose” (the subpoena test).

325 In Cornwell v R [2010] NSWCCA 59 at [298], it was noted that if material sought under subpoena satisfies the disclosure test, a “legitimate forensic purpose” for obtaining such material would be demonstrated. In R v Richard Lipton [2011] NSWCCA 247 at [115] it was noted that if the disclosure certificate indicated there was material satisfying the disclosure test, that would sufficiently demonstrate that it was “on the cards” that the material would assist the defence. In R v Jenkin (No 2) [2018] NSWSC 697 at [16], it was difficult to imagine a case where it could sensibly be asserted that the defendant had no legitimate forensic purpose in seeking production of material that the prosecutor should have disclosed.

326 In Ragg v Magistrates’ Court (2008) 18 VR 300 at 322, it was held that the subpoena test (which balances the need to ensure a fair trial by giving the defendant access to material documents with the need to protect the prosecutor and investigator from unjustified subpoenas) strikes a “similar balance” to the disclosure test (which balances the need to disclose material which tends to assist defendant but not all material held by the prosecution). In Gould v Director of Public Prosecutions (Cth) [2018] NSWCCA 109 at [65], the disclosure test of potential relevance was considered to be a “similar approach” to that adopted regarding subpoenas served by the defendant.

327 In R v Reardon (2004) 60 NSWLR 454 at [95], Simpson J was conscious two “separate issues”: the prosecution duty of disclosure as a matter of fairness to the defendant which exists independently of any active procedures instigated on behalf of the defendant to obtain access to the material and the duty of the prosecution to respond to a subpoena to produce
5.2.14 While serving a subpoena is an option available to the defendant to attempt to obtain material which should have been disclosed, there is no requirement for a defendant to serve a subpoena to ensure that the prosecutor complies with the prosecutor’s disclosure obligations. In short, the defendant need not fossick for information to which it is entitled.\textsuperscript{328} Accordingly, prosecutors should not require a defendant to serve a subpoena and should not require a defendant to demonstrate legitimate forensic purpose before disclosing material.\textsuperscript{329}

Misconception regarding reliance on investigators

5.2.15 Some prosecutors take a passive approach to disclosure, assuming that the investigator’s brief is complete, assuming that further enquiries would be unnecessary and assuming that there is nothing to disclose. A prosecutor who takes this approach may unquestioningly accept the investigator’s assertion that there is no disclosure material\textsuperscript{330} or accept that it would be too onerous to collate the disclosure material.\textsuperscript{331} This approach is risky.

\textsuperscript{328} In \textit{Grey v The Queen} (2001) 184 ALR 593 at [23] it was held that although it may have been possible for the existence of a letter of comfort to be revealed in cross-examination, the defendant in a criminal trial is not obliged to “fossick” for information to which he was entitled. In \textit{R v Livingstone} (2004) 150 A Crim R 117 at [58], it was held that the defendant was not required make a request or serve a subpoena to obtain a relevant record of interview because the defendant need not “fossick” for information to which it is entitled. In \textit{R v Richard Lipton} [2011] NSWCCA 247 at [119], the court was critical of the attitude of the investigator and the prosecutor for not disclosing material relevant on sentence and confirmed that the defence in a criminal trial should not be obliged to fossick for information to which it is entitled. In \textit{R v Jenkin (No 2)} [2018] NSWSC 697 at [32], the court held that the material ultimately obtained under subpoena should have been disclosed to the defendant without the defendant having to seek it out.

\textsuperscript{329} In \textit{R v Reardon} (2004) 60 NSWLR 454 at [58], Hodgson JA accepted that there is no onus on the defence to demonstrate a forensic purpose in relation to material said to be subject to the duty of disclosure. In \textit{Woolworths Ltd v Dr K Chant and Anor} [2009] NSWSC 1082 at [30], the court held that no onus fell on the defendant to establish a legitimate forensic purpose in respect of documents which the prosecutor should have disclosed.

\textsuperscript{330} In \textit{Gould v Director of Public Prosecutions (Cth)} [2018] NSWCCA 109 at [15], the prosecutor had not disclosed affidavits because they had been considered by the investigator and “deemed not to fall within the duty of disclosure.”

\textsuperscript{331} In \textit{R v Tracey & Ors (No 2)} [2005] SASC 356 at [17], the prosecutor had not disclosed Major Crime Journal entries because the investigator asserted it was an “arduous task” but
5.2.16 Often it will be apparent from the disclosure certificate, the brief or experience with similar prosecutions that there may be disclosure material. If so, it should be requested because the disclosure obligations include an obligation to make enquiries.\textsuperscript{332}

5.2.17 While the prosecutor necessarily relies on the investigator to understand what material was gathered during the investigation and what further information could be gathered, ultimately, the disclosure obligations rest with the prosecutor. While the \textit{CDPP Statement} indicates that the prosecutor “largely depends” on the investigator to inform the prosecutor of the existence of material which should be disclosed,\textsuperscript{333} that reliance cannot be absolute. It is unfortunate that this issue was not fully addressed in the recent decision of \textit{Gould}, when the defendant asserted that the prosecutor (not the investigator) should assess whether documents meet the disclosure test.\textsuperscript{334}

5.2.18 The prosecutor cannot entirely abdicate the disclosure obligations to the investigator. In circumstances where there is information in the brief suggesting the existence of disclosable material and/or the defendant has requested disclosure of particular material which may be relevant, it would be unwise to assume that the investigator always provides all disclosable material. The investigator may have simply overlooked some disclosable material or the investigator may not appreciate the relevance of the material to potential defences.

5.2.19 Under the pre-trial disclosure provisions, it is the prosecutor (not the investigator) who must give notice of the prosecution case to the defendant.\textsuperscript{335} Under the \textit{Conduct Rules}, the disclosure obligations are owed by the prosecutor (not the investigator) and it is the prosecutor who must face the consequences of any breach.\textsuperscript{336} Under the common law principles, the disclosure obligations are owed by the prosecutor (not the investigator). The prosecutor is obliged to form his or her own view about whether the material is relevant to an issue in the case.\textsuperscript{337} Indeed, one of the purposes of creating

\textsuperscript{332} \textit{R v Richard Lipton} [2011] NSWCCA 247 at [81].
\textsuperscript{333} Point 5 of the \textit{CDPP Statement}.
\textsuperscript{334} In \textit{Gould v Director of Public Prosecutions (Cth)} [2018] NSWCCA 109 at [16], the defendant submitted that affidavits should have been assessed by the prosecutor (not the investigator) to ensure compliance with the disclosure obligations but the defendant did not rely on any authority, the submission was not articulated before the primary judge, the submission did not explain why the duty should be formulated in that way and it was implied that the submission was somehow inconsistent with the \textit{CDPP Statement}.
\textsuperscript{335} Section 141(1)(a) \textit{Criminal Procedure Act 1986};
\textsuperscript{336} \textit{Conduct Rules} 29.5.
\textsuperscript{337} \textit{R v Richard Lipton} [2011] NSWCCA 247 at [110].
an independent office of prosecutor (as opposed to an arm of the investigation agency) is to ensure that all relevant information is disclosed to the defence.\textsuperscript{338}

5.2.20 Accordingly, the best approach is that the prosecutor should work with the investigator\textsuperscript{339} to ensure that the prosecutor complies with the disclosure obligations, including requesting additional material when necessary and escalating requests when appropriate.\textsuperscript{340}

Misconception regarding a discretion to disclose

5.2.21 Some prosecutors take a complacent approach and understand their disclosure obligations as an unenforceable subjective discretion.

5.2.22 The disclosure obligations can be characterised as a discretion. An individual prosecutor applies the disclosure test by making an appraisal of the material and determining how the material is seen to be relevant. Disclosure is a discretionary responsibility exercisable according to the circumstances as the prosecutor perceives them to be.\textsuperscript{341} It is for the prosecutor to exercise independent prosecutorial discretion to decide whether information should be disclosed.\textsuperscript{342} However, describing the disclosure obligations as a discretion does not mean that they can be inconsistently applied. It cannot be accepted that a lax prosecutor, who has not read the material or has not properly considered how it could be relevant, is somehow entitled to disclose less material than a cautious prosecutor.\textsuperscript{343}

5.2.23 Non-disclosure is not directly enforceable by the court. The Director’s functions are carried out independently of the courts.\textsuperscript{344} The court cannot directly supervise the prosecutor’s discharge of the disclosure obligations\textsuperscript{345} because the court does not know what material is available to the prosecutor.

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\textsuperscript{338} \textit{R v Ulman-Naruniec} (2003) 143 A Crim R 531 at [136].

\textsuperscript{339} Point 7 of the \textit{CDPP statement} indicates that prosecutors will work with investigators in discharging the prosecutor’s duty of disclosure.

\textsuperscript{340} In \textit{R v Medich (No 6)} [2016] NSWSC 1001 at [26], Bellew J accepted that the prosecutor’s initial request to the investigator was laudable but was troubled that there was no evidence that the prosecutor had escalated or expedited the request as the trial approached.

\textsuperscript{341} \textit{Cannon v Tahche} (2002) 5 VR 317 at [57].

\textsuperscript{342} \textit{R (Cth) v Petroulias (No. 22)} [2007] NSWSC 692 at [64].

\textsuperscript{343} In \textit{DPP v Webb} (2001) 52 NSWLR 341 at [36], the court declined to consider whether the effective content of the duty of disclosure in a particular case could be “enlarged or reduced because of exceptional caution or nonchalance” of the prosecutor.

\textsuperscript{344} Guideline 1, \textit{DPP Guidelines}.

\textsuperscript{345} \textit{R (Cth) v Petroulias (No. 22)} [2007] NSWSC 692 at [64].
and does not know how it could be relevant to potential defences.\textsuperscript{346} If the prosecutor assures the court that the disclosure obligations have been complied with, the court is unable to verify that. Unless there is a valid subpoena or a breach of the pre-trial disclosure provisions,\textsuperscript{347} the court does not have the power to order the prosecutor to disclose material.\textsuperscript{348} The court can stay the proceedings until the prosecutor has considered whether there is material which should be disclosed but cannot stay the proceedings until the prosecutor discloses the material.\textsuperscript{349} Doing otherwise would “turn the soft law obligation, to consider, into an enforceable duty to disclose.”\textsuperscript{350} However, although a breach of the Conduct Rules cannot be directly enforced by the defendant,\textsuperscript{351} the defendant has a number of effective remedies to address non-disclosure. Better awareness of these remedies and the significant consequences of non-disclosure should discourage prosecutors taking a complacent approach.

5.2.24 Clearer guidance for prosecutors, which addresses the four misconceptions dealt with above, would greatly assist prosecutors to understand and comply with their disclosure obligations.

5.2 Reform

5.2.1 The uncertainty regarding the exceptions to disclosure and the misconceptions regarding the disclosure obligations clearly indicate a need for reform. Recent developments in the United Kingdom illustrate how action can occur swiftly when there is acknowledgment of the need for reform. A UK prosecutor failed to disclose a text message from the complainant suggesting that she consented to an alleged sexual assault. This led to:

\begin{itemize}
\item In Hunter Quarries Pty Ltd v Morrison (No 3) [2014] NSWIC 1 at [153], the court stated that there could be no basis for a court order that the prosecutor disclose material which fell within the disclosure test because so there would be no way for a court to determine whether a “sensible appraisal” had been carried out of documents which it had not seen.\textsuperscript{346}
\item Section 149E(2) Criminal Procedure Act 1986.
\item In Woolworths Ltd v Dr K Chant and Anor [2009] NSWSC 1082 at [43], Schmidt J held that the court does not have the power to order disclosure on the grounds of prosecutorial non-disclosure and, at [62], stated that any failure to disclose might lead to a conviction being set aside, but is not open to review during the course of the trial.\textsuperscript{348}
\item Gould v Director of Public Prosecutions (Cth) [2018] NSWCCA 109 at [62].\textsuperscript{349}
\item Gould v Director of Public Prosecutions (Cth) [2018] NSWCCA 109 at [62].\textsuperscript{350}
\item Rule 2.3 Conduct Rules.\textsuperscript{351}
\end{itemize}
a) withdrawal of the prosecution, criticism by the court and a formal apology to the defendant in December 2017;

b) public recognition of the scope of the problem, a plan of action and a joint review report by the prosecution and investigation agencies with several recommendations in January 2018;

c) an urgent review conducted by senior prosecutors and 120 police officers of approximately 600 active sexual offence cases to ensure compliance with the disclosure obligations; and

d) a parliamentary inquiry completed in July 2018.

5.2.2 Non-disclosure is a complex problem which requires a multifaceted response. Five areas of potential reform are proposed below:

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352 After dismissing the charges on 14 December 2017 at Croydon Crown Court, Judge Gower stated that something “has gone wrong and it is a matter that the Crown Prosecution Service (CPS) in my judgment should be considering at the very highest level”: David Brown, Chief News Correspondent, The Times, Judge slams Met Police after Liam Allan cleared in rape trial, published 15 December 2017.

353 The Joint Statement from Alison Saunders, Director of Public Prosecutions, and Sara Thornton, Chair of the National Police Chiefs' Council, on 24 January 2018 stated that there “is widespread acknowledgement that disclosure issues are systemic and deep-rooted. This is a problem that all parts of the criminal justice system must address”.


355 The Joint Review Report of the Metropolitan Police Service and Crown Prosecution Service published on 30 January 2018 makes recommendations including a joint Disclosure Improvement Plan, a joint protocol and process for the examination of digital media, disclosure training for all police, accredited police specialist disclosure experts, Disclosure Champions in the CPS, a Metropolitan Police Disclosure lead at Chief Officer level and a Tactical Disclosure lead at Chief Superintendent/ Superintendent level.


358 There are other potential reform options. For example, Martin Hinton in ‘Unused Material and the Prosecutor’s Duty of Disclosure’ (2001) Criminal Law Journal 121 at 137-138 recommends that the prosecutor file and serve comprehensive lists of all documents gathered and created during the course of the investigation, identifying any claims of public interest immunity. David Plater and Lucy de Vreeze in ‘Is the Golden Rule of Full Disclosure a Modern Mission Impossible?’ (2012) Flinders Law Journal 133 at 169, 186 and 188, recommend that, subject to public interest immunity, the prosecutor provide the defendant with a copy of all documents in the possession of the prosecutor gathered during the investigation (or permit inspection if the documents are too voluminous) so the defendant can assess the relevance of the documents. It is beyond the scope of this paper to address the viability of other potential reform options.
a) legislation;  
b) guidelines;  
c) joint training;  
d) procedures; and  
e) technology.

Legislation

5.2.3 Consideration should be given to legislative reform of the disclosure obligations, including:

a) introducing disclosure certificate provisions for all investigators (because section 15A DPP Act only applies to certain investigators providing certificates to the DPP359);  
b) introducing pre-hearing disclosure provisions for all prosecutors (because the pre-trial disclosure provisions only apply to indictable offences);  
c) introducing provisions addressing how all investigators and prosecutors should deal with material which is subject to statutory disclosure restrictions (because section 15A DPP Act only refers to a small selection of potentially applicable statutory disclosure restrictions); and  
d) introducing provisions addressing how all investigators and prosecutors should deal with material which may be subject to a claim of privilege or public interest immunity (particularly where such claims have not yet been made or determined).

5.2.4 This is a complex exercise which would require consultation with investigators, prosecutors, defence and courts.

Guidelines

5.2.5 Consideration should be given to providing clearer disclosure guidelines which are:

359 Although there is no legislative requirement, the CDPP routinely requires investigators to provide disclosure certificates. Police prosecutors and regulatory prosecutors generally do not require disclosure certificates.
a) consistent amongst prosecutors;\textsuperscript{360}

b) consistent with the relevant cases;\textsuperscript{361} and

c) consistent with the relevant legislation.\textsuperscript{362}

5.2.6 Good guidelines on disclosure would:

a) set out the scope of the disclosure obligations, including the obligation to make enquiries, and give examples of material which courts have held should have been disclosed;

b) explain the source of the disclosure obligations, including the common law, the Conduct Rules and the pre-trial and pre-committal disclosure provisions;

c) outline the rationales for disclosure, based upon the fundamental need to ensure a fair trial;

d) explain when the disclosure obligations start and stop, including the continuing obligation to disclose as the matter progresses;

e) include a table of common statutory disclosure restrictions and guidance on whether to disclose material which may be restricted;

f) include scenarios to explore whether to disclose material which may be subject to claims of privilege or public interest immunity;

\[360\] The DPP Guidelines and CDPP Statement only apply to prosecutors at those agencies.

\[361\] In \textit{R v Jenkin (No 2)} [2018] NSWSC 697 at [31] and [33], the court noted that the DPP Guidelines do not reflect the statement of principle expressed in \textit{R v Garofalo} [1999] 2 VR 625 regarding the disclosure of criminal history of prosecution witnesses and affirmed that principle in general terms – this may be adopted in the current review of the DPP Guidelines. In \textit{Kev v The Queen} [2015] VSCA, the court noted that the (then) CDPP Statement defined unused material as information “gathered in the course of the investigation” but noted that there was no reason in principle why the disclosure obligations should not extend to information which in the possession of the Crown through other sources – this appears to have been adopted in point 12 of the current CDPP Statement.

\[362\] The DPP Guidelines (incorrectly) states that the duty of disclosure does not extend to disclosing material relevant only to the credibility of the defendant whereas the CDPP Statement (correctly) states that such material should be disclosed under the pre-trial disclosure provision.
5.2.7 Given that the disclosure test includes some rather nebulous concepts, including “possibly relevant to an issue in the case”, consideration should be given to including scenarios designed to illustrate how material could potentially be relevant to credibility,\(^{363}\) to an objection,\(^{364}\) to a warning\(^ {365}\) or on sentence\(^ {366}\) and practical examples of the types of documents which are disclosable.\(^ {367}\) Such guidelines would also strongly encourage prosecutors to seek further guidance from more experienced prosecutors in difficult cases.

**Joint training**

5.2.8 Disclosure is affected by the quality of the relationship between investigator and prosecutor. If the investigator and the prosecutor have a good relationship, the prosecutor will be able to more effectively comply with the disclosure obligations.\(^ {368}\) If they have a poor relationship, it can lead to late

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\(^{363}\) For example, a prior inconsistent statement by a prosecution witness should be disclosed so the defendant can cross-examine the witness on credibility under sections 43 and 106 Evidence Act 1995. A prosecution expert’s cv should be disclosed so the defendant can cross-examine the expert on the extent to which the opinions are based on the expert’s training and experience under section 79 Evidence Act 1995.

\(^{364}\) For example, a police notebook indicating that a prosecution witness was not cautioned should be disclosed so the defendant can seek to exclude it under section 139 Evidence Act 1995. Custody footage indicating threatening behaviour towards the defendant should be disclosed so the defendant can seek to exclude the defendant’s admissions under sections 84, 85 and 90 Evidence Act 1995. Search warrant footage indicating that evidence was obtained improperly should be disclosed so the defendant can seek to exclude it under section 138 Evidence Act 1995. Identification parade footage indicating that the witness was influenced to identify the defendant should be disclosed so the defendant can seek to exclude it under section 114(2) Evidence Act 1995.

\(^{365}\) For example, material indicating that a prosecution witness was a prison informer, suffered memory loss or was criminally concerned in the offence should be disclosed so the defendant can seek a warning that the witness is unreliable under section 165(1) Evidence Act 1995. Material suggesting that potential witnesses are unable to be located or potential evidence has been lost should be disclosed so the defendant can seek a warning regarding disadvantage caused by delay under section 165B Evidence Act 1995.

\(^{366}\) For example, material indicating that the damage caused by the offence was insubstantial, material indicating that the defendant has no previous convictions and material indicating that the victim provoked the defendant should each be disclosed because they are mitigating factors under section 21A(3) Crimes (Sentencing Procedure) Act 1999.

\(^{367}\) Point 14 of the CDPP Statement gives useful examples of material relevant to the credibility of a prosecution witness including a witness statement which is inconsistent with any other statement made by the witness; relevant adverse finding in other proceedings (such as disciplinary proceedings, civil proceedings or a Royal Commission); evidence before a court, tribunal or Royal Commission which reflects adversely on a witness; any physical or mental condition which may affect reliability and any benefit which has been offered or granted to secure the witness’ testimony.

\(^{368}\) A good relationship relies on both: a good investigator (who promptly provides the disclosure material, clearly describes any withheld material in the disclosure certificate, candidly raises concerns about any sensitive material, frankly discusses any gaps in the investigation and swiftly responds to any requests) and a good prosecutor (who promptly
disclosure or non-disclosure.\textsuperscript{369} Given the serious consequences which may flow from that, it is important that investigators have a solid understanding of what they should provide to the prosecutor, what they may withhold and the importance of promptly responding to any requests. It is equally important that prosecutors understand the types of material commonly gathered during an investigation\textsuperscript{370} and explore the feasibility of obtaining further information to address potential defences.\textsuperscript{371}

5.2.9 Some decisions suggest that the disclosure obligations can be quite onerous:

a) suggesting investigators must provide a copy of electronic records in original format, including metadata;\textsuperscript{372}

b) suggesting prosecutors must disclose complete copies and full searchable access to electronic material;\textsuperscript{373}

\textsuperscript{369} A poor relationship can develop between an inexperienced investigator (who may inadvertently withhold disclosable material, be too slow responding to requests, make blanket assertions about sensitive information and be unwilling to consider potential defences) and an inexperienced prosecutor (who may overlook relevant material, be too timid making requests, dismiss the investigator’s concerns about sensitive material and neglect to consult with the investigator as the matter progresses).

\textsuperscript{370} Familiarity with investigation policies, such as the NSW Police Force Code of Practice for CRIME, can assist prosecutors determine what further information may be available. If the defendant might assert that evidence was improperly obtained, the prosecutor could make enquiries regarding any unrecorded admissions before a caution or any impermissible questioning during a forensic procedure. If the prosecutor anticipates that the defendant may raise mental illness, the prosecutor could request any COPS warnings regarding suicidal thoughts, any medications possessed at arrest, any prescriptions under search warrants and any requests for mental health assessment.

\textsuperscript{371} For example, if the prosecutor suspects that the defendant may allege animosity by the complainant, the investigator may obtain apprehended violence orders, bullying allegations or hostile complaints. If the prosecutor suspects that the defendant may allege being impaired during the interview, the investigator may obtain charge room footage, ambulance records and custody records.

\textsuperscript{372} In \textit{R v Kaddour & Zreika} [2012] NSWDC 50 at [7] and [36], the court was concerned that the defendants had been given compressed versions of telephone intercept material without metadata so stayed the prosecution until the prosecutor paid the defendants’ wasted costs.

\textsuperscript{373} In \textit{R v Michael John Issakidis} [2015] NSWSC 834 at [31] and [36], the court was concerned that the defendant had only been given a list of the material rather than searchable access to the database.
c) suggesting prosecutors must disclose potentially relevant material within files regarding co-offenders, within files regarding similar offences committed by the same defendant, within files regarding similar offences committed against the same victim, and within unrelated files involving similar facts; and

d) suggesting prosecutors must disclose material behind evidentiary certificates.

5.2.10 Encouraging investigators and prosecutors to participate in joint disclosure training would allow them to workshop best practices for providing and reviewing disclosure material, particularly in protracted investigations and complex prosecutions where the disclosure obligations can be onerous. Joint disclosure training would foster open communication, mutual respect and effective working relationships.

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374 In *R v Gatt* (No 6) [2018] NSWSC 487 at [17], it was held that the prosecutor properly disclosed those parts of a letter from a co-offender’s solicitor offering to plead guilty to offences.

375 In *Peter John Reed v Regina* [2006] NSWCCA 314 at [49], it was said to be preferable to disclose statements from briefs already served on the defendant regarding previous similar offences.

376 In *AJ v The Queen* [2011] VSCA 215 at [21], it was held that the prosecutor should have disclosed material regarding lies told by the complainant during a previous trial involving similar allegations against a different defendant.

377 In *Kev v The Queen* [2015] VSCA 36 at [77], it was suggested that, in a “perfect world” the prosecutor would have disclosed material regarding a prosecution of a different defendant involving another heroin importation using a similar technique.

378 In the Victorian decision of *Gaffee v Johnson* (1996) 90 A Crim R 157, the prosecutor opposed disclosure of manuals, model details and testing procedures regarding a speed detection device on the basis that the road transport legislation allowed the prosecutor to rely on an evidentiary certificate to facilitate proof that a Gazetted device was properly tested but the court stated that the material should be disclosed. If that approach was adopted in NSW, it would impose an onerous burden on investigators and investigators who routinely rely on evidentiary certificates and do not ordinarily disclose the source material. There is a wide range of evidentiary certificates, including to prove vehicle registration, firearm registration, breath analysis, drug testing, prohibited weapons and reliability of speed cameras (see section 257 Road Transport Act 2013, section 87 Firearms Act 1996, cl. 24 Passenger Transport (Drug and Alcohol Testing) Regulation 2010, section 40 Poisons and Therapeutic Goods Act 1966, section 48 Weapons Prohibition Act 1998) so requiring disclosure of the documents behind those certificates would be onerous.

379 Investigators and prosecutors necessarily have a different focus because they have different roles, training and responsibilities. Given that the disclosure obligations depend so heavily on the investigator providing the prosecutor with the disclosure material and the prosecutor requesting further material from the investigator as it becomes relevant as the matter progresses, it is important for prosecutors to know how investigators gather, store and analyse information within their operational constraints and vital for investigators to
Procedures

5.2.11 There are three areas of potential procedural reform:

a) encouraging earlier preparation,

b) fostering a culture of disclosure and

c) implementing guided decision making.

5.2.12 Early conferences with the investigator are useful to discuss the disclosure certificate, what material has not been provided, what additional material could be obtained and any concerns about sensitive material. Early witness conferences can also facilitate earlier disclosure because the prosecutor can make an early assessment of the witness’ credibility, promptly request any necessary supplementary statements and issue requisitions arising from the conferences well prior to the hearing. Early preparation is, however, necessarily dependent on prosecutors having sufficient time and resources to review the material well prior to trial.

5.2.13 Fostering a culture of disclosure involves prosecutors respecting the important rationales for the disclosure obligations, acknowledging the serious consequences of non-disclosure and striving to maintain high ethical standards. This can be achieved when prosecutors acknowledge and learn from examples of non-disclosure, consult senior colleagues regarding difficult disclosure issues and confirm that there has been proper disclosure whenever they assume carriage of a prosecution. Given that it is very difficult for a defendant to detect non-disclosure, there may be merit in considering procedures whereby compliance is monitored. It is difficult to foster a culture

know how prosecutors assess relevance, objections and defences and comply with the disclosure obligations within their legal and ethical frameworks.

380 Useful discussion points include whether there may be any relevant material generated before the investigation commenced (such as a referral or intelligence) and/or any other related investigations (such as an internal investigation or inquiry by another agency).

381 Guideline 19, DPP Guidelines states that early conferences enable more accurate disclosure of relevant material.

382 In AJ v The Queen [2011] VSCA 215 at [39], the prosecutor accepted that whenever a matter is transferred, the duty of disclosure arises for consideration again by the new prosecutor and the court stated that it is the personal responsibility of each new prosecutor to ensure that the duty has been discharged before the trial starts and as the matter continues.

383 This could involve review by senior prosecutors in occasional matters to detect non-disclosure but it would be far too time consuming to implement in all matters. Schedule 1 of the Director of Public Prosecutions Regulation 2015 requires the investigator’s disclosure certificate to be “received and noted” by the investigator’s superior officer but it is difficult to know whether that involves any meaningful review.
of disclosure when there is any fear that the defendant may misuse the
disclosure material. Documents produced under subpoena and the brief
served under court order are subject to an implied undertaking that they must
not be used for a collateral purpose without leave of the court.384 Similarly,
documents obtained under civil discovery must not be used for a collateral
purpose unless the court grants leave.385 There is no such requirement for
disclosure material so prosecutors can consider disclosing material subject to
an undertaking that it not be further disclosed.386

5.2.14 Prosecutors should be encouraged to carefully consider all the ways in which
the material could potentially be relevant and carefully think through the
potential exceptions to disclosure. To ensure prosecutors consider all relevant
factors when making their decisions, it would be useful to consider
implementing a disclosure checklist, a list of relevant considerations and/or a
guided decision-making framework.387

Technology

5.2.15 Technology can assist prosecutors determine whether material should be
disclosed.

5.2.16 In many investigations, a huge amount of data is collected. Investigators can
obtain large volumes of material including communications,388 images,389

384 Where a defendant obtains documents which another is compelled to produce, such as in
response to a subpoena or in accordance with court orders to serve evidence, then the
defendant is under an “implied undertaking” not to use such material for any other purpose
without the leave of the court, see Hearne v Street (2008) 235 CLR 125 at [96].

385 Rule 21.7(1) of the Uniform Civil Procedure Rules 2005 provides that no document
obtained as a result of discovery are be disclosed or used otherwise than for the purposes of
the conduct of the proceedings, except by leave of the court, unless the document has been
received into evidence in open court.

386 Such undertakings can be tailored as appropriate to allow disclosure to the defence team
for the purpose of the current proceedings. See also section 281D(5) Criminal Procedure Act
1986 which allows the prosecutor, when giving the defendant a sensitive evidence notice, to
require access subject to conditions to ensure that there is no unauthorised reproduction or
circulation of the sensitive evidence.

387 A guided decision making framework to assist prosecutors determine what should be
disclosed is set out in Appendix A.

388 For example, if communications to a witness are potentially relevant, the prosecutor may
need to disclose emails, texts, call records, messaging, Skype, Facebook, Twitter and other
social media. When the content of a document is potentially relevant, the prosecutor may
need to disclose the original document, drafts, revisions, collaboration versions, electronic
signature record and other metadata.

389 For example, if images are potentially relevant, the prosecutor may need to disclose the
original images, saved versions, edited versions, video images, CCTV images, private
surveillance images, the image metadata, images transmitted via Instagram, Snapchat and
other social media.
The larger the volume of material gathered during the investigation, the more material is potentially disclosable. It can be very difficult to review a large volume of material, isolate the various sources of information, decipher what each document means, consider how the documents relate to each other, filter out the irrelevant material and determine which material meets the disclosure test.

5.2.17 The tools used by civil lawyers to determine whether a document is relevant for discovery can be useful for criminal lawyers to determine whether a document is potentially relevant for disclosure. Technology assisted review ("TAR") has been accepted in some civil litigation. Prosecutors may find some functions of TAR helpful to understand how the material fits together, including chronological document sorting, email threading, financial transaction tracing, removing exact duplicates and highlighting discrepancies in similar documents. Other functions of TAR may assist prosecutors in finding meaning within a large data set, including keyword searches for particular phrases, translating foreign text and analysing audio and video content. TAR can potentially also be used by prosecutors to understand the relevance of individual documents, including reviewing unusual metadata, plotting unusual locations, flagging unusual communications, identifying unusual images and indicating unusual encryption.

5.2.18 Encouraging prosecutors to use TAR more widely to assist them to comply with their disclosure obligations will involve consultation with the relevant stakeholders, funding for TAR software, training for prosecutors, fair access for defence, practice notes to streamline the process and introducing a Conduct Rule requiring prosecutors to be competent in such technology.

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390 If an audio file is potentially relevant, the prosecutor may need to disclose the original audio record, the listening device warrants, the telephone intercept warrants, the call charge records, the transcript, the audio log, the audio metadata, the phone records, the mobile phones, the tablets and the other smart devices which capture ambient sound.

391 If the defendant’s location is potentially relevant, the prosecutor may need to disclose vehicle tracking records, vehicle e-tag records, vehicle GPS records, mobile phone location service records, phone tower records, public transport trip records, taxi fare records, swipe card records and electronic anklet records.

392 In *McConnell Dowell Constructors (Aust) Pty Ltd v Santam Ltd & Ors* (2016) 51 VR 421, a construction dispute involving over 4 million potentially relevant documents, the court approved the use of de-duplication technology (a recognised tool to eliminate duplicate documents from an initial pool of documents) and predictive coding technology (an accepted method which enables a computer to be trained to recognise concepts in the electronic documents fed into the system which are relevant to the issues in the proceeding).

393 There are currently no practice notes regarding TAR in criminal matters. *Supreme Court Practice Note No. SC Gen 7, Use of Technology*, issued 9 July 2008, commenced 1 August 2008, encourages the use of technology in civil litigation and includes guidelines on the matters to take into account in deciding how to make use of technology.

394 The *Conduct Rules* do not address TAR. Clause [8], American Bar Association, Comment on Rule 1.1 of the *Model Rules of Professional Conduct*, issued 16 August 2018,
6 Conclusion

6.1 The present situation regarding disclosure in NSW is unsatisfactory.

6.2 It is unfair for defence solicitors to be forced to serve subpoenas to obtain material which should have been disclosed when proper disclosure is so fundamental to ensuring a fair trial. It is unfair for prosecutors to grapple with so much uncertainty regarding which material should be disclosed when the consequences of non-disclosure are so grave.

6.3 Active consideration should be given to the reform options discussed above to bring more clarity to this complex issue.

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The views expressed in this paper are personal opinions based on a review of selected cases and legislation as at October 2018. I would like to acknowledge the helpful comments of Hugh Selby, Joanna Murray, Kate Bleasel and Adrian Hizo in the preparation of this paper. I am also deeply thankful to my husband for his support.

requires lawyers to keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.
Appendix – Decision Making Framework

This is a framework designed to assist prosecutors determine whether material should be included in the disclosure material provided to the defendant in criminal proceedings. There are 20 sequential steps to identify the relevant factors when deciding which material should be disclosed.

1. What is it?
   a. Who prepared it?
   b. When was it prepared?
   c. Why was it prepared?
   d. What does it mean?
   e. What else could it mean?
   Go to 2.

2. What is the case about?
   a. What are the elements of the offence/s?
   b. What are the potential defences?
   c. What are the potential objections to evidence?
   d. What are the issues in the case?
   e. What are the potential aggravating and mitigating factors on sentence?
   Go to 3.

3. Has an identical document already been served within the brief? If yes, no need to disclose. If no, go to 4.

4. Should it be served within a supplementary brief?
   a. Could it be relevant to prove the elements of the offence?
   b. Could it be used to examine the prosecution witnesses?
   c. Could it be used to cross-examine the defendant/defence witnesses?
   d. Could it be used to examine the prosecution’s expert?
   e. Could it be used to cross-examine the defendant’s expert?
   If yes, serve it in the supplementary brief. If no, go to 5.

5. Has an identical document already been disclosed to the defendant in the current proceedings? If yes, no need to disclose. If no, go to 6.

6. Is the material potentially relevant?
   a. Is it relevant to an issue in the case?
   b. Is it possibly relevant to an issue in the case?
   c. Does it raise a new issue?
   d. Could it possibly raise a new issue?
   e. Does it hold out a real prospect of providing a lead on evidence relevant or possibly relevant to an issue in the case?
   f. Does it hold out a real prospect of providing a lead on evidence which raises or possibly raises a new issue?
   g. Does it weaken the prosecution case?
   h. Does it strengthen any potential defence? and/or
   i. Is it relevant to the guilt or innocence of the defendant?

395 This guide is not intended to replace a good working knowledge of the common law principles, the Conduct Rules and the relevant legislation.
If yes, go to 8. If no or unsure, go to 7.

7. Could it be used by the defendant to:
   a. support a potential defence,
   b. provide a lead to further enquiries,
   c. brief the defendant's expert,
   d. object to prosecution evidence,
   e. cross-examine a prosecution witness,
   f. attack the credibility of a prosecution witness,
   g. implicate a prosecution witness,
   h. cross-examine the prosecution's expert,
   i. challenge an evidentiary certificate,
   j. seek a direction that prosecution evidence is unreliable,
   k. seek a warning and/or
   l. mitigate any sentence?
      If yes, go to 8. If no, no need to disclose.

8. Does rule 29.5 of the Conduct Rules restrict disclosure?
   a. Is there reasonable grounds to believe that disclosure would seriously
      threaten the integrity of the administration of justice?
   b. Is there reasonable grounds to believe that disclosure would seriously
      threaten the safety of any person?
      If yes, consult the investigator, don't disclose, notify the defendant that
      material has been withheld and go to 19. If no, go to 9.

9. Are there any statutory disclosure restrictions which potentially restrict
   disclosure, such as:
   a. any court ordered disclosure restriction/s, and/or
   b. any mandatory disclosure restriction/s?
      If yes, go to 10. If no, go to 11.

10. Are there any potential exceptions to the disclosure restriction?
    a. Is disclosure permitted for the purpose of the current proceedings?
    b. Is disclosure permitted with the consent of a court?
    c. Is disclosure permitted with the authorisation of another party?
    d. Is it possible to vary a court ordered disclosure restriction to permit
        disclosure?
       If yes, go to 11. If no, consult the investigator, don't disclose, notify the
       defendant that material has been withheld and go to 19.

11. Has a court held that the material is subject to a valid claim of public interest
    immunity? If yes, consult the investigator, don't disclose, notify the defendant
    that material has been withheld and go to 19. If no or unsure, go to 12.

12. Is it possible that, if the defendant seeks to subpoena or adduce the material,
    an agency may seek to claim public interest immunity? If yes, consult the
    investigator, don't disclose, notify the defendant that material has been
    withheld and go to 19. If no, go to 13.

13. Has a court held that the material is subject to a valid claim of legal
    professional privilege? If yes, go to 15. If no or unsure, go to 14.

14. Is it possible that, if the defendant seeks to subpoena or adduce the material,
    a client may seek to claim privilege? If yes, go to 15. If no, go to 16.

15. Are there any potential exceptions to legal professional privilege?
    a. Does the client authorise disclosure?
b. Has the client directly or indirectly waived privilege?
   If yes, go to 16. If no, consult the investigator, don’t disclose, notify the defendant that material has been withheld and go to 19.

16. Are there any other potential restrictions on disclosure, such as:
   a. material required to be dealt with by sensitive evidence notice;
   b. material required to be dealt with by terrorism evidence notice;
   c. material subject to sexual assault communications privilege; and/or
   d. material subject to the implied undertaking not to use court documents for a collateral purpose?
      If yes, consult the investigator, don’t disclose, notify the defendant that material has been withheld and go to 19. If no, go to 17.

17. Should any parts of the material be redacted before disclosure?
   a. Does the material include any address, date of birth or telephone number of any living person which is not materially relevant? If yes, redact or seek court order.
   b. Does it include any information about persons who cannot be identified? If yes, redact identifying information and use pseudonyms. Go to 18.

18. Is it necessary to take any additional steps to prevent misuse of material before disclosure? If yes, consider seeking orders, undertakings and/or supervised access then disclose the material. If no, disclose the material then go to 19.

19. If any material has been withheld, may the effect be to render the trial process, viewed as a whole, unfair to the defendant? If yes, reconsider disclosure or discontinue the proceedings. If no, does that remain the correct answer as the case progresses? Go to 20.

20. Is there any other material which should be disclosed?
   a. Is there any other potentially relevant material within the investigator’s current file?
   b. Is there any other potentially relevant material within other files regarding related investigations or other investigations involving the same defendant or the same witness/es?
   c. Is there any other potentially relevant material within the prosecutor’s current file?
   d. Is there any other potentially relevant material within other files regarding related prosecutions or other proceedings involving the same defendant or the same witness/es?
   e. Is there any other potentially relevant material held by third parties?
      If yes, make enquiries to obtain the material and go to 1. If no, does that remain the correct answer as the case progresses?
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