



## Disclosure in criminal proceedings

**Date: Monday May 15, 2023**

A fundamental part of the criminal justice system is the disclosure of evidence by the prosecution. When criminal proceedings are commenced, the accused has the right to be informed in detail the nature and reason for a charge. This right has even been entrenched in Queensland's *Human Rights Act* because, without fair and full disclosure, an accused's right to a fair trial can be jeopardised.

This blog explains the disclosure process in criminal proceedings (where police have laid charges) and outlines the rights of accused persons who find themselves in the criminal justice system.

### Who bears the duty of disclosure in criminal law proceedings?

The 'duty' (or responsibility) of disclosure rests with the police and prosecutors.

At the time of charging a person, the arresting officer must be satisfied there exists sufficient evidence to prove the offence beyond reasonable doubt. Usually, a person is not charged until all such evidence has been gathered.

Although prosecutors conduct criminal cases once they reach court, the duty of disclosure is ongoing, and it extends to both the police and the prosecution.

For completeness, the defence also has a duty of disclosure - albeit only in relation to alibi evidence, expert evidence, and where there is an intention by the accused to adduce evidence of a representation made by a person who is unavailable.

### Rules, duties and principles of disclosure in criminal law

The rules, duties and principles underpinning disclosure in criminal matters predominantly derive from legislation, case law, the Queensland Police Service Operational Procedures Manual, the Australian Solicitors Conduct Rules, and the Office of the Director of Public Prosecutions Guidelines.

Some of the most important concepts include the following:

- The Crown has a duty to make full and early disclosure of the prosecution case to the defence. The duty extends to all facts and circumstances and the identity of all witnesses reasonably regarded as relevant to any issue likely to arise in either the case for the prosecution or the defence (Office of the Director of Public Prosecutions Guidelines, part 29).
- A prosecutor must disclose to the opponent as soon as practicable all material (including the names of and means of finding prospective witnesses in connection with such material) available to the prosecutor or of which the prosecutor becomes aware which could constitute evidence relevant to the guilt or innocence of the accused other than material subject to statutory immunity unless the prosecutor believes on reasonable grounds that such disclosure, or full disclosure, would seriously threaten the integrity of the administration of justice in those proceedings or the safety of any person (Australian Solicitors Conduct Rules, rule 29.5).
- When new and relevant evidence becomes available to the prosecution, that new evidence should be disclosed as soon as practicable. The duty to disclose exculpatory information (that is, information that exonerates or tends to exonerate the defendant of guilt), continues after conviction until the death of the convicted person (Office of the Director of Public Prosecutions Guidelines, part 29).
- The administration of criminal justice relies on the investigative work of police, whose function it is to investigate an alleged offence and to collect and assemble the relevant evidence. Judges and juries depend 'utterly upon the integrity of that process' (*R v Ernst* [2020] QCA 150 at [35]).

## How does disclosure work in criminal law proceedings?

The disclosure process predominantly occurs in the Magistrates Court, as this is where all criminal matters commence, and where both partial and full briefs of evidence are requested by the defence.

The two different types of briefs are defined as follows:

### Partial brief of evidence

A brief which contains copies of signed statements of the prosecution witnesses who will provide the "substantial evidence" in the matter and copies of exhibits of substantial evidence for the purpose of a committal for sentence.

### Full brief of evidence

A brief which contains copies of signed statements of witnesses and exhibits upon which the prosecution proposes to rely on in the proceeding and all things in the possession of the prosecution, other than things the disclosure of which would be unlawful or contrary to public

interest that would tend to help the case for the defendant.

In terms of the process, whilst magistrates are bound by the legislation governing disclosure (discussed below), practice directions have been created to compliment the legislation and to ensure that disclosure procedures are followed.

By way of example, Magistrates Court Practice Direction No. 13 of 2010 stipulates that:

- Where the defence requests specified witness statements or exhibits, the prosecution is to make that material available within 14 days of the request.
- In summary matters (that is, matters that can be finalised in the Magistrates Court), the prosecution must disclose the full brief of evidence within 35 days of the matter being listed for trial, and at least 14 days prior to trial.
- In committal matters (being matters which can only be dealt with in a higher court), the full brief of evidence must be disclosed within 35 days of the matter being listed for committal mention or committal hearing.

Disclosure requests can be made orally in court and also directly to the prosecution in writing.

## What disclosure am I entitled to?

The first item of disclosure an accused person is entitled to is the QP9 or 'court brief' - a document summarising the police allegations. This must be provided prior to the first court appearance. Thereafter, a partial or full brief of evidence can be requested.

Importantly, certain disclosure is mandatory, whereas other disclosure is not.

### Mandatory disclosure

Pursuant to the *Criminal Code*, the prosecution must disclose *all things* in its possession (including in the possession of police) that would tend to help the accused's case, unless doing so would be unlawful or contrary to public interest.

In addition to the prosecution brief of evidence, disclosure that must be made includes: forensic reports and tests, and written notice which describes the evidence on which the prosecution intends to rely.

### Disclosure on request

Disclosure that is not mandatory but which can be requested by the defence (and which must then be disclosed) can include: criminal histories of proposed witnesses, evidence not intended to be used/relied on by the prosecution, and anything that may be adverse to the reliability or credibility of a proposed witness.

# Can the prosecution refuse disclosure?

There are certain categories of evidence which the prosecution may be entitled to refuse or, alternatively, to place limitations on. Most commonly, anything considered to be 'sensitive evidence' can attract disclosure limitations.

Evidence which might fall within this category includes:

- interviews with children;
- child exploitation material; and
- anything displaying an image which might be considered to be obscene or indecent or which would interfere with that person's privacy.

Where this occurs, usually, the defence will need to attend a police station or the prosecutor's office to view the evidence.

Conversely, if a copy of the evidence is supplied, the defence lawyer may need to undertake not to copy or distribute the evidence, including by providing it to their client.

In terms of evidence the prosecution is **not** required to disclose, there are two main categories:

1. Protected counselling communications (which require an application to, and orders by, a court); and
2. Anything which, if disclosed, would be contrary to the public interest, including anything which could:
  - facilitate the commission of another offence;
  - prejudice the prevention, investigation or prosecution of the offence; and
  - cause unlawful or dishonest interference with witnesses.

## Conclusion

Disclosure requests and complaints about inadequate disclosure often require forensic consideration and decision-making by experienced criminal defence lawyers. Carefully considered tactics need to be employed because, in certain cases, it may not be in the accused person's best interests to seek disclosure.

There are also some cases in which applications to the court will need to be made. We, therefore, recommend that you contact our experienced team at Gilshenan &Luton for assistance.

## Contacting Gilshenan &Luton Criminal Defence Lawyers

[07 3361 0222](tel:0733610222) (24/7)

[gnl@gnl.com.au](mailto:gnl@gnl.com.au)

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