Networked Knowledge Briefing Paper

Networked Knowledge Prosecution Reports

This page set up by Dr Robert N Moles

[Underlining where it occurs is for NetK editorial emphasis]

Table of Contents

The Crown's Duty of Disclosure in Australia

The duty of disclosure applies broadly to 'the Crown' in criminal trials in Australia. It extends to all those who may assist in the prosecution of a case. Whilst prosecutors take the lead in prosecutions, they must ensure that all of those assisting them understand and comply with this duty. This includes police investigators, expert witnesses, forensic experts, other witnesses and any people acting on behalf of the Crown who may have relevant information.

The role of the prosecutor

An early Canadian case [1955] stated the key principles applying to prosecutors in criminal trials. They were taken up and applied in Britain and Australia and are contained in the barrister's and prosecutor's rules and guidelines which are in common form in Australia.

The prosecutor:

- must provide the court with all relevant evidence;
- must not use inflammatory or vindictive language;
- must not express a personal opinion or belief in the case

Prosecutors must be guided by the principles of:

Fairness at all times: This starts from the pre-trial period and continues even after any trials and appeals have been concluded. The goal must be to ensure that any trial was fair and in accordance with the rule of law. The motivation must not be to obtain a conviction 'at all costs'.

Independence and equality: prosecutors must apply the law to all without fear or favour and without influence from police, complainants, victims, or politicians.

Impartiality: prosecutors are 'minister of justice', and must act in a consistent, objective and transparent manner in all cases.

Professional rules and guidelines

The prosecution guidelines and barristers' rules reinforce the professional and ethical duties of prosecutors to ensure the integrity of the criminal justice system. Any breach may diminish public confidence in that system. The rules state that:

A prosecutor must fairly assist the court to arrive at the truth. He or she must impartially lay the whole of the relevant evidence intelligibly before the court, and assist the court with

adequate submissions of relevant law and applicable precedents to enable the law properly to be applied to the facts.

A prosecutor must not argue any proposition of fact or law which the prosecutor does not believe on reasonable grounds to be capable of contributing to a finding of guilt and also to carry 'weight' by virtue of being directly relevant to the charge or charges involved.

Disclosure to the defence

A prosecutor must disclose to the defence as soon as practicable all material which could constitute evidence relevant to the guilt or innocence of the accused. There may be an rare exceptions for material subject to statutory immunity, or where full disclosure may threaten the integrity of the administration of justice or the safety of any person.

A prosecutor must call all relevant witnesses

- they are those whose testimony is admissible and necessary for the presentation of all of the relevant circumstances unless there is consent not to call a witness; or subject to the following exceptions:
    - where the only matter with respect to which the particular witness can give admissible evidence has been dealt with by an admission on behalf of the accused;
    - which goes to establishing a particular point already adequately established by another witness;
    - where the prosecutor believes on reasonable grounds that the testimony of a particular witness is plainly untruthful or is plainly unreliable;
    - where the prosecutor believes on reasonable grounds that the interests of justice would be harmed if the witness was called as part of the prosecution case.

The prosecutorial duties of impartiality, full and proper disclosure, not misleading the court and calling all relevant witnesses (including those whose evidence may be exculpatory – clearing of blame or wrongdoing – of the guilt of the accused) are particularly important in maintaining the rule of law and the right to a fair trial.

The prosecutor as a ‘Model Litigant’

There are model litigant rules which set practical and ethical standards for those acting on behalf of government agencies in relation to the conduct of litigation. They are underpinned

by the Crown's obligation to justice and the rule of law. The source of the Crown's power is in the public trust to be exercised in the public interest, and the litigation advantage enjoyed by the Crown by virtue of its size and resources.

The rules state that the prosecutor will act with complete propriety, fairly and in accordance with the highest professional standards which may go beyond the need to just act honestly and in accordance with the law. The corollary is that the prosecutor will not use the legal process for any ulterior or improper purpose.

Deciding to prosecute

A decision to prosecute should only be taken where:

- there is a reasonable prospect of a conviction, and
- the prosecution is in the public interest.

The existence and reliability of any forensic or medical evidence must be taken into account, as well as the credibility and reliability of the prosecution witnesses. (It has been held that a jury decision inconsistent with a unanimous or unchallenged expert opinion would necessarily be an 'unreasonable' jury decision).

A decision to prosecute should not be influenced by any personal feelings concerning the offence, the offender or any victim, nor by any possible political advantage or disadvantage to the government or the possible effect of the decision on the personal or professional circumstances of those responsible for it.

Where the prosecutor is perceived to have strayed beyond the limits of the proper exercise of the prosecutorial discretion, an accused always has recourse to the courts to restrain the improper exercise of this power.

Failure to disclose

A failure to make an appropriate disclosure would likely give rise to a wrongful conviction except where the matter is trivial or insignificant. This is because the loss of the opportunity to cross-examine witnesses about the non-disclosed material is in itself indicative of a miscarriage of justice. It is important to emphasise that a single significant failure to disclose may require the conviction to be set aside. The test is whether there is a reasonable likelihood that the material, if disclosed, may have influenced the jury in arriving at its verdict. If it may have done, the conviction must be set aside. The creation of a reasonable doubt is not consistent with the upholding of a guilty verdict.

Lack of full disclosure of relevant material in the possession of the Crown is becoming increasingly important as all jurisdictions are beginning to recognise the extent of past failures. The High Court of Australia has said the prosecution is obliged to disclose to the defence all material available to it which was relevant or possibly relevant, in order for there to be a fair trial.

The obligation to inquire and to retain relevant material

The duty of disclosure includes the obligation to make inquiry to ascertain whether discoverable material exists and to ensure its preservation. That includes material which goes to the credit – or otherwise – of prosecution witnesses. It may include, for example, a previous inconsistent statement, or any other matter adverse to the character of a prosecution witness. This is particularly important with regard to 'expert' witnesses called by the prosecution. With reference to the issue of forensic experts it should be noted:
the Encyclopedia of Forensic Sciences states:

> The duty to correct and notify is an ethical and professional obligation of criminal legal system stakeholders when an adverse event occurs. Upon the discovery of the adverse event, the duty to correct requires that the forensic science service provider (FSSP) identify the affected cases, determine the system-level root and cultural causes, and remedy and correct all instances of the problem. The duty to notify requires the FSSP and criminal legal system stakeholders to initiate a publicly accountable process to notify all individuals impacted by the adverse event regardless of their case or incarceration status.

This issue is especially significant in the context of the cases referred to at the end of this briefing paper. This underscores the point previously made, that the prosecutorial guidelines state that the duty of disclosure (which includes the duty to identify and correct false and misleading evidence) is ongoing, and continues even after the trial and any appeals are otherwise finalised.

The obligations of disclosure are demanding because of the inequality of resources between the State and the accused. It has been said that the resources that are mobilised by the State are immense by comparison to those generally available to the accused.

Unimpeded access to a court and the right to fair disclosure are inseparable aspects of the right to a fair trial. This means that those acting on behalf of the Crown may not suppress evidence available to it which is material to the contested issues in the trial. This is especially so where the material evidence known to or available to the Crown may cast a significant

light on the credibility or reliability of material prosecution witnesses or the acceptability and truthfulness of exculpatory evidence by or for the accused.

The Crown as an indivisible entity

What constitutes the Crown for the purposes of disclosure may extend to any relevant departments, including forensic services and the police service, or any other government agencies, which may have relevant exculpatory information. The courts do not draw a distinction between the prosecution, the police or another government agency for the purposes of prosecution disclosure (or any failure to disclose).

It has been said that if material is known to the police, for example, the accused is entitled to it, whether or not its existence was known to prosecuting counsel. In such a case, it is not necessary for the court to determine whether the failure to disclose was due to any fault on the part of the prosecutor. When determining fairness to the accused in a criminal trial the court is not concerned with the question as to whether a prosecutor has complied with their professional obligations, but whether the prosecution (and those supporting the prosecution team) have failed to disclose any relevant material or issues.

Legislative provisions governing disclosure duties between police and prosecutors also set out a continuing duty on the investigating police to disclose to the DPP all relevant information, documents and other evidence obtained during the investigation that might reasonably be expected to assist the case for the prosecution or the case for the accused person. The DPP guidelines direct prosecutors that, subject to the exceptions noted above, all such material should then be disclosed in a timely manner by being made available to the defence.

Duty to explain limitations in the prosecution evidence

The prosecution has an obligation properly to disclose any limitations in its evidence. This is a corollary of the obligation '*to have the whole of the relevant evidence placed intelligibly before the court.'*

Whether the failure to disclose certain deficiencies in the evidence of a prosecution witness has led to a miscarriage of justice will depend upon the importance of that witness's evidence and whether there was any issue of witness credibility with respect to it.

In cases where credibility is in issue in the trial, the admission of inadmissible evidence, the rejection of admissible evidence or the unavailability of significant and relevant evidence that later comes to light may require a verdict to be set aside.

If the Crown presents a person as a reliable witness and fails to disclose prior questionable activities that omission may constitute a disingenuous basis upon which to present the witness. It may mean that the accused has been prevented from opening up a fertile ground of cross-examination which may require the conviction to be quashed. This is not an issue to which the fresh-evidence rule applies in criminal appeals.

If the Crown wishes to rely upon forensic evidence, for example, the prosecutor has a clear duty to all involved to explain in ordinary language the aspects of the discipline and methodology involved to enable them to make a proper evaluation of the opinions expressed by the forensic expert. If the evidence is of a comparatively novel kind, the duty resting on the Crown is even higher. It is not sufficient to say the defence may draw such information out in cross-examination. Not making the information available for the benefit of the Court is an abdication of the Crown's responsibility.

Legal professional privilege

It is accepted that the prosecutor has a duty to disclose material which might assist an accused person in the conduct of their defence or which might reasonably lead to assisting the defence through exposing a relevant line of inquiry. However, there may be circumstances where meetings with expert witnesses, who might be called by the prosecution, may be subject to legal professional privilege. It has been accepted that if relevant information was provided in the course of such a meeting, the duty of disclosure takes precedence over the legal professional privilege, requiring disclosure be made to the defence. This includes anything which might go to the credibility of a witness, the reliability of the procedures or any other matter which might open up a new line of inquiry for the defence.

Prosecutors have sometimes suggested that they would have been willing to disclose relevant information '*if requested to do so'*. However, this presupposes sufficient knowledge on the part of the accused on which to base such a request. Often that knowledge will be lacking and the accused person will be unaware that such information exists. That position is not consistent with a 'duty to disclose' and which requires disclosure in the absence of any such request.

Prosecutors have sometimes said that they regarded the duty as being satisfied by the provision of all reports and that records of intermediate consultations were usually not handed over. It has been acknowledged that such a practice falls short of the required duty of disclosure. It has also been recognised that where such a 'systemic error' is identified in one case, the appropriate institutional response is to conduct an inquiry to identify other possibly deficient cases in order to rectify them. There should have been no distinction between file notes of conversations and more formal expressions of opinions in statements and reports.

Public confidence in the trial process

The central question is whether in the absence of material evidence the accused received a fair trial, understood as a trial resulting in a verdict 'worthy of confidence'. The 'fruits of investigation' are the 'property of the public to be used to ensure that justice is done'. The fundamental issue is whether exculpatory evidence not presented to the jury led to a conclusion that the trial cannot enjoy public confidence. These issues go beyond the interests of the parties to the case – it is a question of the integrity of the public system of law and justice.

It is not sufficient to say a prosecution witness was willing to divulge information, but was simply not asked. A defence lawyer should not be put in the position of having to try to find out in front of the jury if such material exists. Where the issues are uncertain, there are risks involved in questioning such a witness in front of the jury. There is no reason why the defence in a criminal trial should be obliged to 'fossick for information' of this kind to which it is entitled.

To treat this issue of disclosure as one amenable to the rules governing fresh or new evidence following a criminal trial is effectively to convert the prosecutor's duty to disclose into an accused's obligation to find out. The essential question is whether, if the jury had known about the additional material, it would have cast doubt on the essential features of the prosecution case. Or, was the body of evidence which was not presented to the jury potentially significant?

As mentioned above, the point of appellate review is not to discover whether there was misconduct by the prosecution. It is to determine whether the non-disclosed material was relevant to the credibility and reliability of the prosecution witnesses or the prosecution case.

Failure to disclosure to the defence, the jury, or to the court?

Whilst often treated as an issue of a failure to disclose to the defence, the courts have made it clear that the fundamental question is whether there has been a failure to disclose 'to the jury' – or to 'the court'. In some cases, there may have been in existence facts or evidence which were either ignored or overlooked by the defence. In such cases, it is important to bear in mind that where a miscarriage of justice is said to arise from a failure of process, it is the process that is judged, not the performance of the participants in the process. Where the conduct of counsel is said to give rise to a miscarriage of justice, it is what was done or omitted that is of significance, rather than why that occurred.

The duty to disclose must be timely: it is a continuing obligation

The duty must be timely which means other parties, especially the defence, must be notified without delay, so as to enable them to make a proper assessment of the issue before other relevant evidence may be lost or mislaid. To say the duty continues after the trial, means that it continues in perpetuity, until the matter is effectively resolved.

Professional people should disclose all matters within their knowledge – whether they believe they are relevant or not – which other relevant professionals may wish to take into consideration. The duty is based upon the expectation between experts that they will at all times be full and frank in their dealings with each other.

Professional reports should be of a high standard in presentation and appropriate to the purpose for which they are intended. They should include detailed descriptions of issues considered, how the conclusions interpret those issues, and any other relevant investigations. The findings should be laid out in clear, concise language, which will be readily understood by lay persons.

It is clear that an individual expert's subjective opinion as to relevance or significance could not be a sufficient reason for not disclosing results which other experts might reasonably wish to consider. If additional test results are not referred to at all, then the report will not contain information which others may need to evaluate. If an expert was entitled not to disclose information just because it was considered to be not relevant or potentially relevant, then the underlying reasons for requiring disclosure would be liable to be defeated. This is not just common sense and good practice; it is also good law.

If an expert were able to say that because they were able to discount certain factors, nobody else would need to consider them, the inherent danger would be obvious. The suggestion that a failure to disclose results because the reports on them were produced by other experts is also entirely without merit. So too is the claim that results were not disclosed because they were thought to be known to other experts.

Prosecution concessions

Once in possession of evidence that the trial process was inappropriately compromised, prosecutors, forensic and police services have a duty to ensure appropriate remedial steps are taken.

Whilst it may not be the responsibility of the prosecution to tell an appeal court that they think the appeal should be allowed, they may well tell the court that they do not object to such a course.

Australian prosecutors have generally been reluctant to make such concessions. By way of comparison, the practice in other countries is somewhat different.

In the UK for example, the prosecution conceded that where a conviction was supported by a jailhouse confession, the fact that the informant had been the recipient of a previous confession in another case ought to have been disclosed.

The prosecution stated that whilst recognizing that the ultimate responsibility lies with the court, the view taken on behalf of the prosecution is that the court should concede that the conviction is unsafe and therefore needs to be set aside. It accepted that if there is material that ought to have been available to the defence which might have caused doubt to be cast about the witness, then the fact that that evidence was not available at the trial must lead to the conclusion that the resulting conviction was unsafe.

In the UK, in three cases where people had been hanged, the Crown stated that it did not seek to uphold the convictions. By contrast in Australia, the Hon Michael Kirby, former justice of the High Court, stated that in 12 years on the court, he had only come across one case in which the prosecution allied itself with the defence claim that the Crown's reasoning at the trial did not support the upholding of the conviction. Whilst there have been some additional cases of Crown concessions since then, there is still a prevalent practice by prosecutors to seek to uphold convictions where the evidence in support of them has been shown to be fundamentally flawed.

There has been one Western Australian case where the Crown conceded that advances in science had proven the Crown case at trial to have been misconceived due to the erroneous understanding at that time.

There was also a case in New South Wales (NSW) where the prosecution accepted that a royal commission in Western Australia had found that the evidence at a trial there had been compromised by the planting of evidence and a false confession. The Crown in NSW accepted that the verdicts in a related case there had been tainted by that finding and could no longer stand.

The duty of disclosure and the expert witness

The duty of an expert instructed by the prosecution is to act in the cause of justice, not solely in the cause of the Crown.

If, while investigating, an expert does a test which casts doubt on the evidence against an accused person, or a laboratory test shows a result favourable to the accused, there is a duty on the expert to disclose the fact to those instructing him or her. They, in turn, have a duty to disclose the result favourable to the defence, to the defence. This duty exists irrespective of any request by the defence: that is, whether the defence "asks the right questions" or not. It is not confined to the documentation or other materials upon which the findings of the expert are based. It extends to anything which might arguably assist the defence. It is a positive duty which, in the context of scientific evidence, obliges the prosecution to make full and proper inquiries from forensic scientists to ascertain whether there is discoverable material.

The fact that information may ultimately be found to be of no real significance should be wholly excluded from the minds of the prosecution when the question of disclosure is being considered. Relevant evidence may go beyond that which is obviously of help to the accused or which will obviously advance the accused's case. It may be of help to the accused to be able to consider additional material evidence which the prosecution has gathered.

The growing awareness of failures to disclose overseas

The issue of failures to disclose has been a perennial problem in all jurisdictions. An emerging scandal in the UK is of particular note. It has been recently reported (2021) that over 1,600 prosecutions have had to be abandoned by the Crown Prosecutorial Service in the UK due to failures in disclosure. The report indicates that some involved major criminal trials and cases involving serious rape allegations. A £34m ($62m AUD) money laundering trial had to be abandoned or not proceeded with.

The greatest scandal in British legal history has involved the Post Office failing to disclose that the software system which it used across all post offices had serious flaws. Over 700 people had been convicted for theft, embezzlement or fraud, and a great many more had been forced to pay back money which was not if fact owed. This conduct led to deaths from suicide, failed businesses and marriages and other catastrophic outcomes for their former employees and sub-contractors. Over 60 convictions have been overturned and public appeals have been made to inform others of their right to do so. Compensation cases continue in 2022-23.

Australia is lagging behind

Other legally comparable countries do have systems or programs in place to address the issues of wrongful convictions. The USA has conviction integrity units in some states within prosecutorial departments, in addition to their extensive network of Innocence Projects. Britain, Norway and New Zealand have Criminal Cases Review Commissions (CCRCs). Canada has a well-established Innocence Project and has developments in place for the establishment of a CCRC. Australia is the only comparable country which has none of these initiatives in place or in contemplation.

As a consequence, the USA had identified over 3,000 wrongful convictions in the past 20 years or so. Britain because of its CCRC has identified over 550 wrongful convictions. Australia, by comparison continues to defend cases which are manifestly wrongful convictions and refuses to investigate cases involving the most serious cases of systemic error ever to have occurred in any comparable country. See for example, the cases of Susan Neill-Fraser and Kathleen Folbigg.

South Australia employed a chief forensic pathologist for 27 years whilst knowing throughout that time that he was not qualified to conduct autopsies, and that he was not qualified to give evidence in court as an expert witness. The head of the forensic science centre actually gave sworn evidence in court to that effect. Despite Crown and public knowledge of that information, he was instructed to conduct 10,000 unlawful autopsies, and required to give false and misleading evidence in support of some 400 wrongful convictions over the next 20 years. The state has known about this deplorable conduct for over 50 years – and the public has known about it for over 20 years. Despite all that, legal officials throughout Australia continue to turn a blind eye and pretend that all is well with its legal system.

This deplorable conduct will be the subject of a number of national programs and further legal proceedings in early 2023. We will keep you informed of their progress.

Further details and references relating to the issues discussed in this briefing paper can be found in the following:

Bibi Sangha, Robert Moles, Miscarriages of Justice: Criminal Appeals and the Rule of Law in Australia (2015) LexisNexis, Sydney.

Bibi Sangha, Kent Roach, Robert Moles, Forensic Investigations and Miscarriages of Justice – the Rhetoric Meets the Reality, (2010) Irwin Law, Toronto.

The Prosecutors Homepage on Networked Knowledge – for further details relating to disclosure obligations, prosecutorial concessions and other related matters.

Briefing Paper on the deplorable conduct of the disgraced former chief pathologist in South Australia.

This page has the correspondence with the various South Australian Attorneys-General, requesting them to ensure that proper disclosure is made by the DPP in the matter of R v Bromley which is currently (in 2023) proceeding before the High Court. To date, the chief prosecutor in South Australia has not disclosed to this court (or any other court in the last 50 years) that the former chief pathologist was not qualified to conduct autopsies or to give evidence in court as an expert witness. Such a situation concerning a persistent refusal by a chief prosecutor to comply with a clear legal duty has never arisen before in Australia, Britain, Canada, the USA or New Zealand.

A program dealing with some of these issues will be broadcast nationally in Australia (and on YouTube) early in February 2023 – See Channel Nine "Under Investigation" for further details.

See also the briefing papers, research reports and other materials in relation to the following cases:

The Case of Susan Neill-Fraser in Tasmania – and recent briefing paper on this case.

The Case of Kathleen Folbigg in New South Wales and recent briefing paper on this case.

This briefing note by Bibi Sangha and Bob Moles 21 December 2022. ENDS