

# Prosecution Disclosure

*s15A Director of Public Prosecutions Act (NSW) 1986  
ss142, 147 Criminal Procedure Act (NSW) 1986*

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The law of NSW imposes obligations on prosecutors to disclosure relevant material to the Defence in criminal matters. However, there are different requirements for Indictable proceedings and Summary proceedings. This article aims to assist legal practitioners in New South Wales by explaining prosecution disclosure requirement.

## Disclosure to the DPP

Disclosure by investigators to the DPP is covered by s15A(1) DPP Act which provides:

*Law enforcement officers investigating alleged offences have a duty to disclose to the Director 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 case for the accused person.*

The key point here is that the investigators are required to disclose all relevant material even if it harms the prosecution case. This obligation continues until the proceedings are finalized by acquittal, conviction or withdrawal of the charge.<sup>1</sup> The term 'law enforcement officer' is defined to include police officers and staff of the LECC, ICAC and NSW Crime Commission.<sup>2</sup>

## Disclosure By the DPP

Disclosure by the DPP to the Defence is covered by s142 Criminal Procedure Act which provides that the DPP must serve notice on the Defence of:

1. any material in their possession that 'could reasonably be regarded as relevant' to either the prosecution or defence case,<sup>3</sup>
2. a list of any relevant material that is not in their possession and the place they believe that material to be situated,<sup>4</sup>
3. a copy of any information in the possession of the prosecutor that is relevant to the reliability or credibility of a prosecution witness,<sup>5</sup> and
4. a copy of any information, document or other thing in the possession of the prosecutor that would reasonably be regarded as adverse to the credit or credibility of the accused person.<sup>6</sup>

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<sup>1</sup> s15A(2) Director of Public Prosecutions Act 1986

<sup>2</sup> s15A(9) Director of Public Prosecutions Act 1986

<sup>3</sup> s142(i) Criminal Procedure Act 1986

<sup>4</sup> s142(j) Criminal Procedure Act 1986

<sup>5</sup> s142(k) Criminal Procedure Act 1986

<sup>6</sup> s142(l) Criminal Procedure Act 1986

The key points here are that the DPP must disclose all relevant material in their possession, as well as a list of relevant material that is not in their possession but that they know about. In addition, they are required to disclose material that is relevant to the reliability and credibility of their witnesses and the accused – ie criminal histories.

Information relevant to the reliability and credit of prosecution witnesses would include criminal activity and even allegations of criminal activity. To this end, practitioners should be aware that the DPP maintain a register of 'adverse mentions' against police members. This register is known as the Adverse Mentions List. Further information is found [here](#).

## Disclosure Requirements in Summary Hearings

Now for the bad news. The statutory disclosure requirements in s142 CPA only apply in matters that are going to the District Court or Supreme Court. It appears that where the DPP runs matters in the Local Court, the investigators are obliged to disclose to the DPP but there is no statutory obligation on the DPP to disclose to the defence.

So, in the Local Court we must rely on the common law. The High Court has held that the prosecution must disclose all relevant evidence to an accused, and that a failure to do so may, in some circumstances, require the quashing of a verdict of guilty.<sup>7</sup> However, it is a discretionary duty and what material is required to be disclosed will vary with the facts of each case and possibly between prosecutors.

## What Material Should Be Disclosed?

At a minimum, the police should disclose the material referred to in s142 CPA. So, the Defence should write to the police prosecutors and request all relevant material in their possession, as well as a list of relevant material that is not in their possession but that they know about. In addition, any material that is relevant to the reliability and credibility of their witnesses and the accused (criminal histories, facts sheets and COPS records).

## What if They Refuse to Disclose?

The duty is owed to the court and not the Accused, so it is for the court to enforce disclosure. The court can make an order for disclosure, grant a temporary stay<sup>8</sup> until disclosure is made and subsequently make an order for costs.<sup>9</sup> So it is imperative to produce your letter requesting disclosure to the court when the matter arises. I have attached a sample letter to assist.

Should you have any issues, I'm available every day after 4pm.

Chris Nowlan  
Barrister-at-Law  
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<sup>7</sup> Grey v The Queen [2001] HCA 65; (2001) 75 ALJR 1708; 184 ALR 593 at [17]

<sup>8</sup> R v Lipton [2011] NSWCCA 247

<sup>9</sup> s213 Criminal Procedure Act 1986

Atticus Finch  
Fancy Law Firm  
Street Name  
Suburb

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1 January 2020

Senior Sergeant  
Downing Centre Prosecutors  
143 Liverpool Street  
Sydney NSW 2000

Dear Sergeant,

**Re Client Name ats Police – H1234 5678  
For Mention 1 February 2020 at Downing Centre LC**

We have been retained to represent the Accused in the abovementioned matter. This is an assault matter where we intend to raise the issue of self-defence. We foresee the case will turn on the reliability and credibility of the police and defence witnesses.

#### **Duty of Disclosure**

Police prosecutors owe a duty to the court to disclose all relevant material in their possession, as well as a list of relevant material that is not in their possession but that they know about. In addition, they are required to disclose material that is relevant to the reliability and credibility of their witnesses and the accused – ie criminal histories.

I request that you disclose the following material before the next mention date:

1. The criminal history of the complainant and other police witnesses,
2. Police Facts Sheets relating to entries on the witness's criminal histories;
3. All other material in the possession of Police or available to Police that is relevant to the credibility and / or reliability of police witnesses,
4. All COPS entries related to this matter,
5. All notebook records related to this matter,
6. All emails related to this matter,
7. All entries in the Adverse Mentions List relating to police officers involved,
8. Any other material in possession of police which could reasonably assisting the defence,
9. A list of any material not in the possession of Police that may assist the defence case.

Please acknowledge receipt of this letter and contact me should you require any further information.

Yours faithfully,

Fancy Law Firm  
Per Atticus Finch