

Chapter 2: Disclosure by the Prosecution

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Aims and learning outcomes

Aims

To enable you to:

- understand the regulations and guidelines relating to disclosure;
- understand what is meant by the prosecution's duty to disclose;
- be aware of the mode of trial issues relating to summary, either-way and indictable offences;
- understand the duties and functions of the disclosure officer;
- identify third party disclosure.

Learning outcomes

If you have worked through this material successfully, you should be able to:

- explain the role of the disclosure officer and his functions;
- explain the main principles behind the prosecution's duty to disclose material to the defendant;
- identify and liaise with third parties in criminal proceedings.

Skills and attributes

If you have worked through this material successfully, you should be able to:

- read and understand primary disclosure legislation;
- give an account of the duties of a disclosure officer;
- answer written and oral questions about the prosecution's duty to disclose in criminal proceedings.

2.1 Introduction

You have learnt so far that fairness in criminal proceedings, coupled with the doctrine of presumption of innocence and human rights legislation, requires that **any** relevant material held by the prosecution should be disclosed to the defence. "Material" as defined by the **Code** and the **Attorney-General's Guidelines** include, documents which may weaken the prosecution's case

or strengthen that of the defendant. If necessary all unused material must be disclosed, even if it is not relied on at trial as part of the prosecution's formal case against the accused.

As we have seen in **1.1**, common law has revealed miscarriages of justice resulting from evidential material that was withheld from disclosure by the police. The golden rule is that full disclosure of all material should always be made by the prosecution.

This chapter will look at the prosecution's duty of disclosure in different types of trial and the duties of the disclosure officer, followed by an explanation of third party disclosure.

2.2 Types of offence

All crimes – no matter how serious – are first heard at the Magistrates' Court, and the CPS applies strict guidelines to assist the court with the option as to where the defendant's case should be heard – either at the Magistrates' or the Crown Court.

Types of offence comprise:

- (1) **summary-only offences** – tried only at the Magistrates' Court;
- (2) **offences triable either way** (either-way offences) – tried either at the Magistrates' Court or committed to the Crown Court;
- (3) **indictable-only offences** – tried only at the Crown Court; these are "sent" by the Magistrates' Court to the Crown Court.

Summary offences can be described as less serious offences such as:

- driving offences (e.g. speeding);
- common assault;
- battery.

Either-way offences are prescribed by statute and can be tried either at the Magistrates' Court or the Crown Court. They include offences such as:

- criminal damage under **s1 Criminal Damage Act 1971**;
- theft under **s1 Theft Act 1978**;
- assault occasioning actual bodily harm (ABH) under **s47 Offences Against the Person Act 1861 (OAPA 1861)**;
- malicious wounding or grievous bodily harm (GBH) under **s20 OAPA 1861**;

This is the most interesting category of crimes. If the accused is charged with an either-way offence and pleads not guilty, the prosecution must provide the magistrates with advice and sufficient evidence as to whether the case should be tried at the Magistrates' Court or be committed to the Crown Court. This is known as the mode of trial hearing.

If at the mode of trial hearing the magistrates decide that they have insufficient powers to hear the case, the accused will be **committed** to the Crown Court. If they decide they can hear the case, the accused is given the opportunity

to elect trial by jury in the Crown Court. If he chooses trial by jury he will be committed to the Crown Court; otherwise the case will be heard in the Magistrates' Court.

Indictable-only offences are serious offences tried on indictment and sent to the Crown Court. They include:

- wounding with intent GBH under **s18 OAPA 1861**;
- robbery under **s8 Theft Act 1968**;
- rape under **s1 Sexual Offences Act 2003**;
- offences such as murder, attempted murder or manslaughter.

Although indictable offences will have their first hearing at the Magistrates' Court they will be **sent** to the Crown Court under **s51 Crime and Disorder Act 1998 (CDA 1998)**.

Research has shown that the defendant stands a higher chance of acquittal by a jury at the Crown Court. The disadvantages of Crown Court trial are that the process takes longer, it is more expensive and carries the risk that the accused will end up receiving a much higher sentence if found guilty by the jury.

Note that the term "indictable offence" is taken to include both an offence triable either way and an indictable-only offence.

2.3 Disclosure by the prosecution

2.3.1 Pre-interview disclosure

Brief mention is made of the position as regards police disclosure prior to an interview of a suspect. The legal obligations upon the police to make disclosure of their evidence at this stage are minimal. They are set out in **PACE Code C 10.3** and in **Note 10B**. These provisions were considered in ***Imran and Hussain [1997]***, in which the Court of Appeal held that whilst there is an obligation on the police not actively to mislead any suspect, there is no legal obligation on the police to make disclosure of evidence prior to interview. In this case, it became apparent during the interview that the police had video evidence of the robbery in which the defendants were alleged to have been involved. Neither defendant nor their legal advisers asked that the interview be suspended so that the content of the video could be viewed. On appeal, it was contended on behalf of the defendants that the police should have disclosed the video and having failed to do so, that no adverse inference could be drawn under **s34 Criminal Justice and Public Order Act 1994**. Rejecting such a proposition, the Court of Appeal reasoned:

"In support of the application it is submitted that the tenor of sections 34 to 38 of the Criminal Justice and Public Order Act 1994 require the police to give as full a briefing as possible of disclosing all material to a legal representative before the interview with the suspect commences. We do not agree. There is of course a duty on the police not actively to mislead any suspect, but it is in our judgment totally impossible to spell out either expressly or by any permissible implication from those five sections any such requirement on the part of the police . . ."

Defence practitioners are trained to press interview disclosure officers for all relevant information prior to interview and will point out the mutual benefits of such disclosure, which would include the fact possibly of having to stop the interview repeatedly in order to give legal advice as new facts emerge, if

evidence is withheld until interview. A defence adviser is more likely to advise his client to remain silent in interview if he feels he has not had sufficient disclosure. Whilst an adverse evidential inference can be drawn where an accused fails to mention facts in interview or upon being charged which he subsequently relies on his defence at trial, a jury or magistrates can only do so if they conclude that it was reasonable for the accused to have remained silent. A jury or magistrates may conclude it was reasonable for an accused to have remained silent on legal advice where the reason for that advice was based on a failure by the police to provide any or sufficient disclosure to the legal adviser (*Roble [1997]*). Ultimately, it is a matter for the interviewing officer to decide whether to disclose and how much information to disclose prior to interview.

Where an investigation gives rise to a charge, there are clear statutory obligations on the police to record, retain and reveal material obtained during the investigation to the prosecutor and for the prosecutor to disclose material to the accused. Those duties are largely, though not exclusively, contained in **CPIA 1996** and the **Code**.

In line with legislation laid down by **CPIA 1996**, the prosecutor must:

- disclose to the defendant any prosecution material which has not previously been disclosed to him and which might reasonably be considered capable of undermining the case for the prosecution against him, or of assisting the case for the defendant (**s3(1)(a) CPIA 1996**); or
- give to the defendant a written statement that there is no material of any such description (**s3(1)(b)**). For these purposes, prosecution material is material which is in the prosecutor's possession, and came into his possession in connection with the case for the prosecution against the defendant, or which, in pursuance of a code, he has inspected in connection with the case for the prosecution against the defendant.

In the Crown Court, where the prosecutor discloses prosecution material to the defence or gives the defendant a written statement that there is no such material, the prosecutor must inform the court officer at the same time (**CrPR r22.2**).

Under **CPIA 1996** the prosecution is required to give three types of disclosure:

- **advance information;**
- **initial disclosure;**
- **continuous disclosure.**

2.4 Post charge pre-trial disclosure by the prosecution – an introduction

At a number of stages in a criminal case the rules governing the pre-trial disclosure of evidence impose extensive obligations on the CPS which are critical to a defendant's right to a fair trial. Clearly a defendant cannot be expected to defend allegations made against him unless he is aware of the evidence that will be given in support of those allegations. It would be wrong for the prosecution (with its available resources) to withhold evidence that weakens the prosecution case or assists the defence case. Although the aim in

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