

Work Health and Safety Prosecutor Guidelines

DisclosureOWHSP Guideline 2/2019

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Pursuant to s.48 of Schedule 2 to the *Work Health and Safety Act 2011* (the Act), this guideline is issued to:

- a. the staff of the WHS Prosecutor;
- b. the regulator; and
- c. any public service employees employed in the department undertaking work relevant to the WHS Prosecutor's functions under the Act.

Disclosure Principles

1. The guiding principle in determining what material should be disclosed by the prosecution is that there is a need to ensure that the accused receives a fair trial.
2. In order to ensure that the accused receives a fair trial, there must be adequate notice of the evidence to be adduced as part of the prosecution case.
3. The prosecution's duty of disclosure is ethical in nature and it is an obligation that is owed to the court. It is a significant aspect of the administration of criminal justice and the court's capacity to ensure the accused's right to a fair trial. Accused are entitled to know the case against them, so that they can properly defend the charges they face. An accused is entitled to know the evidence that will be adduced in support of the charges and whether there is any other material which may be relevant to the defence of the charges, including material relating to the credibility or reliability of a prosecution witness. A failure to disclose may result in a miscarriage of justice.
4. In addition to fulfilling statutory obligations relating to disclosure, the prosecution must disclose to the accused any material which:
 - a. can be seen on a sensible appraisal by the prosecution to run counter to the prosecution case (i.e. points away from the accused having committed the offence); or
 - b. might reasonably be expected to assist the accused in advancing a defence; or
 - c. might reasonably be expected to undermine the credibility or reliability of a material prosecution witness.
5. The prosecution duty of disclosure under this guideline does not extend to disclosing material which is:
 - a. relevant only to the credibility of defence (as distinct from prosecution) witnesses;
 - b. relevant only to the credibility of the defendant;
 - c. relevant only because it might deter the defendant from giving false evidence or raising an issue of fact which might be shown to be false;
 - d. relevant in that it might alert and prevent the defendant from creating a trap for themselves based on suspect evidence (i.e. a suspect alibi), if at the time the prosecution became aware of the material it was not disclosable pursuant to Paragraph 4.

6. A precondition for prosecution disclosure is that the material is in the possession of, or the information is known by, the prosecution. For the purposes of this guideline, and at common law, there is no distinction between the prosecuting agency and the investigative agency. The courts generally regard the investigative agency and the prosecuting agency as “the prosecution”. Consequently, the OWHSP largely depends on OIR as the investigative agency to inform it of the existence of material which should be disclosed to the defence, whether the investigative agency holds it or is aware it is held by a third party including another, State, Territory or Commonwealth agency, private entity or individual.
7. If a matter involves investigation by more than one agency, the OWHSP depends on OIR, as the investigative agency which refers the brief to the OWHSP, to inform the OWHSP of all disclosable material which any of the agencies involved hold or are aware of.
8. Disclosure should be timely and occur as soon as is reasonably practicable. The disclosure obligation is ongoing throughout the prosecution process and continues after trial and the conclusion of any appeals.
9. Disclosure of the prosecution case will ordinarily be by provision of a copy of the brief of evidence. A copy of the brief should always be provided where requested. There may be matters, however, where a defendant wishes to plead guilty quickly without a copy of a brief of evidence being requested and provided. The duty of disclosure is not incompatible with a defendant wanting to plead guilty before a full brief is served and a plea of guilty may well be accepted by the prosecution in such circumstances.
10. The prosecution may hold or be aware of information or material, other than the material in the brief of evidence, which has:
 - a. been gathered or come to the attention of investigators in the course of the investigation; or
 - b. is otherwise held within any part of OIR, other agencies, or a third party;that satisfies the requirements for disclosure set out in the Disclosure Principles in this guideline.
11. Examples of material that may fall within this category of material appear below.

Disclosure affecting credibility or reliability of a prosecution witness

12. The prosecution should disclose to the defence information in its possession which is relevant to the credibility or reliability of a prosecution witness, for example:
 - a. a relevant previous conviction or finding of guilt;
 - b. a statement made by a witness which is inconsistent with any other statement made by the witness;

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- c. a relevant adverse finding in other criminal proceedings or in non-criminal proceedings (such as disciplinary proceedings, civil proceedings or a Royal Commission);
- d. evidence before a court, tribunal or Royal Commission which reflects adversely on a witness;
- e. any physical or mental condition which may affect reliability;
- f. any concession or benefit which has been offered or granted to a witness in order to secure that person's testimony for the prosecution;
- g. where credibility is in issue, that the witness has been charged with a relevant offence.

13. Some examples of material of the kind referred to in paragraph 12. are further discussed below.

Previous convictions

- 14. Minor prior convictions for formal or non-contentious witnesses may not meet the requirements for disclosure, whereas previous convictions for perjury and offences involving dishonesty should always be disclosed to defence.
- 15. The prosecution must, on request, disclose a copy of a criminal history of a proposed witness which is in the possession of the prosecution. Where blanket requests for 'all witnesses' are made, the prosecution should attempt to negotiate with defence practitioners to ensure that unnecessary checks do not have to be undertaken for formal or non-contentious witnesses.
- 16. The duty to disclose relevant prior convictions is not confined to cases of specific requests for the criminal histories of witnesses. For that reason, it is appropriate for the prosecution to ensure, prior to the commencement of any trial or summary hearing, that criminal history checks have been undertaken for significant civilian witnesses whose credit may be in issue. In addition to paragraph 14, in some cases convictions relating to Driving Under the Influence or illicit substances might be relevant particularly if the proposed witness is to give evidence relating to operation of plant/machinery.

Adverse findings

- 17. Where a prosecution witness has been the subject of an adverse finding (including a finding of dishonesty) in other criminal proceedings, disciplinary proceedings, civil proceedings or a Royal Commission, such adverse findings should be disclosed by the prosecution to the defence. That is, unless the finding does not meet the requirements for disclosure set out in the Disclosure Principles in this guideline. Regard should be had to the nature of the evidence expected to be given and the issues likely to arise in the case at hand. For example, it may not be necessary to disclose adverse findings which arise from inefficiency, incompetence or disobedience of orders, but it might be necessary to disclose any history relevant to those matters in paragraph 16.

Concessions to witnesses

- 18. The prosecution must disclose:

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- a. any concession offered or provided to a witness with respect to his or her involvement in suspected offences in order to secure his or her evidence for the prosecution, whether as to choice of charge, the grant of an undertaking or otherwise;
- b. any monetary or other benefit or inducement that has been claimed by, or offered or provided to, a witness. This does not include any payments made in the ordinary and usual course of a witness coming to court to give evidence (e.g. the payment of travel and accommodation expenses or the fees of expert witnesses) and disclosure will be subject to any legislative requirements such as witness protection legislation; and
- c. where the witness participated in the suspected offending that is the subject of the charges against the defendant, whether the witness has been dealt with in respect of his or her own involvement and, if so, whether the witness received a discount on sentence as a result of undertaking to cooperate with the prosecution in relation to the current matter.

Disclosure affecting the competence or credibility of an expert witness or of expert or scientific evidence

19. The prosecution should disclose to the defence information of which it is aware that is relevant or potentially relevant to the competence or credibility of an expert witness the prosecution intends to rely on.
20. The prosecution should also disclose to the defence information of which it is aware that is in the form of an expert opinion and/or in the nature of scientific evidence, which differs from such evidence already received by the prosecution or in some way casts doubt on the opinions or evidence on which the prosecution intends to rely where that opinion or evidence is relevant and not merely speculative.

Disclosure of a statement by a witness who is not credible

21. If the prosecution has a statement from a person whose evidence meets the requirements for disclosure as set out in the Disclosure Principles in this guideline, but who will not be called because they are not credible, the defence should be provided with copy of the statement of that witness. The witnesses contact details may also be provided in certain circumstances – see s.590AP *Criminal Code* (Qld).¹

Material withheld from disclosure

22. Where material has been withheld from disclosure as:
 - a. it is considered that the material is immune from disclosure on public interest grounds; or
 - b. disclosure of the material is precluded by statute; or
 - c. it is considered that legal professional privilege should be claimed in respect of the material;the defence should ordinarily be informed of this. In most cases it should be possible to provide some general information as to the nature of the material concerned. The extent of any further information will be determined by reference to the particular matter, but as a general rule

¹ See Annexure to Disclosure Guideline 2/2019_Disclosure legislation

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information about the nature of the claim should be provided unless it will compromise that claim (e.g. the fact of there being an informer claim is not usually disclosed). Notification of the existence of such material may in some circumstances generate the issuing of a summons or subpoena to produce the material.

23. If the existence of material that otherwise meets the requirements for disclosure as set out in the Disclosure Principles in this guideline cannot be disclosed at all because of one of the matters identified in paragraph 22, or where a claim for immunity has been upheld by a court, then consideration will need to be given as to whether it is fair for the prosecution to proceed or continue in the absence of such disclosure. In some circumstances a prosecution may not be able to proceed and may need to be discontinued.

Disclosure and Sentencing

24. While disclosure most frequently arises in the context of hearings and trials there are some important obligations on the prosecution in the context of the sentencing process. In particular, any information or material that may affect an assessment of the moral culpability of a defendant on sentence should be disclosed. Such material will often be in the possession of OIR and should be disclosed to the OWHSP in that event.

Other Matters

Timing of Disclosure

25. Disclosure should be timely, and occur as soon as practicable, always remembering the obligation is ongoing throughout the prosecution process, including during the sentencing process and continues after trial and the conclusion of any appeals (see s.590AL *Criminal Code* (Qld))². However, in certain circumstances, it may be appropriate to delay disclosure. Some examples of this may include the following:
- a. where disclosure might prejudice ongoing investigations (see paragraphs 22 and 23), and OIR requests the non-disclosure of material that would otherwise be disclosable under this guideline, disclosure may be able to be delayed until after the investigations are completed;
 - b. where the prosecution is of the opinion that to disclose evidence is likely to lead to a witness being intimidated, or a risk to the safety of a witness, or to some other interference with the course of justice.
26. Where disclosure of material has been delayed in accordance with the preceding paragraph, the defence should ordinarily be so informed, unless to do so might compromise the reason for the delay (e.g. the existence of an ongoing investigation).

How material should be disclosed

² See Annexure to Disclosure Guideline 2/2019_Disclosure legislation

27. There are various ways material may be disclosed, and this guideline does not purport to prescribe a necessary means of disclosure. Material may be disclosed in hard copy or electronic form. Disclosure may occur via a schedule listing the material, or by making the material available for inspection or copying. Where a schedule listing material is provided, it should include a description making clear the nature of that material and the defence should be informed that arrangements may be made to inspect the material. This is because the essence of disclosure is that the defence be made aware of the existence of the material – in many instances they may not actually wish to have a copy of the material.
28. There may be cases where, having regard to:
- a. the absence of information available to the prosecution as to the lines of defence to be pursued; and/or
 - b. the nature, extent or complexity of the material gathered in the course of the investigation;
- there may be special difficulty in accurately assessing whether particular material meets the requirements for disclosure set out in the Disclosure Principles in this guideline. In these cases, after consultation with OIR, the prosecution may permit the defence to inspect such material.

Disclosure of material held by third parties

29. Where the prosecution is aware of disclosable material that is in the possession of a third party, the defence should be informed of:
- a. the name of the third party;
 - b. the nature of the material; and
 - c. the address of the third party (unless there is good reason for not doing so and if so, it may be necessary for the prosecution to facilitate communication between the defence and the third party).