PROSECUTORIAL DISCLOSURE & SUBPOENAS

Part One: Overview

Fundamental Concepts	
A criminal trial is a contest between the state and a person. There is an inequality of resources between the two parties.	*R v Reardon (No 2)* [2004] NSWCCA 197; (2004) 60 NSWLR 454 at [46].
The person has a right not to be tried unfairly.	*Jago v The District Court of NSW* [1989] 168 CLR 23 at 56-57 and *Dietrich v The Queen* (1992) 177 CLR 292 at 299 and 362.
The Court has various processes to ensure a person is not tried unfairly.	*Jago* at 25 and 56.
But the Court must ensure its processes are not abused.	*Williams v Spautz* (1992) 174 CLR 509 at 520.

Information held by the State	
The state is responsible for investigating and prosecuting alleged crimes.	*Police Act* s 6(3) and 201 (neglect of duty), *DPP Act* (NSW) s 7, *DPP Act* (Cth) s 6.
The state is also responsible for recording and maintaining certain information.	For example, *State Records Act 1998* (NSW); *Health Records and Information Privacy Act 2002* (NSW); *LEPRA* 2002 s 131 (Custody Management Records).

Obligations to disclose information to accused persons	
The police have obligations to disclose information.	*CPA* s 36B, *DPP Act* s 15A (see, also, DPP Guideline 13.3).
Prosecutors have obligations to disclose information.	*CPA* ss 61-64, 66(2), 141, 142, 147, 247E, 247O; *Legal Profession Uniform Conduct (Barristers) Rules 2015* r 87-88; *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* 29.5; *DPP (Cth) v Kinghorn* (2020) 102 NSWLR 72; [2020] NSWCCA 48 at [124]-[142] and *Bradley v Senior Constable Chilby* [2020] NSWSC 145 at [45]-[50].
Prosecutors are also subject to guidelines that require them to disclose certain information.	NSW DPP Guideline 13 and CDPP Guideline 8.1 and its Statement on Disclosure, March 2017. Guidelines differ to legislation: *Marwan v DPP* [2019] NSWCCA 161 at [37].
The above obligations are ongoing and apply in sentence proceedings.	*R v Lipton* (2011) 82 NSWLR 123; [2011] NSWCCA 247 **at** [82].
Prosecutors are obliged to disclose evidence in a timely manner otherwise such evidence may be excluded.	CPA ss 146 and 188, *R v Al Batat & Ors (No 6)* [2020] NSWSC 1079*; Evidence Act* s 137, *R v Sharpe (No 2)* [2021] NSWSC 32.
Prosecutors, in certain circumstances, have obligations to investigate or make enquiries.	*Eastman v DPP (No 13)* [2016] ACTCA 65 at [338]-[344] and *Marwan v DPP* [2019] NSWCCA 161 at [45]-[52] and [67]-[76].
Expert witnesses have obligations to disclose information.	*UCPR 2005* Sch 7 Expert witness code of conduct; *Supreme Court Rules* 1970 Pt 75.3J (application of Code to criminal proceedings).

Because of the above obligations, it has been said an accused person should not have to "fossick for information" to which they are entitled or "engage in a complicated detective exercise" to obtain it.	*Grey v The Queen* (2001) 75 ALJR 1708; HCA 65 at [23] and *R v Grey* (2000) 111 A Crim R 314; [2000] NSWCCA 46 at [39].

Methods of obtaining further information not disclosed (aside from subpoenas)	
Further disclosure may be requested.	See, for example, *Bradley v Senior Constable Chilby* [2020] NSWSC 145 at [16]-[17]. See, also, CPA s 70(3)(a) re using a case conference to obtain further information.
Further investigation may be requested.	See discussion in *Marwan v Director of Public Prosecutions* [2019] NSWCCA 161 at [40]-[44].
Pre-trial orders for disclosure may be obtained.	CPA ss 136, 139(3)(c), 149E.
Orders for the examination of witnesses may be obtained (committal hearings and *Basha* inquiries).	CPA Chapter 3 Pt 2 Div 6 (committal hearings); *Xie (No. 11)* [2014] NSWSC 1977 at [19]-[43] (*Basha* inquiries).
Orders requiring a conditional stay of proceedings pending disclosure may be obtained.	*Bradley v Senior Constable Chilby* [2020] NSWSC 145 at [51], [82], [84]-[87]; *Marwan v Director of Public Prosecutions* [2019] NSWCCA 161 at [22]-[26] and [29].

Legitimately using subpoenas to obtain information	
A subpoena may be issued to challenge the adequacy of disclosure.	*Gould v DPP (Cth)* (2018) 333 FLR 352; [2018] NSWCCA 109 at [18] and *DPP (Cth) v Kinghorn* (2020) 102 NSWLR 72; [2020] NSWCCA 48 at [136] and [140].
There are numerous requirements to issue a subpoena.	CPA ss 220-232; *Local Court Rules* 2009 Pt 6; *District Court Rules* 1973 Pt 53 Div 2; *Commissioner of Railways v Small* (1938) SR (NSW) 564 at 573-575.
Some of these requirements ensure a non-party or "stranger" to the litigation is not inconvenienced by having to form a judgment on the relevance of their documents to the litigation.	*Commissioner of Railways v Small* (1938) SR (NSW) 564 at 573.
However, the proposition that the informant in criminal proceedings is a "stranger" to those proceedings has been described as "misconceived."	*Frugtniet v Magistrate Garbutt & Anor* [2003] NSWSC 770 at [36]-[37] per Bell J, citing *R v Fisher* [2003] NSWCCA 41 at [19].
A subpoena may only be issued for a legitimate forensic purpose	See Part 2 of this paper.

Obstacles to using subpoenas to obtain information	
Some privacy legislation prohibits the disclosure of certain information. However, it is important to check if there are exceptions	See, for example, *Privacy and Personal Information Protection Act 1998* (NSW) ss 6 and 23(5). See, also, *R v Jenkin (No 2)* [2018] NSWSC 697 at [26] where Hamill J said, "I can see no

that allow for the disclosure of information to a court pursuant to a subpoena.	basis to find that, as a general rule, a witness's right to privacy in respect of their criminal history is a basis upon which to deny an accused person access to material that may assist them in their defence".
Some provisions of secrecy legislation prohibit the disclosure of certain information "to any person". However, it is important to determine whether such provisions prohibit the disclosure of information to a court pursuant to a subpoena.	See, for example, *Osborne v R* [2014] NSWCCA 17, 238 A Crim R 417, 283 FLR 97 at [8]-[13] and [33].
Privileged information cannot be obtained by a subpoena. However, it is important to consider if the relevant information is (and still is) in fact privileged (e.g. has it been waived?)	For example, see *Evidence Act* ss 130 and 131A and *Alister v R* (1983) 154 CLR 404 (re public interest immunity); see CPA Part 5, Div 2 (re sexual assault communications privilege); *DPP v Stanizzo* [2019] NSWCA 12 at [20]-[27] (re the DPP's legal / client privilege – although see NSW DPP Guideline 13.4).

Limits on the use of information obtained through a subpoena	
A Court may allow access to the subpoenaed material on a conditional basis.	*Antoun v Antoun (No 2)* [2021] NSWSC 1331 at [19]-[20].
Material obtained on subpoena (or through other court orders) may only be used for the purpose of those proceedings.	*Hearne v Street* (2008) 235 CLR 125; [2008] HCA 36 at [96].
After material has been obtained there is a separate question as to whether it is admissible in the proceedings.	*National Employers Mutual General Association Limited v. Waind & Hill* (1978) 1 NSWLR 372 at 381F.

Further remedies in cases where relevant information was not able to be obtained	
Consideration may be given to withdrawing the charge(s) because of the unfairness of not having the information.	*Barristers Rules 2015* r 88 and *Solicitors' Conduct Rules 2015* 29.6; ODPP Guidelines (NSW) 13.3; CDPP Statement on Disclosure – March 2017 at [23], [24].
Evidence may be excluded on the basis that the absence of other information means it is out of context and therefore there is a danger it will be given more weight than is justified.	*Evidence Act* s 137 and *DPP v Madina & Douglas* [2019] VSCA 73 at [26]-[27] and [67]-[68].
The unfairness arising from the absence of relevant information may justify a permanent stay of proceedings.	See, in a different context, *Jackmain (a pseudonym) v R* (2020) 102 NSWLR 847 [2020] NSWCCA 150 at [209], [212]-[228].

Appeals against conviction because of an absence of disclosure	
A conviction may be set aside (on appeal or following the inquiry process) if the absence of disclosure caused a miscarriage of justice.	*Grey v The Queen* (2001) 75 ALJR 1708; HCA 65 at [23]; *Mallard v The Queen* [2005] HCA 68; 224 CLR 125; *JB v R (No 2)* [2016] NSWCCA 67 *Edwards v The Queen* [2021] HCA 28; 95 ALJR 808.

Part Two: Legitimate Forensic Purpose

Introduction

A subpoena may only be issued for a legitimate forensic purpose. Otherwise, it is an abuse of process and may be set aside: *Secretary of the Department of Planning, Industry and Environment v Blacktown City Council* [2021] NSWCA 145 at [60] and [88].

Onus and the "test" that has frequently been applied in criminal proceedings

Where a subpoena is challenged on this ground, the issuing party bears the onus of establishing that it was issued for a legitimate forensic purpose: *Attorney General for New South Wales v Dylan Chidgey* (2008) 182 A Crim R 536; [2008] NSWCCA 65 at [5].

This requires the issuing party to:

(1) Identify with precision the legitimate forensic purpose for which the material is sought; and

(2) Demonstrate that it is "on the cards" that the documents will materially assist that party's case.

See, for example, *R v Saleam* [1999] NSWCCA 86 at [11] and *Chidgey* at [64] and [70].

In other words, a party is not permitted to use a subpoena in order to undertake a "fishing expedition" in the hope that material might assist their case: *Alister v The Queen* (1984) 154 CLR 404; [1984] HCA 85 at 414, *R v Saleam* (1989) 16 NSWLR 14 at 17-18, *Chidgey* at [5], [62]-[64] and *The Commissioner for Railways v Small* (1938) 38 SR (NSW) 564 at 575.

Further, it is not sufficient for a party seeking production of documents to merely establish that such documents are or may be relevant: *Chidgey* at [59]-[63] (but see further below). See, also, *Gould v DPP (Cth)* (2018) 333 FLR 352; [2018] NSWCCA 109 at [65]-[68].

A recent development in civil matters: Secretary of the Department of Planning, Industry and Environment v Blacktown City Council [2021] NSWCCA 145 ("Blacktown")

In *Blacktown*, Bell P (as his Honour then was) reviewed the authorities and stated:

- The language of "tests" for the setting aside of subpoenas should be avoided – it is sufficient to observe that subpoenas will and should be set aside when they can be seen to involve or amount to an abuse of process as part of the Court's general power to regulate and protect its own processes: see [60] (and [98] per McCallum JA).
- Satisfaction of the two criteria referred to in *Saleam* will generally establish that the subpoena was issued for a legitimate forensic purpose: see [65] and [80].
- However, at least in civil matters, it will generally also be sufficient if the material sought has an apparent relevance to the issues in the case and / or bear upon the cross-examination of witnesses to be called: [80] (and [89]-[90] per Brereton JA).

Bell P, at [69], also referred to the statement in *Chidgey* at [59] (referred to above) in the following terms:

> If the documents are apparently relevant and, provided that the terms of the subpoena are not unduly vague or the ambit of the subpoena is not such that it would be oppressive to comply with it, the subpoena should not be set aside. To that extent, the statement in *Chidgey* at [59] that mere relevance is "not sufficient", and a similar statement in *Carroll* at 182 that "mere relevance is not enough" may, with respect, be apt to mislead or confuse. In the latter case, Mahoney AP said at 182 that a party issuing the subpoena:
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> > "must be able to indicate that the document is relevant in the sense that it may assist his case. In the present case, that could not be claimed. Nor was it shown. At best, the claim was: 'I wish to see the document to see if it may assist my case.' That, in my opinion, is not sufficient."
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> There is a very subtle distinction at play in this passage which, in my view, is undesirable, is inconsistent with many of the authorities referred to above, and has the potential to lead to the unwarranted setting aside of subpoenas or refusals to inspect documents. Where apparent relevance of the documents subpoenaed to the issues in the case or to the cross-examination of a witness or witnesses is established, this should not generally lead to the setting aside of a subpoena. As King CJ put it in *Carter* at 453, where a document or documents sought by subpoena by their nature have a "bearing on the issues in the case and may well have evidentiary value", a subpoena seeking such a document or documents will not amount to fishing.

Application of *Blacktown* in criminal law cases

In *Blacktown*, the Court expressly limited its conclusion as applying to civil matters: see [80] per Bell P and [91] per Brereton JA. The Court referred to some of the contextual differences between civil and criminal law matters, which might have some bearing on whether, in an appropriate case, the reasoning should be extended to the criminal law: see [72], [74]-[79], [84] and [91].

Since then, *Blacktown* has been referred to in several criminal cases: see, for example, *Waters v Secretary of the Attorney-General's Department (Cth)* [2021] NSWCCA 193 at [24]-[28]; *Commissioner of Police (NSW) v Fantakis* [2022] NSWCCA 94 at [38]-[47]; *R v Abdaly; R v Hosseinishoja (No 1)* [2022] NSWSC 1482 at [19].

But none of these cases determined if the reasoning in *Blacktown* should extend to criminal law matters.

Examples

In *Mann v Commissioner of Police* [2020] NSWSC 369 at [31] Adamson J (as her Honour then was) described the identification of a legitimate forensic purpose as a matter which is "peculiarly contextual". Thus, her Honour saw limited utility in drawing conclusions from the authorities beyond the statements of general principle. Nonetheless, a few examples are:

- *R v Jenkin (No 2)* [2018] NSWSC 697
- *Bradley v Senior Constable Chilby* [2020] NSWSC 145
- *Mann v Commissioner of Police* [2020] NSWSC 369
- *R v Abdaly; R v Hosseinishoja (No 1)* [2022] NSWSC 1482
- *Waters v Secretary of the Attorney-General's Department (Cth)* [2021] NSWCCA 193

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