

Model Criminal Disclosure Act and Model Prosecution Disclosure Guidelines



The Commonwealth

Office of Civil and
Criminal Justice Reform

Model Criminal Disclosure Act and Model Prosecution Disclosure Guidelines



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Introduction

One of the fundamental tenets of the rule of law is the right to a fair trial. This is reflected in a number of international and regional instruments, including Article 14 of the International Covenant on Civil and Political Rights 1966, Article 6 of the European Convention on Human Rights 1950, Article 8 of the American Convention on Human Rights 1969, and Article 7 of the African Charter on Human and Peoples' Rights 1981.

The right to a fair trial enshrines the need for the defence to be fully informed of the case against him, permitting him to mount a 'full and robust' defence. As part of the proceedings, the defendant must be served with the evidence that the prosecution seeks to adduce during the course of the trial. He must also be provided with relevant material that has come into existence as part of the investigation but which the prosecution does not intend to place reliance upon. Practice across Commonwealth jurisdictions differs markedly in this respect.

In addition to international obligations, there are other, practical reasons why it is important that countries without an established disclosure process take steps to introduce one, and that those with such a process already in place ensure that all involved are fully trained and aware of their responsibilities. A failure by the prosecutor or investigator to comply with their respective disclosure obligations may, for example, allow the accused to raise a successful abuse of process argument at the trial, the accused may be released from the duty to make defence disclosure (in those countries where such an obligation exists), the court may decide to exclude evidence, or appellate courts may find that any conviction is unsafe.

In some Commonwealth member countries, there may be a preference for disclosure legislation, whilst others will be content to formulate guidance or codes of practice for prosecutors and law enforcement staff.

This Criminal Disclosure Act provides model legislative provisions, together with Model Prosecution Disclosure Guidelines, that encapsulate international best practice, setting out the alternatives where more than one approach is available. Commonwealth member countries may then choose whether or not to enact such legislation. Either way, the Model Prosecution Disclosure Guidelines will prove valuable to all countries and to both practitioners and policymakers within each jurisdiction, whether of civil or common law heritage.

It should be noted that in a common law jurisdiction, a prerequisite to the disclosure process is a credible system of what might be called, 'revelation'. Revelation refers to the investigator bringing to the attention of the prosecutor the existence of relevant material that has been retained in the investigation. The stronger the lines of communication, the more likely that revelation will take place effectively and in a timely manner. Revelation to the prosecutor does not, of course, mean automatic disclosure to the defence.

In order for both revelation and any subsequent disclosure to be effective and to ensure fairness, all investigators must be given a duty to record and retain relevant material obtained or generated by them during the course of the investigation. Recording and retention should be at the heart of any investigation. Material may be photographed, video-recorded, captured digitally or otherwise retained in the form of a copy rather than the original, if the original is perishable, or the retention of a copy rather than the original is reasonable in all the circumstances.

Background

At their Meeting in Edinburgh in 2008, Law Ministers and Attorneys General considered a paper by the Commonwealth Secretariat on prosecution disclosure obligations. The paper proposed a programme of work, including development of model legislative provisions and detailed guidance on disclosure.

Following approval of the programme of work, the Commonwealth Secretariat engaged in an extensive consultation exercise with member countries. It also conducted a pan-Commonwealth survey by way of a Questionnaire on disclosure practices in the Commonwealth in October 2009. A total of 20 legal jurisdictions from 16 countries responded to the Questionnaire with at least one country from each region represented in the responses. All Questionnaire respondents had a common law legal system, with the exception of Mauritius and Cameroon which have mixed systems of civil and common law.

The Secretariat also undertook independent research on the effectiveness of the disclosure regimes in a number of jurisdictions, in order to identify best practices and the practical issues that arise in relation to the disclosure of evidence in criminal proceedings in Commonwealth jurisdictions.

The responses to the Questionnaire, discussions with Commonwealth representatives at conferences in the Pacific, Asia and Africa, and the independent research conducted by the Secretariat were subsequently collated and analysed.

Senior Officials of Commonwealth Law Ministries were invited to consider a first draft of the Model Criminal Disclosure Act and draft Model Prosecution Disclosure Guidelines at their meeting held 18-20 October 2010 in Marlborough House, London. Senior Officials established an expert working group to be convened by the Secretariat, in order to consider specific issues, including, amongst others, two-stage disclosure; prosecution disclosure of all available relevant material; privilege against disclosure; third party disclosure; public interest immunity; sanctions for failure to disclose relevant material; obligations regarding defence disclosure; and misuse of disclosed material.

The expert working group included delegates from Australia, Canada, Jamaica, Malawi, Mauritius, Singapore and the United Kingdom. The expert working group convened in London in March 2011, and further liaised by email thereafter.

The refined version of the Model Criminal Disclosure Act and Model Prosecution Disclosure Guidelines was considered and approved by Commonwealth Law Ministers at their meeting held from 11-14 July 2011, in Sydney, Australia.

Model Criminal Disclosure Act

This Model Criminal Disclosure Act sets out in legislative form best practice recommendations related to criminal disclosure identified by a Commonwealth expert working group. It is primarily drawn from the relevant provisions in those member countries that have already enacted specific legislation on criminal disclosure. These provisions should be tailored by member countries in accordance with national law, and practice and procedure in respective jurisdictions. Words in square brackets are intended to provide options for jurisdictions to consider.

1. Purpose and overview

The purpose of this Act is to promote fair, effective and efficient disclosure of relevant information between the prosecution and the defence and by non-parties for the purposes of criminal proceedings.

2. Application of Act

This Act applies to criminal proceedings that are commenced on or after the date on which this Act comes into force.

3. Interpretation

In this Act—

Criminal proceedings:

- (a) means proceedings for an offence tried on indictment [or the equivalent in each jurisdiction];
- (b) includes any appeal against conviction or sentence in such proceedings;
- (c) does not include ancillary proceedings (such as an application for identity suppression or confiscation proceedings).

Evidence in support of an alibi: means evidence tending to show that, by reason of the presence of the accused at a particular place, the accused was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission.

Investigating agency: means the police force or other agency vested with statutory powers of investigation.

Prosecutor: means the person who is in charge of the file or files relating to criminal proceedings and includes:

- (a) any other employee of the person or agency by whom the prosecutor is employed who has responsibilities for any aspect of the conduct of the criminal proceedings;
- (b) any legal representative of the person who laid the information or other initiating process in the criminal proceedings.

4. Time of commencement of criminal proceedings

For the purposes of this Act, criminal proceedings are commenced at the earlier of—

- (a) the service of a summons or other court attendance notice; or
- (b) the first appearance of the accused in Court following arrest, or in response to the summons or other court attendance notice.

5. Time of conclusion of criminal proceedings

For the purposes of this Act, criminal proceedings against an accused are to be taken to be concluded at the latest of—

- (a) a plea of guilty being recorded against the accused;
- (b) the accused being acquitted;
- (c) the proceedings against the accused being discontinued;
- (d) the accused being convicted and not appealing against the conviction before the expiry of the time allowed for such an appeal; or
- (e) any appeal proceedings being concluded.

6. Provision of information to prosecutor

1. As soon as practicable [At the prescribed time] after the first appearance of an accused in court, the investigating agency must comply with the requirements of subsection (2).
2. The investigating agency must—
 - (a) reveal to the prosecutor all information that may be relevant that the agency is aware of that was obtained (whether by the agency or otherwise) in the course of investigating the matter to which the appearance relates;
 - (b) retain all such information as may be prescribed.
3. The duties under subsection (2)(a) continue until the conclusion of the proceedings against the accused.
4. In this section “relevant” means any information that appears to have some bearing on the offence under investigation, or on any person being investigated, or the surrounding circumstances, unless it is incapable of having any impact on the case.
5. Regulations may be made for the purposes of implementing this Act.

7. Preliminary disclosure

1. At the commencement of criminal proceedings, or as soon as practicable after that time, and in any event not later than the prescribed date, the prosecutor must disclose to the accused sufficient information to enable the accused to know the nature of the allegation made against him or her. Such information may include—
 - (a) a copy of the charge; and
 - (b) a summary that is sufficient to fairly inform the accused of the facts on which it is alleged that an offence has been committed and the essential facts alleged against the accused.

2. The prosecutor must also provide to the accused a list of the accused's previous convictions that are known to the prosecutor.
3. Such disclosure must not include information the disclosure of which is excepted by section 9.

8. Full disclosure

1. Subject to section 9, as soon as practicable [at the prescribed time] after the indication of a plea of not guilty, the prosecutor must disclose to the accused all —
 - (a) information that is material [or relevant] to the proof of the prosecution case;
 - (b) information that would materially weaken or undermine the prosecution case [or is relevant to the weakening or undermining of the prosecution case]; and
 - (c) information that would materially strengthen the accused's case [or is relevant to the strengthening of the accused's case].
- [2. The prosecutor need not disclose material that is relevant only to the credibility of a defence witness.]
2. The prosecutor's obligations of disclosure remain subject to section 9 at all times.

9. Disclosure exceptions

1. The duty under section 8 applies as determined by domestic law in relation to—
 - (a) Privileged [and/or sensitive] information; or
 - (b) Information the disclosure of which is otherwise protected by law.
2. The duty under section 8 does not apply in relation to information that is not privileged information or otherwise protected by law, the disclosure of which would be likely—
 - (a) to cause serious injury or death to any person;
 - (b) to obstruct or prevent the prevention, detection, investigation or prosecution of crime; or
 - (c) to cause serious prejudice to the public interest,
 where a non-disclosure order has been made.

10. Redaction of non-disclosable information by prosecutor

1. Subsection (2) applies where—
 - (a) by virtue of section 8 the prosecutor is required to disclose to the accused information (the "disclosable information"); and
 - (b) the disclosable information forms part of, or contains, other information (the "non-disclosable information") which the prosecutor is not required to disclose.

2. Before disclosing the disclosable information, the prosecutor may (whether by redaction or otherwise) remove or obscure the non-disclosable information.

11. Continuing duty of disclosure by the prosecutor

The prosecutor's obligation of disclosure under section 8 continues until the conclusion of the criminal proceedings against the accused [subject to the filing of a defence statement] and where there is a material change to the information disclosed under section 8.

12. Manner of disclosure

The prosecutor must make disclosure of information by any reasonable means having regard to the form and nature of the information being disclosed, the circumstances of the accused and subject to Regulations that may be made in that regard.

13. Alibi disclosure by the accused

1. If an accused intends to adduce evidence in support of an alibi, the accused must give written notice to the prosecutor of the particulars of the alibi within the prescribed period.
2. For the purposes of subsection (1) written notice must include—
 - (a) the name and address of any witness the accused believes is able to give evidence in support of the alibi, if the name and address are known to the accused when the statement is given; and
 - (b) any information in the accused's possession which might be of material assistance in finding any such witness, if his or her name or address is not known to the accused when the statement is given.

14. Defence statements

1. The accused may [or must]—
 - (a) give a defence statement to the prosecutor; and
 - (b) if he or she does so, must also give a copy of such a statement to the court.
2. In this section "defence statement" means a statement setting out—
 - (a) the nature of the accused's defence, including any particular legal defences on which the accused intends to rely;
 - (b) any matters of fact or opinion on which the accused takes issue with the prosecution and the reason for doing so;
 - (c) any point of law in relation to disclosure which the accused wishes to take and any authority on which the accused intends to rely for that purpose;
 - (d) by reference to the accused's defence, the nature of any information that the accused requires the prosecutor to disclose; and
 - (e) the reasons why the accused considers that disclosure by the prosecutor of any such information is necessary.
3. A defence statement need only be provided after full disclosure under section 8.

4. A failure to provide a defence statement may relieve the prosecutor from his/her duties under section 15 and under section 11 except where there is a material change to the information disclosed under section 8.
5. If an accused raises a matter at the trial which was not raised earlier and it would be reasonable for the accused to have raised it in a defence statement, the court may draw such inferences as may appear proper. [Note: unless inconsistent with the law of a jurisdiction].
6. With leave of the court, the prosecutor may raise for consideration by the court an inconsistency between the information disclosed in a defence statement and a defence position adopted at another time, including during the trial. [Note: unless inconsistent with the law of a jurisdiction].
7. In determining whether to grant leave under subsection (6) the court is to take into account—
 - (a) the accused's right to silence; and
 - (b) the circumstances in which the defence statement was provided.

15. Secondary disclosure by the prosecutor

As soon as practicable [At the prescribed time] after the accused provides a defence statement under section 14(1), the prosecutor must, in the light of that statement:

- (a) determine whether section 8 applies to any information held by the prosecutor; and
- (b) comply with section 8 or, if no such information exists, give to the accused a written statement that there is no further material to provide.

16. Application by accused for additional disclosure

1. Where an accused satisfies the court that the prosecutor has failed to comply with section 8, the court may order the prosecutor to disclose information to the accused.
2. Where an accused has provided a defence statement and satisfies the court that the prosecutor has failed to comply with section 15, the court may order the prosecutor to disclose information to the accused.

17. Confidentiality of disclosed information

1. This section applies where by virtue of the Act the prosecutor discloses information to an accused.
2. The accused must not use or disclose the information or anything recorded in it other than in accordance with subsection (3).
3. The accused may use or disclose the information or anything recorded in it—
 - (a) for the purposes of the proper preparation and presentation of the accused's case in the proceedings in relation to which the information was disclosed ("the original proceedings");
 - (b) with a view to the taking of an appeal in relation to the matter giving rise to the original proceedings;
 - (c) for the purposes of the proper preparation and presentation of the accused's case in any such appeal.

4. A person to whom information is disclosed by virtue of subsection (3) must not, without lawful justification or excuse or without order of the court, use or disclose the information or anything recorded in it other than for the purpose for which it was disclosed.
5. Nothing in this section affects any other restriction or prohibition on the use or disclosure of information.

18. Contravention of section 17

A person who, without lawful justification or excuse or without order of the court, uses or discloses information for a purpose other than the purpose for which it was disclosed, knowing that the information or anything in it cannot be used for this other purpose, commits an offence.

19. Non-disclosure order

1. A non-disclosure order referred to in section 9(2) is an order by the court allowing the prosecutor to withhold (wholly or to a specified extent) from disclosure to the accused specified information that the prosecutor would otherwise be required to disclose to the accused.
2. An application for an order under subsection (1) may be made—
 - (a) with notice to the accused, including notice of the information sought to be excluded from disclosure; or
 - (b) with notice to the accused, without notice of the information sought to be excluded from disclosure; or
 - (c) without notice to the accused.
3. The circumstances in which the courses described under subsection (2) will be taken may be prescribed [by regulation or rules of court].
4. A court may make an order under subsection (1) where—
 - (a) it is satisfied that if the information were to be disclosed it would be likely to—
 - (i) cause serious injury, or death, to any person; or
 - (ii) obstruct or prevent the prevention, detection, investigation or prosecution of crime; or
 - (iii) cause serious prejudice to the public interest, and
 - (b) the potential harms in (i), (ii) or (iii) cannot be addressed by other means, and
 - (c) the public interest in non-disclosure of the information outweighs the public interest in protecting the fair trial rights of the accused, unless the non-disclosure may render the trial process, viewed as a whole, unfair to the accused.

20. Variation of a non-disclosure order

On application by the prosecutor or the accused, or of its own motion, the court may vary a non-disclosure order if it considers it in the public interest to do so.

21. Third-party disclosure

1. At any time after full disclosure by the prosecution, an accused in criminal proceedings may, with notice to the prosecution and the third party, apply to the court for an order that information that he or she reasonably believes is held by a third party be disclosed as the court determines.
2. The onus is on the accused to satisfy the court that the information is—
 - (a) material [or relevant] to strengthening his or her case; or
 - (b) material [or relevant] to undermining the prosecution case.
3. The application must—
 - (a) describe with as much particularity as possible the information that the accused seeks to have disclosed, and state the name of the person or agency that the accused reasonably believes holds the information; and
 - (b) contain written evidence indicating that the accused has made reasonable efforts to obtain the information from the person or agency that the accused alleges holds the information.
4. Before making an order for disclosure, the court must consider whether any of the information applied for is or may be excepted from disclosure under section 9.
5. The court may order disclosure of all or part of the information where it is satisfied that it is in the interests of justice to do so.

22. Consequences of non-disclosure

1. When information that should have been disclosed under this Act was not disclosed and there was no reasonable excuse for the failure to comply, the judge has a discretion to—
 - (a) adjourn the trial; or
 - (b) exclude the evidence; or
 - (c) admit the evidence notwithstanding the failure.
2. The judge must consider the interests of justice, including the right of the accused to a fair trial, when making an order under subsection (1).
3. This provision does not limit the powers of a court under a rule of law to deal with any failure by a prosecutor or accused or non-party to comply with the directions of the Court under this Act.

Model Prosecution Disclosure Guidelines

The following Model Prosecution Disclosure Guidelines are designed as a supplement to the Model Criminal Disclosure Act.

Model Prosecution Disclosure Guidelines

Introduction

1. Every accused person has a right to a fair trial. Fair disclosure to an accused, subject to the laws of the jurisdiction, is an inseparable part of a fair trial.
2. The scheme set out in the Criminal Disclosure Act is designed to ensure that there is a fair disclosure of material which may be relevant to the innocence or guilt of the accused. Disclosure under the Act should assist the accused in the timely preparation and presentation of the defence case and assist the court to focus on all the relevant issues in the trial. Disclosure which does not meet these objectives may risk preventing a fair trial taking place.
3. Fairness does, however, recognise that there are other interests that need to be protected, including those of victims and witnesses who might otherwise be exposed to harm and where the effectiveness of law enforcement may be jeopardised. It is also important to ensure that material is not disclosed which overburdens the participants in the trial process, diverts attention from the relevant issues, leads to unjustifiable delay or is wasteful of resources.
4. Investigators must be fair and objective and work with prosecutors to ensure that disclosure obligations are met. A failure to take action leading to proper disclosure may result in a wrongful conviction. It may alternatively lead to a successful abuse of process argument or an acquittal against the weight of the evidence.
5. The Act is intended to provide a framework for the regulation of the disclosure of information. However, it is strongly desirable that any disagreements or disputes about the disclosure of information should be settled if possible by negotiation between the parties rather than by application to the Court.

General Principles

6. Prosecutors should do all they can to facilitate proper disclosure, as part of their general and personal professional responsibility to act fairly and impartially in the interests of justice. Prosecutors must be alert to the need to provide advice to investigators on disclosure issues and to advise on disclosure procedures generally.
7. Prosecutors must thoroughly review information revealed to them and must be alert to the possibility that material may exist that falls within the disclosure criteria.

8. Prosecutors should consider, in every case, whether they can be satisfied that they are in possession of all relevant information. Where prosecutors have reason to believe that investigators have not complied fully with the duty of revelation of information, they must raise the matter with investigators and request that it be done.
9. Prosecutors must ensure that there is a record in writing of all actions and decisions they make in discharging their disclosure responsibilities.
10. If prosecutors are in doubt about whether information should be disclosed, they should resolve any such doubt in favour of disclosure unless the information is exempted from disclosure under the Act.
11. If prosecutors are satisfied that a fair trial cannot take place because of a failure to disclose which cannot or will not be remedied, they should consider whether or not to continue with the case.

Provision of information to the prosecutor

12. Investigators should identify information that is or may be exempted from disclosure to the accused pursuant to the Act and inform prosecutors accordingly.

Preliminary Disclosure

13. Preliminary disclosure is intended to inform the accused at an early stage in the proceedings of the nature of the allegations made against him or her, in order to assist the accused in determining whether to plead guilty or not guilty.
14. Prosecutors must always be alive to the need, in the interests of justice and fairness in the particular circumstances of any case, to make disclosure of material after the commencement of proceedings but before the prosecutor's duty for full disclosure arises.

Full Disclosure

15. Prosecutors are under a continuing obligation to make full disclosure to the accused in a timely manner of all information held by prosecutors which can be seen on a sensible appraisal by prosecutors to be disclosable under the Act.
16. Full disclosure under the Act has three principal aspects:
 - (1) The disclosure of all information that is material [or relevant] to the proof of the prosecution case;
 - (2) The disclosure of all information that is not relied on by the prosecution as part of its case, but that is considered to be material [or relevant] to the accused's case, including information that would undermine the prosecution case; and
 - (3) Recognition of the exceptions to disclosure provided by the Act, including section 9.
17. Disclosable information under paragraph 16(1) may include, for example:
 - (a) the names of any witnesses whom the prosecutor intends to call at the hearing or trial;
 - (b) statements provided by any such witnesses;

- (c) a list of the exhibits that are proposed to be produced on behalf of the prosecution at the hearing or trial;
 - (d) copies of all records of interviews with the accused;
 - (e) copies of any records of evidence produced by a testing device that contain relevant information;
 - (f) copies of any diagrams and photographs made or taken by a law enforcement officer that contain relevant information;
 - (g) a copy of any statement made by, or record of an interview with, a co-accused, in any case where the co-accused are to be proceeded against together.
18. Disclosable information under paragraph 16(2) may include, for example:
- (a) information that [materially] contradicts evidence upon which the prosecution would rely;
 - (b) information that casts doubt upon the credibility of prosecution witnesses;
 - (c) information that points to the lack of culpability of the accused and/or to another person as the perpetrator, such as information that casts doubt on the reliability of a confession;
 - (d) information which points to illegality in the course of the investigation that [materially] undermines the prosecution case;
 - (e) any information which may have a [material] effect on the admissibility of any prosecution evidence.

Limitations on the duty

19. This Act does not derogate from the operation of other laws and rules which apply in particular jurisdictions to regulate the disclosure of information. Examples of the types of information which may be subject to an absolute [or near absolute] exemption from disclosure or to disclosure subject to a decision of the court in particular jurisdictions include:
- (a) Matters in the interest of national security;
 - (b) Cabinet documents;
 - (c) Identity of informers;
 - (d) Covert and/or innovative investigation methods;
 - (e) Confidential communications and records regarding medical assessment and treatment;
 - (f) Legal professional privilege;
 - (g) Confidential government information;
 - (h) Victim counselling, including sexual assault counselling;
 - (i) Priest-parishioner;
 - (j) Marital, ie communication between partners;
 - (k) Communication regarding children, including social services records;
 - (l) Forensic methods and systems of analysis for the purpose of investigation.

20. The prosecution duty of disclosure may not extend [in some jurisdictions] to disclosing material:
- (a) relevant only to the credibility of defence witnesses; or
 - (b) relevant only to the credibility of the accused person; or
 - (c) relevant only because it might deter an accused person from giving false evidence or raising an issue of fact which might be shown to be false; or
 - (d) of which it is aware concerning the accused's own conduct to prevent an accused from creating a trap for himself or herself, if at the time the prosecution became aware of that material it was not seen as relevant to an issue in the case or otherwise disclosable pursuant to the criteria above.

Protection of Witnesses

21. This Act addresses the issue of witness protection in several ways. First, information the disclosure of which might jeopardize the safety of witnesses may be excepted from disclosure pursuant to section 9(2) of the Act. Second, personal information that may jeopardize the safety of a witness which is included in disclosable information may be redacted pursuant to section 10 of the Act. Third, section 16 of the Act protects information from further disclosure other than in accordance with the Act.

Defence Statements

22. Prosecutors should be open, alert and promptly responsive to requests for disclosure of information supported by a defence statement.

Unrepresented Accused

23. Unrepresented accused should be informed by the prosecutor or by the Court of their right [or duty] to provide a defence statement [and to apply for additional disclosure].

Manner of disclosure

24. The purpose of section 12 (manner of disclosure) of the Act is to permit the manner of disclosure to be responsive to the nature of the information to be disclosed, the circumstances of the accused and to take into account specific considerations such as the privacy of individuals.
25. Prosecutors should have regard, amongst other considerations, to the following:
- (a) That the information is in documentary, electronic, photographic or other form;
 - (b) The volume of the information to be disclosed;
 - (c) The sensitive nature of the information being disclosed;
 - (d) The accused being unrepresented and/or in custody;
 - (e) The resource implications for both the prosecutor and the accused;
 - (f) The location of the accused;
 - (g) Any time restrictions on the making of disclosure;
 - (h) The provisions which may be made for access to or inspection of the information;
 - (i) The involvement of a third party in the disclosure process.



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