

## 2013 PUBLIC DEFENDERS' CRIMINAL LAW CONFERENCE

### PROSECUTORIAL ETHICS AND DUTY OF DISCLOSURE

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#### Introduction

1. In recent times the Court of Criminal Appeal has made significant decisions relating to the role of prosecutors. The judgments in *R v Lipton* [2011] NSWCCA 247, *Wood v R* [2012] NSWCCA 21 and *Gilham v R* [2012] NSWCCA 131 provide guidance, not only to the prosecutors in meeting ethical standards expected of them, but also to defence lawyers as to the standards of fairness to which clients are entitled.
2. To some extent the decisions have highlighted standards of fairness that are not new, but the decision in *Lipton* has provided an illustration of the need to consider the application of what might be regarded as traditional rights in the context of contemporary refinement of principles of fairness. In particular, the evolution over the last 20 years of an obligation upon the prosecution to disclose all relevant material, generates active consideration of issues associated with the status of informers in criminal investigations and prosecutions.

#### Ethical obligations of prosecutors

3. The principles of fairness applicable to prosecutors upon which the convictions of *Wood* and *Gilham* were quashed by the Court of Criminal Appeal are not novel, but provide a timely reminder of their importance in the modern trial context.
4. The facts of *Wood* are well known and do not require elaboration. Eleven years after the body of his girlfriend, Caroline Byrne, was recovered from the rocks at The Gap at Watsons Bay, he was charged with her murder and among a number of grounds of appeal was the allegation that the trial had miscarried by reason of the prejudice occasioned by the Crown Prosecutor, and that there had been a miscarriage of justice as a result of evidence undisclosed at the trial. The prejudice allegedly occasioned by the prosecutor was in part that he had advanced a "second man" theory which was not supported by the evidence and had in address invited the jury to consider a list of 50 questions which he suggested needed to be answered in order to decide the outcome of the case. The issue generated a consideration by the CCA of established principles of fairness expected of a prosecutor including the repetition of the classic statement that:

*“Prosecuting counsel in a criminal trial represents the State. The accused, the court and the community are entitled to expect that, in performing his function of presenting the case against an accused, he will act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused’s trial is a fair one.”*

[per Deane J in *Whitehorne v The Queen* (1983) 152 CLR 657 at pp663-664]

5. McClellan CJ at CL (as he then was) who gave the leading judgment, referred to the particulars of the principle described in the judgment in *Livermore v The Queen* (2006) 67 NSWLR 659 at [31] which identified a number of features of a Crown address, which either alone or in combination, might require censure by an appellate court. They include:
  - (i) *A submission to the jury based upon material which is not in evidence.*
  - (ii) *Intemperate or inflammatory comments, tending to arouse prejudice or emotion in the jury.*
  - (iii) *Comments which belittle or ridicule any part of the accused’s case.*
  - (iv) *Impugning the credit of a Crown witness, where the witness was not afforded the opportunity of responding to an attack upon credit.*
  - (v) *Conveying to the jury the Crown Prosecutor’s own opinion.”*
6. The judgment included a further example where submissions are made that contain matters which the appellant is asked to explain, and the onus of proof is inappropriately reversed [580].
7. McClellan CJ at CL did not find fault with the “second man” approach of the prosecutor which had been the subject of a discharge application at the trial but was less charitable in relation to the approach taken of inviting the jury to resolve the 50 questions before deciding upon the guilt of the accused. The questions were not “neutral” but each contained the implication that unless the accused could explain a particular fact, the result would be a demonstration of guilt. The court applied the principle which had been earlier identified in *R v Rugari* (2001) 122 ACrimR 1 at [57] stating that it is plain that the raising of matters which an accused is asked to explain reverses the onus of proof, and asking “rhetorical” questions falls into this category [606].
8. Blame was not confined to the prosecutor. Senior counsel for the accused had objected to the fifty questions being placed before the jury in a document but the prosecutor then proceeded to put them to the jury orally in a careful and deliberate manner, inviting the jury to take notes and pausing to allow them to do so without objection. The court considered that the approach of counsel for the accused in attempting to deal with the questions had the result of giving prominence to them and leaving the jury to consider whether the Crown’s challenge had been met, which the court considered to be the wrong course to take [621].

9. Apart from the fifty questions issue it was also contended that the prosecutor had impermissibly given his own opinion, particularly in relation to the emotional impact of performing a dive from the top of The Gap. The court repeated the statement previously made by Simpson J to the effect that inviting juries to “determine contested factual issues on the basis of how they would feel” ... etc was “a dangerously wrong approach”: *GDD v The Queen* (2010) NSWCCA 62 at [121].
10. McClellan CJ at CL also disapproved of a statement by the prosecutor that “people that commit suicide generally don’t argue for an hour beforehand” about which there was no evidence in the trial. The court held that the remarks should not have been made and was a serious breach of the prosecutor’s duty to put the Crown case fairly before the jury [631].
11. He was also critical of the manner in which the prosecutor misrepresented the evidence of a witness which was found to have breached the obligation of fairness and detachment because the prosecutor was “fighting for a conviction”: *Gonzales v The Queen* (2007) 178 ACrimR 232 at 100. This was also found to be a serious breach of the prosecutor’s obligation [649].
12. The result was that Wood had his conviction overturned and a verdict of acquittal entered.
13. The circumstances of the prosecution of Jeffrey Gilham are also matters of some notoriety. Thirteen years after the murder of his parents, Gilham was charged and eventually found guilty and sentenced to life imprisonment on each count. On appeal, a number of grounds related to the conduct of the Crown Prosecutor during what was a re-trial. A complaint was also made about the failure of the prosecutor to call a medical expert retained by the defence and called on the voir dire on an issue over the admissibility of other medical evidence.
14. On the latter point, the court referred to well established principles in *Whitehorn v The Queen* (1983) 152 CLR 657; *R v Apostilides* (1984) 154 CLR 563; *R v Kneebone* (1999) 47 NSWLR 450 and *Velevski v R* [2002] HCA 4 and concluded that the failure to call the witness lacked a legitimate scientific foundation and constituted a miscarriage of justice [412]. The court was critical of the fact that the prosecutor at the second trial had not conferred with the witness but had relied upon an earlier decision that the witness was “plainly unreliable”, an approach which the court considered fundamentally flawed [394].

15. The court noted that it would have been available to the prosecutor to seek leave to cross examine under s 38 of the *Evidence Act*, a process in which the court considered that the interests of justice are preserved and advanced [405].
16. Complaints were also made concerning the conduct of the Crown Prosecutor in wielding a knife before the jury and in having Gilham demonstrate his dexterity with the knife. The demonstration with the knife was found to have had no relevance to the issues in the trial and, given the likely consequence that the demonstration would provoke a response adverse to Gilham, the court concluded that it was unfairly prejudicial [419]. The use of the knife during the final address was also said to be without justification and should not have been allowed [452].
17. Similarly, questions and submissions by the Crown Prosecutor such as her views on dealing with a child with problems and a person's need for "their mum and dad" were considered inflammatory and inappropriate [433].
18. As is well known, in the end result the views of Fullerton and Garling JJ that there should be entered a verdict of acquittal prevailed over the judgment of McClellan CJ at CL who favoured a new trial. It is significant that both Fullerton J (at [671]) and Garling J (at [698]) both held that the manner in which the trial had been conducted by the Crown was a factor in their decision to acquit rather than order a new trial.
19. Whilst the court were critical of the language of the Crown Prosecutor in some respects it was mild compared with previous examples. In *Libke v The Queen* (2007) 230 CLR 559 comments by the prosecutor such as "I do not buy that explanation" and "we've heard about that one" and others were described as a sarcastic and repeated commentary which went too far and was described by Heyden J as being cross examination of a "wild and uncontrolled and offensive character". In *Livermore v R* (2006) 67 NSWLR 659 the court considered that the use of the terms such as "idiot" in reference to a witness and "bizarre", "silly" and "reminiscent of a plot worse than an episode of *Desperate Housewives*" inappropriately conveyed the personal views of counsel. In *Gonzales v R* (2007) 178 ACrimR 232 the use of the terms "pathetic" and "absolutely pathetic" should not have been used but did not amount to a "gratuitous denigration of the appellant or the defence case".

## Duty of Disclosure

20. The law that a prosecutor is obliged to make available to the defence all material which may prove helpful to the defence is a relatively modern development. It emerged initially in UK cases such as *R v Ward* [1993] 2 AllER 577, *R v Davis* [1993] 2 AllER 643 and *R v Keane* [1994] 2 AllER 478, and slowly gained recognition in Australia in cases such as *Grey v R* [2001] HCA 65; *R v Reardon (No. 2)* (2004) 60 NSWLR 454 and *Mallard V R* (2005) 224 CLR 125.
21. The obligation is now entrenched in Guidelines of most Directors of Public Prosecutions and has statutory recognition in the *Director of Public Prosecutions Act (NSW)* 1986. The duty is also clearly set out in Barristers Rule 66, 66A and 66B and Solicitors Rules A66, A66A and A66B.
22. Nevertheless, the extent and circumstances in which the obligation is to be discharged have remained matters of some uncertainty. In *R v Keane* the Court of Appeal (UK) held that the prosecution must disclose documents which can be seen on a sensible appraisal by the prosecution (a) to be relevant or possibly relevant to an issue in the case, (b) to raise or possibly raise a new issue the existence of which is not apparent from the prosecution case, or (c) to hold out a real (as opposed to a fanciful) prospect of providing of a lead in evidence going to either (a) or (b). The same formula was incorporated in the DPP Disclosure Guidelines. The statutory formulation in s 15A of the *Director of Public Prosecutions Act* was that police officers have a duty to disclose to the DPP all relevant information that might reasonably be expected to assist the case for the prosecution or the case for the accused.
23. It has become clear that the accused does not have to fossick for information to which he is entitled (*Grey v R* at [23]) and that in order to constitute unfairness non-disclosure may be inadvertent, and it is immaterial where fault lies; the DPP has to live with it (*R v Fisher* (2003) 56 NSWLR 625 at [19]).
24. In relation to prosecutions in New South Wales, s 15A of the *Director of Public Prosecutions Act* imposed a duty on investigating police to disclose to the Director of Public Prosecutions all relevant information, documents and 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 DPP Disclosure Guidelines directed staff of the DPP that, subject to public interest immunity considerations, where police notify the Director of the existence of relevant documents and information, such material should be disclosed and, where practicable, made available, to the defence. The form of Disclosure Certificate prescribed in Schedule 1 of the Director of Public

Prosecutions Regulation 2005 made provision for the police to indicate that there was sensitive material not contained in the brief but imposed no other obligation to provide copies or details of it to the prosecutors. However, no provision was made in relation to the obligations of the prosecution to gain access to the sensitive material, or otherwise become aware of its nature and content and the practice of the DPP was not to take any such steps.

### **Commonwealth DPP Disclosure Policy**

25. The Commonwealth did not enact a statutory scheme but the Commonwealth Director of Public Prosecutions has published a “Statement on Prosecution Disclosure” which purports to commit the CDPP to the similar obligations, particularly in relation to disclosing “unused material”. It specifically provides that where material has been withheld from disclosure on public interest grounds the defence should be informed of this and the basis of the claim in general terms. It would seem to imply that the CDPP has had access to the material and is able to determine what action should be taken.

### ***R v Lipton***

26. The point of *Lipton* is that it was held that a prosecutor is under an obligation to gain access to material held by police over which a claim of public interest immunity is made, in order to determine whether the material should be disclosed or dealt with in some other manner.
27. Lipton was charged with two counts of supplying a large commercial quantity of a prohibited drug pursuant to s 25(2) of the *Drug Misuse and Trafficking Act 1985* and pleaded guilty to both counts in the lower court, and was committed for sentence to the District Court. The supplies were to an undercover police officer acting in the course of a controlled operation. In a manner which is familiar, the UCO had bought two small quantities and then “ramped up” the amounts until they reached large commercial quantities whereupon Lipton was immediately arrested. His contention was that he had been manipulated by his girlfriend with whom he had a tempestuous relationship. She suggested the idea, introduced him to the UCO, was present during the first negotiations, and according to him had put pressure on him to deal in quantities with which he had never dealt before and about which he was most reluctant.
28. Even though Lipton pleaded guilty he was entitled to have consideration given to a reduction in his sentence if the evidence suggested that he might not have been a participant in the offences if the police in some way facilitated them (e.g. *Taouk v R* (1992) 65 ACrimR 387 at [396], [403]).

29. His girlfriend, Melanie Brown, had effectively been written out of the brief even though she was seen at meetings and heard discussing the drug deals with Lipton on telephone intercepts, and was not sighted after Lipton was arrested.
30. A request was made to the DPP to disclose the records relating to communications between police and Ms Brown but without asking to see the material, acting on advice from the police that they would not be providing the information sought, the DPP advised that there was no further material to be disclosed and that there would be a public interest immunity issue. An attempt was made by the defence to obtain access to the material by subpoena which caused two folders of documents to be produced (leaving little doubt as to the extensive collusion between Ms Brown and police), but the judge at first instance held that there was no evidence of legitimate forensic purpose, and an appeal against that order was unsuccessful (*Lipton v R* [2010] NSWCCA 175). When the matter next came before a judge for sentence, an application was made for a permanent stay of the prosecution on the basis of the failure of the prosecutor, who still had not taken steps to examine the material, to discharge his duty of disclosure. A permanent stay was then granted, against which the prosecution appealed to the Court of Criminal Appeal. The CCA upheld the order staying the prosecution until such time as the prosecutor discharged his duty (*R v Lipton* [2011] NSWCCA 247).
31. In the leading judgment, McColl JA reviewed the authorities relating to the duty of disclosure and concluded that the prescribed Police Disclosure Certificate is invalid to the extent that it departs from the language in s 15A and purported to enable police to withhold relevant material from the DPP. More importantly, her Honour specifically held that the DPP is obliged to form his own view about whether the material is relevant to an issue in the case and so advise the respondent including, where applicable, advising him of any claim of public interest immunity [110].
32. Her Honour also concluded that because on the Disclosure Certificate, the police had ticked a box indicating that they held material which “might reasonably be expected to assist in the case for the prosecution or the case for the accused person” prima facie Lipton should have access to it in order to determine its utility in the sentence proceedings, subject to any privilege claim [116]. R S Hulme J made a further conclusion that it was not possible to disclose “all relevant information” without revealing the content of that information and simply advising of the existence of the documentation did not discharge the obligation imposed by the Act.

33. The story drags on interminably. When the matter went back before the sentencing judge, the Director advised that he had looked at the material and concluded that it could assist the defence case but there was a claim of public interest immunity made by the police on the basis that Ms Brown was an informer. A subpoena was then reissued for the documents and a claim of public interest immunity repeated. The sentencing judge examined the documents and partly because it was obvious to anyone that Ms Brown was an informer, and ordered that a number of them should be provided to the defence. The Crown appealed again and the CCA held that, because Lipton had not given evidence, the judge had erred in finding that there was a legitimate forensic purpose (*Attorney General (NSW) v Lipton* [2012] NSWCCA 156). The matter went back to the sentencing judge for sentence. Lipton duly gave evidence of the actions of Ms Brown, which, together with other evidence from telephone intercepts and SMS messages clearly provided support for his contention that she had placed considerable pressure on him to continue to deal with the UCO even though he was reluctant to do so because of the quantity involved. The Crown were separately represented and indicated that if a further call was made on the subpoena, the claim for public interest immunity would be pressed again and if the documents were to be handed over, a further appeal would be made to the Court of Criminal Appeal. In the end Lipton capitulated and the sentencing proceeded to conclusion with him receiving a significant discount as a result of the enticements of Ms Brown (*R v Lipton* [2012] NSWDC 201).

#### **Legislative response**

34. The decision of the CCA that the permanent stay of proceedings was appropriate, produced an immediate legislative response. Within a few days an amendment was made to s 15A of the *Director of Public Prosecutions Act*, although with a sunset clause that the amendment cease to have effect on 1 January 2013. The effect of the amendment was that the duty imposed by the section did not require police officers to disclose to the Director material that was the subject of a bona fide claim of privilege, public interest immunity or statutory immunity. The duty of police officers in such a case was said to be to inform the Director that they have obtained material “of that kind”. The amendment seemed to be of limited effect as it did not deal with the duty of the Director where he was otherwise aware of the existence of such material, in which case the CCA decision indicated that he still had a duty to examine it.

35. Late last year a further amendment was made to s 15A, unlimited by any sunset clause. The amendment had the effect of extending the duty beyond police officers to include officers of the Police Integrity Commission, the NSW Crime Commission and the Independent Commission Against Corruption. It also extended the duty of those officers to not only disclose to the Director the existence of material that is the subject of a claim of privilege, but also the nature of the material and the claim relating to it (subsection (6)). An officer must provide to the Director any material subject to a claim if the Director requests it to be provided (subsection (7)). The duty of the officers is also limited where the material “would contravene a statutory publication restriction” in which case the officer is to inform the Director of the existence of the material and the nature of it (subsection (8)). There does not seem to be any obligation to produce that material to the Director if it is requested to be provided.
  
36. The form of Disclosure Certificate was also changed and now makes provision for a “(d)escription of item” for material that may be immune from disclosure or subject of a statutory publication restriction.
  
37. My observations on the current position are as follows:
  - (i) the duties imposed by s 15A are upon law enforcement officers and the legislation is silent as to the duty of prosecutors;
  - (ii) the duty of prosecutors identified in *Lipton* to form a view about whether the material is relevant to an issue in the case and so advise the respondent, is unaffected by s 15A;
  - (iii) Disclosure Certificate is now to contain a description of the item, presumably sufficient to inform the Director of the nature of the material, but there is no obligation to serve the certificate on the defence;
  - (vi) the position is far from clear and it seems to me that there will inevitably be cases where the prosecution should be discontinued if the prosecutor considers that material should be disclosed but a public interest immunity claim is upheld and the prosecutorial duties cannot be discharged.
  
38. The related issue of public interest immunity will be an interesting topic for another day. There are significant issues concerning the reconciliation of older cases to the effect that public interest immunity applies to informers with the modern law relating to the duties of a prosecutor to disclose relevant material, call all material witnesses and put all facts before the court. A related question arises in relation to the relevance of legitimate forensic purpose. If the prosecutor, as was the case in *Lipton*, concludes that there is material which would be of assistance to the defence, it is arguable that the issue of legitimate forensic purpose should not arise.

39. Similarly, the reference in the 2012 amendment to s 15A to not contravening statutory publication restrictions has the potential to attract further controversy, particularly in the light of the reserved decision of the High Court in *X7 v Australian Crime Commission* [2012] HCA Trans 280 and the grant of special leave in *Lee v NSW Crime Commission* [2013] HCA Trans 27 which both concern the power to compulsorily examine persons on matters with which they have been charged, and the judgment of the CCA in *R v Sellar and McCarthy* [2013] NSWCCA 42 which indicates that if such material is disseminated or disclosed to the DPP, it might prejudice a fair trial. It will be an interesting topic for next year.

8 March 2013