

The Duty of Disclosure

- 1 Every accused has a right to a fair trial, a right long embodied in our law and guaranteed under Article 87 of the Basic Law. A fair trial is the object and expectation of all of those involved in the trial process. The prosecutor must make fair disclosure to the defence as an integral part of a fair trial.
- 2 The duty to disclose is a positive duty placed upon the prosecution. It is also continuing. If material becomes relevant during the course of a trial it should be disclosed.
- 3 The prosecutor must be alert to the need to make advance disclosure of material of which he or she is aware (either from his or her own consideration of the papers or because attention has been drawn to it by the defence) and which he or she, as a responsible prosecutor, recognizes should be disclosed at an earlier stage. Such material includes :
 - (a) previous convictions of a complainant or deceased if that information can reasonably be expected to assist the defence when applying for bail;
 - (b) material which may enable a defendant to make a pre-committal application to stay the proceedings as an abuse of process;
 - (c) material which may enable a defendant to submit that he or she should only be committed for trial on a lesser charge, or perhaps that there should not be a committal for trial at all;
 - (d) material which will enable the defendant and the legal advisers to make preparations for trial which may be significantly less effective if disclosure is delayed (e.g. names of eye witnesses who the prosecution do not intend to use).
- 4 The prosecution should make available to the defence any witness whom they do not propose to call but whom they know could give material evidence that tends either to weaken the prosecution case or strengthen the defence case. If the prosecutor is possessed of material which may be of relevance to the defence, whether documentary or otherwise, this should be disclosed. There is a positive duty to ascertain the existence of, and to disclose scientific evidence which might assist the defence. The task of the prosecutor is to evaluate the materiality of information which he or she possesses.

- 5 Not all material needs to be disclosed to the defence. The rule is that information need not be disclosed by the prosecutor if such disclosure would be prejudicial to the public interest. This may arise in various situations, as where disclosure would harm the proper functioning of the public service. The concept of 'public interest immunity' recognizes not that the prosecution have a privilege to withhold information, but that there is immunity from making disclosure when the public interest in withholding information in a particular case outweighs the normal rules requiring disclosure.

- 6 In *R v Keane* (1994) 99 Cr App R 1, the Court of Appeal defined 'materiality', emphasized the prosecution's duty in judging materiality, and set out the balancing exercise to be undertaken by judges in deciding upon disclosure. The procedure to be adopted, whether it be by way of *inter partes* hearing, or exceptionally in an *ex parte* hearing, is governed by rules of practice identified both in *R v Keane* and in *R v Davis, Johnson and Rowe* (1993) 97 Cr App R 110. In *R v Keane*, it was held that the prosecution should have notified the defence before the trial began that an *ex parte* application was to be made to the court, and such an application should have been made so that the trial judge could have seen the material and heard the prosecution's reasons for not wishing to disclose it before making a ruling. The prosecution had to identify the documents and information which were material and, having done so, such material should be disclosed unless they wished to maintain that public interest immunity or other sensitivity justified withholding some or all of it. Only that part which was both material in the estimation of the prosecution and sought to be withheld should be put before the court for its decision. The more full and specific the indication the defence lawyers gave of the defence or issues they were likely to raise, the more accurately both prosecution and judge would be able to assess the value to the defence of the material. The guidance provided in *Keane* encompasses the common law duty of disclosure which applies in Hong Kong (*HKSAR v Lau Ngai-chu* [2002] 2 HKC 591). Any order that material otherwise disclosable be withheld on the basis of public interest immunity should be no wider in scope than the public interest demands; and similarly it should not remain in force any longer than necessary (*Johnson and Others v R* [1999] EWCA Crim 885).

- 7 If the prosecution wish to claim public interest immunity in a criminal trial for documents which might help the defence case, they should give notice of their intention to the defence so that, if necessary, the court can be asked to rule on the question. If, in a wholly exceptional case, the prosecutor is not prepared for the issue to be decided by the court, the prosecution may need to be discontinued. Material covered by legal professional privilege, including confidential advice given on the case by the prosecutor to the investigator, is not in general subject to the rules of disclosure.

- 8 The ultimate arbiter of what must be disclosed is the court and not the prosecutor. Subject to that, the material which the prosecution is required to disclose is that 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 whose existence is not apparent from the evidence that the prosecution proposed to use; and
 - (c) to hold a real (as opposed to fanciful) prospect of providing a lead on evidence which go to (a) or (b).

Thus any unused material in the possession of the prosecution, e.g. a statement of a witness which contains information inconsistent with the evidence that he or she is expected to give, must be disclosed.

- 9 In deciding whether to provide copies of audio and video surveillance to the defence the prosecution are entitled to take into consideration the protection of the safety of an undercover police officer (*R v Crown Prosecution Service and Another, Ex parte J and Another* TLR 8 July 1999).

- 10 The prosecutor's duty is to prosecute the case fairly and openly in the public interest and does not extend to conducting the case for the defence. It follows that the prosecution are under no duty to disclose to the defence material which is relevant only to the credibility of a defence witness; indeed, there is a clear distinction to be drawn between such material, and material which may assist the defence case, which is disclosable. Accordingly, where the result of checking an alibi notice is to provide the prosecution with material which undermines the credibility of a witness who supports the alibi there is no duty on the prosecution to disclose that material to the defence.

11 In *R v Ch'ng Poh* [1996] 1 HKCLR 18 concern was expressed about the somewhat cavalier attitude of the prosecution to the duty of disclosure of material that was or might be relevant. The discharge of that duty is to be measured, not by the actual knowledge or difficulties of the prosecution or departments concerned, but by the potential effect upon the defence of the accused and the extent to which it may be assisted or prejudiced.

12 The Criminal Procedure and Investigations Act 1996, does not apply to Hong Kong but the following provisions (section 3 and section 9) are suggested for guidance :

- (a) The prosecutor must disclose to the accused any prosecution material which has not previously been disclosed to the accused and which in the prosecutor's opinion might undermine the case for the prosecution against the accused;
- (b) Where material consists of information which has been recorded in any form the prosecutor discloses it :
 - (i) by securing that a copy is made of it and that the copy is given to the accused; or
 - (ii) if in the prosecutor's opinion that is not practicable or not desirable, by allowing the accused to inspect it at a reasonable time and a reasonable place or by taking steps to secure that he is allowed to do so;

and a copy may be in such form as the prosecutor thinks fit and need not be in the same form as that in which the information has already been recorded;

- (c) Where material consists of information which has not been recorded the prosecutor discloses it by securing that it is recorded in such form as he thinks fit and :
 - (i) by securing that a copy is made of it and that the copy is given to the accused; or
 - (ii) if in the prosecutor's opinion that is not practicable or not desirable, by allowing the accused to inspect it at a reasonable time and a reasonable place or by taking steps to secure that he is allowed to do so;

- (d) Where material does not consist of information the prosecutor discloses it by allowing the accused to inspect it at a reasonable time and a reasonable place or by taking steps to secure that he is allowed to do so;
- (e) Material must not be disclosed to the extent that the court, on an application by the prosecutor, concludes it is not in the public interest to disclose it and orders accordingly;
- (f) The prosecutor must keep under review the question whether at any given time there is prosecution material which :
 - (i) in his opinion might undermine the case for the prosecution against the accused; and
 - (ii) has not been disclosed to the accused;

and if there is such material at any time the prosecutor must disclose it to the accused as soon as is reasonably practicable.

13 The prosecutor should disclose to the defence the previous convictions of a prosecution witness. If discreditable conduct has previously been established against a prosecution witness which might affect the assessment to be made of him or her as a witness, that should also be disclosed. The safest course for the prosecutor is to make enquiry about a witness's record and character where his or her credibility is likely to be a crucial issue in the case.

14 Material which is subject to legal professional privilege is not disclosable, unless privilege is waived. Legal advice by a prosecutor to an investigator is privileged. Internal notes, memoranda, correspondence or other materials generated by the prosecution in the preparation of the case for trial may also be privileged. As a general rule, privilege attaches to matters of opinion as opposed to matters of fact.