CRIMINAL CODE AMENDMENTS: REDISCOVERING CRIMINAL DISCOVERY AND THE CHALLENGES OF DISCLOSURE

-A JUDICIAL PERSPECTIVE-

JUDGE MARSHALL IRWIN
CHIEF MAGISTRATE
QUEENSLAND

The concept of criminal discovery which is the subject of this paper was inserted as a new Chapter division 3 into Chapter 62 of the Criminal Code (Queensland) on 5 January 2004 by the *Evidence (Protection of Children) Amendment Act* 2003 (the Act).

The Explanatory Notes to the Act state that the purpose of this amendment was to ensure that an accused person is properly informed of the case against him or her, and thereby receives a fair trial.

Although as the Notes concede this is in truth a "statutory codification of the existing prosecution disclosure obligations" rather than a rediscovery of criminal discovery. This is emphasised by the new section 590 AB (1) which expressly "acknowledges" that it is a fundamental obligation of the prosecution to ensure that prosecution proceedings are conducted fairly with the single aim of determining and establishing truth.

As stated in the Notes:

"Until now the obligations of the prosecution (including the Queensland Police Service and the Office of the Director of Public Prosecutions) to disclose their case to the defence have depended on a number of different guidelines, procedures, policies, case law, unwritten rules, and general practice. While the requirements of the prosecution disclosure are generally well understood and compiled with by police, prosecution and defence, there is no easily referenced code setting out the rules of disclosure".

Development of Prosecution Disclosure in Queensland

However the existence of Chapter division 3 demonstrates as recognised by de Jersey CJ in *R v Spizzirri* [2001] 2 Qd.R.686 at 688 [10] that:

> "The last three decades have seen substantial change in the practice of the criminal courts. The modern trend strongly favours early disclosure of the true issues between Crown and defence, rather than their being held back or, worse still, concealed."

As the Chief Justice also said at 688 [11]:

> "In the trial of 20 to 30 years ago, the defence would jealously, and sometimes even definitely, "keep its counsel"as to the accused's version of events. That may have been explained partly by the Crown's

> own approach. Under the regime, the Crown for its part was entitled to hold back witness' statements, and other potential evidence.(cf.*O'Shea v. Bandiera, Ex parte O'Shea* [1998] Q.W.N 43 at 98)".

O'Shea v Bandiera was a case in which the Queensland Full Court set aside a magistrate's decision to order the production to the defence of the statements of prosecution witnesses, and also the decision to dismiss the complaint for non compliance with the order. The court said that in the Magistrates Court, there was no authority which justified giving access by the defence to the Crown witnesses' statements which might be contained in the "prosecutor's brief". As recognised by the Court of Criminal Appeal in *R v Kingston* [1986] 2 Qd.R.114 at 121:

> "The court seemed to say that in the lower court the defence was not entitled to those statements as of right and further, that a Magistrate lacked power even in the exercise of his discretion to order production of them".

In K*ingston* the court applying the decision of the New South Wales Court of Appeal in *Maddison v Goldrick* [1976] I N.S.W.LR. 661, which reasoning the High Court expressly declined to disapprove when special leave to appeal in that case was refused in *Attorney-General for New South Wales v Findlay* (1976) 50 A.L.J.R.637, concluded that:

> " It should now be taken that, while nothing like general discovery of the prosecution's documents can be legitimately be sought, a Magistrate can, **if adequate reason is shown**, order that previous statements of the prosecution witnesses be shown to the defence and the documents be placed into the court's custody to allow that purpose to be carried out. Passage of the documents into the custody of the court can be arranged whether by defence *subpoena* or by calling in court for the documents to be produced to the court."
>
> (my emphasis)

As observed by Pincus JA (with whom all de Jersey JA and White J) agreed in *Spizzirri* at 690 [22] the practice in criminal courts is now not reconcilable with *O'Shea v Bandiera*. The practice has now also moved beyond the decision in *Kingston* that the magistrate's power to order that previous statement of prosecution witnesses be provided arises only "if adequate reason is shown".

The modern approach appropriately encourages candid early disclosure on both sides. The Crown is obliged to disclose in advance its statements and other potentially relevant evidence to the defence. This is reflected in the Queensland Director of Public Prosecutions' Guidelines to Prosectors. The defence is also encouraged, although –with limited exceptions- not obliged to "show its hand" as early as possible. Defence admissions are much more frequently made, and early during trials defence counsel will not unusually delineate for the jury the issues essentially in contention. (see de Jersey CJ in *Spizzirri* at 688 [12]).

As de Jersey J also observed in *Spizzirri* at 688 [13]:

> "These are obviously desirable, enlightened developments: helpful to the administration of justice, by encouraging the early entry of honest pleas of guilty, and streamlining necessary trials, avoiding the wasting of time and other resources; and also helpful to the parties, both in preserving resources, minimising jury frustration, and ensuring to accused persons who plead guilty, appropriate reduction in penalty."

The United Kingdom position

This approach is now also increasingly adopted in the United Kingdom where previously, as noted by Pincus JA in *Spizzirri* at 690 [22] a restrictive view of defence rights to obtain documents by subpoena, in criminal cases, has previously been taken.

At the 19th International Conference of the International Society for the Reform of Criminal Law at Edinburgh in June 2005 the Rt. Hon. Lord Goldsmith QC, Attorney-General of England and Wales observed that the role of prosecutors requires openness and transparency. And in respect of the Scottish position the Rt. Hon Lord Macfadyen of the High Court of Justiciary, Edinburgh referred to a change in the practice of the Crown in relation to the disclosure of the police statements of Crown witness as a factor encouraging early pleas of guilty. According to His Lordship:

> "The Scottish approach traditionally was that sufficient disclosure in most cases was made by the lists of witnesses and of documentary and other productions attached to the indictment. The defence then had the opportunity of taking statements of their own ("precognitions") from Crown witnesses. The Crown has now changed its practise in that regard, and the police statements of witnesses are routinely disclosed. That speeds up the process of defence preparations".

The Prosecution's duty of fairness

The duty of prosecution disclosure flows from the obligation that the prosecution conducts a criminal trial with fairness.

This fundamental duty of fairness of the prosecution was expressed in *R v Lucas [1973] VR 693* in terms that:

> "…..it has long been established that a prosecution must be conducted with fairness towards the accused and with a single view to determining and establishing the truth."

And in the same year as the decision in *O'Shea v Bandiera* was denying the defence access to the prosecution brief in *R v Hay and Lindsay* [1968] Qd.R

459 at 476 W.B Campbell in the Queensland Court of Appeal formulated this duty as follows:

" ……. the Crown counsel is a representative of the State, "a minister of justice"; his function to assist the jury in arriving at the truth…..It cannot be too often made plain that the business of counsel for the Crown is to fairly and impartially to exhibit all the facts to the jury. The Crown has no interest in procuring a conviction. Its only interest is that the right person should be convicted, that the truth should be known, and that justice should be done".

As stated by Cooper J (with whom Kneipp J and Sheperdson J agreed) in *R v M* [1991] 2 Qd R 68 at 80:

> "it is important to remember that the underlying reason for the rule, and it is reflected in all of the cases to which I have referred, is that an accused has a basic right to a fair trial."

It has also been said in a United States commentary on prosecutorial ethics:

> "The first, best and most effective shield against injustice must be found not in the persons of defence counsel, trial judge or the appellate courts, but in the integrity of the prosecutor….this notion lies at the very heart of the criminal justice system".

Queensland Director of Prosecutions' Guidelines

The obligation of prosecution disclosure involves:

- disclosing to the accused the material that the prosecution intends to lead in evidence; and
- all evidence held by the prosecution that will tend to assist in the defence case.

These principles are reflected in the Queensland Director of Public Prosecutions' Guidelines to Prosecutors issued both before and after the introduction into Parliament of the amending legislation.

For example it is stated in the Director's Prosecution Policy of 1995 as set out in Carter's Criminal Law of Queensland, vol 2 at [145,501.10] and [145,501.65]:

- The Crown should assist courts to operate efficiently. Therefore, the Crown's case should be fully disclosed to the defence at the earliest possible opportunity and any evidence that tends to the proof of innocence should also be disclosed at the earliest possible time. Full and early disclosure can reduce the numbers of late pleas of guilty.

- When the prosecuting counsel knows that a Crown witness has prior convictions and/ or is indemnified in respect of the matter before the

court, it is the Crown Prosecutor's duty to reveal the convictions or the indemnity to the defence.

In the Director's Guidelines issued on 18 November 2003, it would seem with knowledge of the amendments, it is stated:

"**[147,000]1. DUTY TO BE FAIR**

The duty of a prosecutor is to act fairly and impartially, to assist the court to arrive at the truth.

- a prosecutor has the duty of ensuring that the prosecution case is presented properly and with fairness to the accused.

[147,120] 25. DISCLOSURE

The Crown has a duty to make full and early disclosure of the prosecution case to the defence.

The duty extends to all facts and circumstances and the identity of all witnesses reasonably regarded as relevant to any issue likely to arise, in either the case for the prosecution or defence.

[147,1200.1] ***(i)Criminal histories***

The Criminal history of the accused must be disclosed:

- where a prosecutor knows that a Crown witness has a criminal history, it should be disclosed to the defence.
- Where the defence in a joint trial wishes to know the criminal history of a co-accused it should be provided.

[147,120.5] ***(ii) Immunity***

Any indemnity or use-derivative use undertaking provided to a Crown witness in relation to a trial should be disclosed to the defence.

[147,120.10] (iii) ***Exculpatory information***

If a prosecutor knows of a person who can give evidence that may be exculpatory, but forms the view on reasonable grounds that the person is not creditable, the prosecutor is not obliged to call that witness.

The prosecutor must however disclose to the defence:

(a) the person's statement, if there is one, or
(b) the nature of the information:
    - the identity of the person who possesses it; and
    - when known, the whereabouts of the person.

The details should be disclosed in goodtime. The Crown, if requested by the defence, should subpoena the person.

[147,120.15] (iv) *Inconsistent statement*

Where a prosecution witness has made a statement that may be inconsistent in a material way with the witness's previous evidence the prosecutor should inform the defence of that fact and make available the statement. This extends to any inconsistencies made in conference or in a victim impact statement.

"Of particular interest to the Magistrates Court is Disclosure Guideline 25 (ix) concerning **committal proceedings"** [147,120.40]. This includes the following:

"All admissible evidence collected by the investigating police officers should be produced at committal proceedings, unless the evidence falls into one of the following categories:

(d) it is reasonably believed the evidence is untrue or so doubtful it ought to be tested upon cross-examination, provided the defence is given notice of the person who can give the evidence and such particulars of it as will allow the defence to make its own inquires regarding the evidence and reach a decision as to whether it will produce the evidence.
   - Any doubt by the prosecutor as to whether the balance is in favour of, or against, the production of the evidence should be resolved in favour of production.
   - Copies of written statements to be given to the defence including copies to be used for the purpose of an application under section 110A of the Justice Act 1886, are to be given so as to provide the defence with a reasonable opportunity to consider and to respond to the matters contained in them; they should be given at least 7 clear days before the commencement of the committal proceedings."

There is also a requirement that a "Disclosure Form" be fully completed and provided to the legal representative of the accused no later than 14 days before the Committal hearing and within 28 days of the presentation of the indictment, or prior to the trial evidence, whichever is sooner (Disclosure Guidelines 25 (xii), [147,120.55]).

Disclosure Guideline 25 (xiii) [147,120.60] provides for an "Ongoing obligation of Disclosure" as follows:

"When new and relevant evidence becomes available to the prosecution after the disclosure forms have been published, that new evidence should be disclosed as soon as practicable. The duty of disclosure of exculpatory information continues after conviction until death of the convicted person: section 590 AL.

> Post conviction disclosure relates to reliable evidence that may raise reasonable doubt about guilt: section 590AD."

There is a requirement that a prosecutor must take particular care when dealing with an "Unrepresented Accused" (Disclosure Guideline 27 [147,130]) states:

> "There is an added duty of fairness and the prosecution must keep the accused properly informed of the prosecution case."

Disclosure Guideline 35 [147,170] relates to "Witnesses" and provides:

> "In deciding whether or not to call a particular witness the prosecutor must be fair to the accused.
>
> The defence should be informed at the earliest possible time of the decision not to call a witness who might otherwise be reasonably expected to be called. Where appropriate the witness should be made available to the defence."

Chapter division 3 of the Criminal Code

In some respects the Disclosure Guidelines go beyond the disclosure obligations imposed by Chapter division 3 on the prosecution in relation to relevant proceedings. Relevantly for the Magistrates Court these proceedings are committals and prescribed summary trials. A trial on indictment is also a relevant proceeding.

However the amendments extend beyond prosecutions conducted by the Queensland Director of Public Prosecution. Accordingly they apply in circumstances where the Guidelines do not apply. Section 590 AD of the code defines "prosecution" to mean the person in charge of the prosecution or a person appearing for the prosecution. This includes prosecutions conducted by the Queensland Police Service, and other departments and statutory authorities.

By virtue of section 590 AB (2)(b) the obligation includes an ongoing obligation for the prosecution to give the accused full and early disclosure not only of all the evidence it proposes to rely on in the proceedings but also of:

> "all things in the possession of the prosecution, other than things the disclosure of which would be unlawful or contrary to public interest, that would tend to help the case of the accused person".

Further section 590 AE (3)(b) extends the obligation to those things of which the arresting office or a person appearing for the prosecution is aware and that person is able, or would be able, to locate without unreasonable effort.

Section 590 AG reflects the common practise in the criminal jurisdiction that most material is disclosed directly to the accused's lawyer rather than to the accused.

Section 590 AH sets out the mandatory disclosure obligations of the prosecution. As stated in the Explanatory Note the listed items reflect what is generally called the police brief or the prosecution brief of evidence. The items include a copy of any statement in the possession of the prosecution of a proposed prosecution witness.

Section 590 AI provides timeframes within which mandatory disclosure must be made. Director's Guideline 25 (x11) is consistent with this.

Section 590 AJ recognises that investigators also gather evidence which does not form part of the brief of evidence that the prosecution intends to rely on in a proceeding. It requires that the prosecution on request must give the defence listed items of this description. The items include a copy of any statement of any person and in the possession of the prosecution but on which the prosecution does not intend to rely; and a copy or notice of any thing in the prosecutions' possession that may be reasonably considered to be adverse to the reliability or credibility of a proposed prosecution witness.

Neither section 590 AH or 590 AJ limits the prosecution's general obligation of disclosure. This is consistent with this proposition that as mentioned, the Director's Guidelines go beyond the scope of the disclosure obligations in Chapter division 3.

Implications for Magistrates Court

These disclosure obligations are of particular significance for the operations of the Magistrates Court and the members of the public which have contact with the court as witnesses or defendants. Because as the court of first instance in the judicial system where approximately 96 percent of all criminal matters are dealt with, it is here that the greatest majority of prosecutions will be conducted. Most of these matters will be prosecuted by the Queensland Police Service. And frequently the defendants will be self represented. It is also likely that the number of unrepresented defendants, particularly in the case of summary trials will increase.

Committal Protocols

The Magistrates Court has issued Protocols for the Conduct of Committals in Brisbane. Under the Brisbane Committals Project these committals are prosecuted by the Queensland Director of Public Prosecutions. The purpose of these protocols is to provide for the efficient and timely disposition of indictable offences. The signatories are the Chief Magistrate, Director of Public Prosecutions, the Commissioner of the Queensland Police Service and Chief Executive Officer, Legal Aid Queensland.

These protocols include the imposition of disclosure requirements on the prosecution. These requirements are to:

- provide the Form QP9 containing a summary of the prosecution case at an early stage of the proceedings;
- advise the defence that the brief of evidence is available for collection no later than 14 days prior to the committal proceedings.

The latter requirement is reflected in the time frames for mandatory disclosure in section 590 A (2)(a) of the Code. The purpose of the time frames is also to enable the defence to be in a position to determine and advise the court at an early stage as to whether any witnesses will be required for cross-examination. And if so, to advise as to which witnesses will be required. This will ensure that the court can accurately allocate time to the proceeding so that time is not wasted. In this way other cases can be listed at the earliest possible available time.

As observed by de Jersey J in *Spizzirri* and Lord Macfadyen the early and full disclosure of the prosecution case is helpful to the administration of justice by encouraging early guilty pleas. In my own experience as a practitioner such disclosure achieves early resolution of matters by enabling the defence to appreciate the strength of the prosecution case.

Disclosure Directions

The Magistrates Court will also have an important role in relation to the issue of whether there is to be disclosure to the accused (including his/her lawyer) for committal proceedings or prescribed summary trials, of:

- sensitive material;
- witness contact details;
- material, the disclosure of which is contrary to the public interest; and
- original evidence, in the sens of viewing that evidence.

For each of these issues the court has power to direct disclosure by the prosecution in accordance with legislative criteria. The court would generally be expected to address such issues at a direction hearing under section 83 A of the *Justices Act* 1886. The directions that a magistrate can give at a hearing under this section have been extended to include disclosure directions under Chapter 62, Chapter division 3 of the Code. Section 590 AV (1) of the Code permits the court to make a disclosure direction on its own initiative or on the accused's application.

In relation to witness contact details the court may only direct disclosure under section 590 AP (4) if-

- the accused person satisfies the court a legitimate purpose is achieved by giving this to the accused; and
- it is satisfied that to do so is not likely to present a reasonably ascertainable risk to the welfare or protection of any person.

In relation to the issue of disclosure contrary to the public interest, section 590 AQ provides that unless disclosure is also prohibited by law, the court may

direct disclosure, only if it is satisfied, on balance, that disclosure to the accused is not in fact contrary to the public interest,

In relation to the viewing of original evidence which is not sensitive evidence the court may direct under section 590 AS that the prosecution allow an "appropriate person" to view and examine the thing for the purposes of the proceeding, subject to the conditions the court considers appropriate to protect the integrity of the thing. The court may only make the direction if it is satisfied that the terms of the direction can ensure the integrity of the thing is protected. An "appropriate person" is the accused; a lawyer acting for the accused; or another person engaged by the accused; if the court considers it appropriate for the other person to view or examine the thing.

In relation to "sensitive evidence", section 590 AO (1) provides that the prosecution is not required to give the accused a copy of the thing the prosecution reasonably considers to be sensitive evidence other than required under the section.

Section 590 AF (1) defines "sensitive evidence" to mean anything containing or displaying an **image** of a person:

- that, is obscene or indecent; or
- the disclosure of which to another person, without the imaged person's consent, would interfere with the imaged person's privacy.

Section 590 A F (2) extends the term to "child exploitation material" under chapter 22 of the code, or material alleged to be child exploitation material. This is material that, in a way likely to cause offence to a reasonable adult, describes or depicts someone who is, or apparently is, a child under 16 years in:

- a sexual context, including for example, engaging in sexual activity; or
- in a offensive or demeaning context; or
- being subjected to abuse, cruelty or torture.

As set out in Disclosure Guideline 25 (vi) on this issue the view has been taken that this will include:

"Video taped interviews with complainants of sexual offences".

Thus these interview tapes are regarded as being in the same category as pornography, child computer games and police photographs of naked complaints. I note that autopsy photographs are also included in this category.

As a result of this categorisation the Guideline provides that these interview tapes:

- **must not** be given to the defence without a court order;
- **must be** made available for viewing by the defence on request if, the evidence is relevant to either the prosecution or defence case.

As a result of applications made to the Magistrates Court, for the legal representatives of accused to be given a copy of these tapes under section

590 AV it would appear that this Guideline is being strictly applied and that such interview tapes will not be provided in response to a lawyers undertaking that the tape will not be provided to the accused. It is likely that the extension on 4 April 2005 of the definition of "sensitive evidence" to include "child exploitation material" will reinforce this position in relation to interview tapes with children under 16 years who complain about sexual offences.

Although it also appears from these applications that transcripts will be provided to the lawyers, such transcripts will not convey the body language and manner of speech, which may be highly relevant in determining how to advise the accused and as to how to approach cross-examination. Such transcripts will not always be accurate. As a consequence they are only admitted by a court as an aid to interpretation, with the only accurate account being the words spoken on the tape.

Merely making the tape available for viewing by the defence may not be sufficient as it may be necessary for the lawyers to revisit it over a number of days to properly prepare for the hearing.

When applications are made to the Magistrates Court for a disclosure direction in relation to these interview tapes the court under section 590 AV(2) may make the direction on the conditions about the circumstances of disclosure or otherwise, it considers appropriate. By virtue of section 590 AV (3) these conditions may include:

- partial disclosure only; or
- disclosure only be made to a lawyer

The court has power to impose similar conditions upon disclosure directions it makes concerning sensitive witness contact details; material, the disclosure of which is contrary to the public interest; and the viewing of original evidence.

Although I appreciate the concerns which have resulted in this policy, in my opinion the legislature did not intend that the disclosure requirements, which include the mandatory disclosure of any statement of a proposed prosecution witness, would be fettered by excluding video taped interviews with complaints for sexual offences. This is particularly so when section 590 AH (2) (c) (i) (A) gives as an example of such a statement, one "made by a proposed witness for the proposed witness for the prosecution in an audio recording of an interview". I am of this view not withstanding the fact that the mandatory disclosure provisions are subject to limitations on disclosure in Chapter subdivision D of the Code.

Although because of the principles of judicial independence I am unable to bind any other magistrate to take this view I am aware from decisions that have been made to disclose such interview tapes subject to appropriate conditions, that it is shared by other magistrates.

In these circumstances, I consider that it is important for the legislation to clarify whether or not it is intended that such interview tapes are sensitive

evidence. Because if they are not, unnecessary direction hearings on this issue will be avoided.

Based on experience to date I believe that in the interim, magistrates will in the interests of ensuring that an accused person is properly informed of the case against him or her, and thereby receives a fair trial, require maximum disclosure by the prosecution, in accordance with the legislative intention and subject to appropriate conditions.

Conclusion

Since the decision of the Queensland Full Court in *O'Shea v Bandiera* there has been a substantial change in the practise of criminal courts in Queensland as to the requirement for prosecution disclosure. The modern trend favours early disclosure of the true issues between the Crown and the defence.

The new Chapter division 3 which was introduced into the Criminal Code on 5 January 2004 is a statutory codification of existing prosecution disclosure obligations. It provides easily referenced code setting out the rule of disclosure.

So far as the Queensland Director of Public Prosecutions is concerned this is reflected in the Directors' Guidelines to Prosecutors. And whereas in some respects the Directors' Guidelines go beyond the disclosure obligations imposed by Chapter Division 3 those obligations are now made clear for other prosecution agencies, such as the Queensland Police Service, and other departments and statutory authorities.

Early disclosure by the prosecution is helpful to the administration of justice, by encouraging early pleas of guilty, and streamlining necessary trials, thereby avoiding the wasting of time and other resources.

The disclosure obligations under Chapter division 3 are relevant to committal proceedings and prescribed summary trials before the Magistrates Court. This is of public importance because approximately 96 percent of all criminal matters are dealt with here.

The Magistrates Court will have a particularly significant role in determining whether there will be disclosure in those cases where there are limitations on prosecution disclosure under the Code, and whether any such disclosure will be subject to conditions (and if so, on what conditions), eg in the case of sensitive evidence.

Based on experience to date, I believe that magistrates will, in the interests of ensuring that the accused person is properly informed of the case against him or her, and thereby receives a fair trial, require maximum disclosure by the prosecution, in accordance with the legislative intention and subject to appropriate conditions.