



## **2023 Practice Note:**

### **Criminal Disclosure in High Court Trials**

#### **HCPN 2023/1**

##### **Application**

1. This Practice Note applies to all criminal trials in the High Court.

##### **Purpose**

2. The purpose of this Practice Note is to put measures in place to avoid delay in making disclosure from disrupting criminal trials. This Practice Note takes effect from 8 March 2023.

##### **Judicial Disclosure Conference**

3. The presiding judge at the case review hearing,<sup>1</sup> or at the first call in the High Court (whichever is the later), will schedule a Judicial Disclosure Conference, unless there is reason not to.
4. The date of the Judicial Disclosure Conference will be a date which allows the prosecution reasonable time, having regard to the nature of the case, to have made full disclosure and for defence counsel to have had reasonable time to consider the disclosure.
5. The purpose of the Judicial Disclosure Conference is to identify whether:
  - (a) Full disclosure has been made; or
  - (b) Full disclosure has not yet been made, but outstanding disclosure has been identified and a timetable for its completion can be directed; or
  - (c) There is a dispute about disclosure which requires judicial intervention to resolve; or
  - (d) There is an issue of non-party disclosure which requires judicial intervention to resolve.
6. At the conclusion of the Judicial Disclosure Conference, the presiding judge will either record that full disclosure has been made or make such directions as are necessary to resolve any outstanding disclosure issues.

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<sup>1</sup> Criminal Procedure Act 2011, s 57.

### **Prosecution obligations**

7. Prior to the Judicial Disclosure Conference, prosecuting counsel will meet with the investigating officer responsible for making disclosure to decide which of the matters in 5(a)–(d) applies.
8. Prosecuting counsel, and the police officer in charge of the case (where appropriate), will, subsequent to the meeting with the investigating officer, meet with defence counsel with a view to reaching a common position on the matters in 5(a)–(d); and if no common position can be reached then to identify the differences in positions.

### **Defence obligations**

9. Defence counsel will meet with prosecuting counsel as per 8 with a view to reaching a common position on the matters in 5(a)–(d); and if no common position can be reached then to identify the differences in positions.
10. Defence counsel will, prior to meeting with prosecuting counsel, diligently review the disclosure made to that point, note any disclosure issues and give consideration to whether applications for non-party disclosure will be necessary.<sup>2</sup>

### **Checklist**

11. Prosecuting counsel in their meeting with the investigating officer will use the checklist (and any update promulgated from time to time) annexed to this Practice Note to help ensure that all relevant areas of disclosure have been addressed.
12. Prosecuting counsel and defence counsel will likewise use the checklist in their meeting.
13. Counsel will provide a copy of the checklist to the presiding judge at the Judicial Disclosure Conference.

### **General obligations of counsel**

14. If any issue relating to criminal disclosure arises outside the terms of this Practice Note which might disrupt the commencement of a trial as scheduled or which might otherwise require judicial intervention to resolve, counsel must advise the court of the issue without delay.
15. This Practice Note does not reduce or replace the obligations of counsel to identify issues of disclosure at the case review hearing or trial callover.

Hon Justice Susan Thomas  
Chief High Court Judge – Te Kaiwhakawā Matua

7 March 2023

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<sup>2</sup> Criminal Disclosure Act 2008, s 24.

# HIGH COURT DISCLOSURE CHECKLIST

## INTRODUCTORY NOTES

1. *Disclosure is an integral part of any investigation and prosecution. It ensures a fair and transparent process and is a vital safeguard against miscarriages of justice.*
2. *Investigators must pursue all reasonable lines of inquiry, whether inculpatory or exculpatory in respect of a suspect.*
3. *Investigators must record and retain any material obtained during an investigation which could be relevant to the investigation. Relevant means "information or exhibit, as the case may be, that tends to support or rebut, or has a material bearing on the case against the Defendant". Where there is any doubt as to relevancy, the information should be recorded on the disclosure schedule and discussed with the prosecutor.*
4. *A disclosure management document should be prepared at the commencement of any investigation and disclosure prepared on an ongoing basis as the investigation proceeds.*
5. *Whilst the Criminal Disclosure Act lists specific categories of documents in ss 12 & 13 the overriding principle is "relevance" as defined in s 8 and any information that could be relevant to the defence or prosecution must be disclosed unless lawful withholding grounds apply.*
6. *Each case should have a Disclosure Schedule that includes a description of any information not disclosed with sufficient particulars for the prosecutor and defence to understand in broad terms what the material is and the rationale for non-disclosure.*

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## Disclosure to be Provided (non-exhaustive, and may be updated from time to time)

*The following information will almost always be relevant and should be presumed to be disclosable. It should be provided as soon as it is available with lawful and appropriate redactions.*

- ☐ All information advising Police of offence including:
  - CARD event chronologies
  - 111 calls/Comms audio
  - Transcripts of 111 calls
  - Offence or Incident reports
  - NIA occurrence/record
- ☐ All available footage relating to the alleged offence, including:
  - Eagle footage
  - Taser footage
  - CCTV footage
  - ANPR stills
  - Police Cellphone footage
  - Public Cellphone footage
  - All scene photographs including proof sheets and scene maps/diagrams/spherical or 3D photography
- ☐ Electronic copies of all photographs in original format taken in relation to investigation of alleged offence including photos of victim/complainant injuries
- ☐ Medical notes and reports detailing victim/complainant statements and injuries
- ☐ Pathology reports and photos
- ☐ Pathologists working file – consideration of relevance with Prosecutor and Pathologist
- ☐ All statements, job sheets, scene canvass questionnaires and any other documents created during the investigation

- ☐ Previous convictions of any witnesses spoken to during investigation relevant to credibility or reliability
- ☐ Any information held that could undermine the credibility or reliability of any witnesses
- ☐ In the case of 'inmate witnesses' or 'incentivised witnesses' *e.g., immunity from prosecution*, any information relevant to para 3.17 of the 2021 Solicitor General Guidelines for use of inmate admissions
- ☐ All records of relevant communications with victims and witnesses *e.g., text messages*
- ☐ Copies of notebook entries of all staff involved in the investigation
- ☐ Copies of any e-mails that are relevant to the investigation
- ☐ Copies of any search warrants or production orders obtained during the investigation
- ☐ Copies of any search warrant or production order applications
- ☐ Copies of any surveillance device or tracking device warrants obtained during the investigation
- ☐ Copies of any surveillance device or tracking device warrant applications created during the investigation
- ☐ Exhibit schedule and all documents/photos relating to exhibits
- ☐ ESR POL 143s
- ☐ ESR Reports
- ☐ ESR Working file – consideration of relevance with prosecutor and ESR
- ☐ Official breath and blood receipts, device logbook entries and device calibration results
- ☐ Summary of facts, charging documents and any other custody notes for Defendant including any mental health reports/assessments
- ☐ Fingerprint reports and working files
- ☐ Opposition to Bail forms
- ☐ Defendants' criminal convictions QHA
- ☐ All written records relating to defendant and co-defendants interviews
- ☐ Any digital/electronic interview records relating to Defendants and co-defendants.
- ☐ Transcripts/synopsis of digital/electronic interview records
- ☐ All records of interview and interviews of suspects interviewed but not charged
- ☐ Copies of instructions to expert witnesses
- ☐ Expert witness statements/reports and copies of working files
- ☐ ISURV records/surveillance logs
- ☐ Cellphone/electronic devices raw data and extraction reports
- ☐ All Hi-Tech Crime reports and working files including description of search parameters
- ☐ Trial/JAT witness/exhibit list

**Matters for Discussion (non-exhaustive and may be updated from time to time)**

*Specific Matters to be discussed with Prosecutor as soon as practical and well prior to trial date as per Prosecutor obligations in para 7 of the 2023 Practice Note "Criminal Disclosure in High Court trials". Object of discussions being to identify any additional relevant information that needs to be considered for disclosure.*

- ☐ Are all interactions (either by police or prosecutors) with witnesses that could have relevance recorded and disclosed?
- ☐ Is there any information relevant to the case that is not recorded?
- ☐ What search parameters have been applied to any digital evidence? – have these been disclosed.
- ☐ Have any redactions of substance been made by police at first instance (eg beyond name/address). Are these appropriate?
- ☐ CMC monitored phone call records, disclosure summaries and transcripts
- ☐ Surveillance logs/ ISURV records
- ☐ Records of any communication platform containing relevant information e.g. Microsoft teams.
- ☐ Other specialist squad involvement
- ☐ Intelligence documents
- ☐ Operations orders or Operational Instructions
- ☐ Relevant Information from Covert Human Intelligence Sources  
Discussions to be cognisant of section 64 of the Evidence Act *“An informer has a privilege in respect of information that would disclose, or is likely to disclose, the informer’s identity”*.  
HSMU supervisor to be advised.
- ☐ National intelligence Application
- ☐ Without limiting the effect of sections 24-29 of the CDA that govern non-party disclosure, discussion regarding the potential relevance of any non-party information from such agencies as;
  - Corrections
  - ACC
  - Oranga Tamariki
  - Other government departments
  - Forensic experts consulted orally or in writing
  - Clinical notes made by Sexual Abuse Assessment and Treatment Service clinicians.
- ☐ Negative information -information can sometimes be as significant to an investigation as positive information; that which casts doubt on the suspect's guilt or implicates another person must also be included. Examples of negative information include:
  - a CCTV camera that recorded the crime/location/suspect in a manner which is not consistent with the prosecution case.
  - where a number of people present at a particular location at the particular time that an offence is alleged to have taken place state they saw nothing unusual.
  - where a finger-mark from a crime scene cannot be identified as belonging to a known suspect; and
  - any other failure to match a crime scene sample with one taken from the accused.
- ☐ Any other relevant information