

Group Briefing

February 2018

Prosecutors, Regulators & Investigators: Time to Review your Disclosure Procedures

KEY CONTACTS



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Prosecutors, regulators and investigators can learn from the recent failings by police and prosecutors in the UK to properly comply with their disclosure obligations. Media reports suggest that these failings have resulted in a 70% increase in the number of prosecutions in England and Wales that have collapsed due to a failure to disclose relevant evidence.

WHAT IS DISCLOSURE?

Disclosure is the duty of the prosecution or investigative body to disclose all relevant evidence in its possession, even if it does not intend to rely on that evidence at hearing. It is one of the basic principles of the right to a fair hearing.

The Guidelines for Prosecutors (2016), issued by the Irish Director of Public Prosecutions, set out the following principles:

- » The prosecution must disclose all relevant evidence to the defence, even evidence it does not intend to rely on at trial. 'Relevant evidence' includes evidence that might undermine some aspect of the prosecution case or in some other way be of assistance to the defence.
- » The prosecution must disclose all relevant evidence as a matter of course. The defence should not have to ask for relevant evidence to be disclosed.
- » The prosecution should provide

the defence with copies of relevant material not intended to be used at trial, or the opportunity to inspect the material where this is not feasible.

- » Disclosure should be made sufficiently in advance of the trial to enable the defence to consider the evidence.

Similar principles apply to investigations conducted by other enforcement bodies and regulators and to inquiries.

WHAT HAPPENS IF DISCLOSURE IS NOT DONE CORRECTLY?

If disclosure is not done correctly, it can jeopardise a successful prosecution or investigation. This has come to the fore recently in the UK, following the collapse of a number of trials where crucial evidence was disclosed at the last minute. The UK Crown Prosecution Service is now undergoing a review of cases to check that disclosure obligations have been met. Similar issues could arise here as the same legal principles

and obligations in relation to disclosure apply in Ireland.

COMMON FAILINGS IN THE DISCLOSURE PROCESS

- » **Treating disclosure as ‘just another administrative process’:** Disclosure is a fundamental feature of the justice process. It is not just another administrative task – it underpins the right to a fair hearing. Disclosure should be at the forefront of any prosecutor’s or investigator’s mind from the outset.
- » **Failing to disclose all relevant material:** The threshold for disclosure is extremely low. The duty is to disclose anything which could potentially be useful to the other side in making its own case or in undermining the prosecutor’s or investigator’s case. While the prosecutor or investigator might not regard evidence as relevant to its case, this does not mean that it does not have to be disclosed. It is up to the other side to decide whether to use the material.
- » **Leaving disclosure to the last minute:** Relevant evidence should be disclosed in advance to allow time to consider it. Leaving disclosure to the last minute or after evidence has been given can lead to unnecessary

adjournments, increased costs and the collapse of a prosecution or investigation.

- » **Waiting for requests to disclose material:** It is not appropriate to await a request to disclose material. The onus is on the prosecution or investigative body to disclose all relevant evidence.
- » **Failing to review the decision to prosecute when additional evidence becomes available that may undermine the prosecution or assist the defence:** The DPP’s Guidelines for Prosecutors state that the evidence against the accused must be assessed at every stage in the proceedings, not just at the initial stage. If additional evidence becomes available that undermines the prosecution, it must assess whether it is in the public interest to continue with the prosecution. The DPP Guidelines state that it is not in the public interest to use public resources on a prosecution which has no reasonable prospect of success. Similar principles apply to investigations and inquiries.
- » **Failing to have an adequate audit trail of actions and decisions:** As a matter of best practice, the prosecutor or investigator should

maintain an audit of all actions and decisions taken in the disclosure process to ensure full and complete disclosure and a fair hearing.

WHAT CAN PROSECUTORS, REGULATORS & INVESTIGATORS DO?

- » Review your organisation’s policies and procedures for making disclosure. Ensure that they adequately address how to deal with any issues that can arise in a timely manner. If you do not have policies and procedures in place, now is the time to action this.
- » Ensure that all personnel dealing with disclosure receive ongoing training and that they fully understand their disclosure obligations and the importance of complying with them.
- » Improve supervision of prosecutions/investigations and review the effectiveness of case management systems.
- » Put in place an audit system for recording all disclosure decisions and ensure all personnel record their decisions in sufficient detail for this audit trail to be effective.

Read our previous article on the importance of disclosure [here](#).