



In The Supreme Court of Bermuda

CRIMINAL JURISDICTION

GUIDANCE NOTES

FORM 1

(PROSECUTION DISCLOSURE NOTICE)

GENERAL

1. The Prosecution's statutory duty to disclose its case and all relevant unused material is stated in sections 3 and 4 of the Disclosure and Criminal Reform Act 2015 (DCR).
2. FORM 1 is now the prescribed Notice which must be filed and served by the Prosecution in order to comply with sections 3(3) and 4(2) DCR.

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COVER LETTER TO THE REGISTRAR

3. FORM 1 must be filed under a cover letter to the Registrar stating the following:
 - (i) compliance (or non-compliance) with the required timeframe for filing- (where there is non-compliance, an explanation should be included in the cover letter);
 - (ii) whether a hearing is requested or whether a written application is being submitted for consideration by a Judge;

- (iii) with the exception of *ex parte*¹ hearings, specification of hearing dates mutually available to the Defence and the Prosecutor covering a 30 day period from the filing date; and
- (iv) whether a joint hearing bundle is enclosed or will subsequently be filed in accordance with the rules of this Practice Direction.

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JOINT HEARING BUNDLES

- 4. Where the Prosecution intends to make a written or oral application, a copy of any skeleton argument and related case law which the Prosecution intends to place before the Court shall be served (not filed) on the Defence.
- 5. The Defence will then have 14 days thereafter within which to serve the Prosecution with a copy of any skeleton argument and /or case law in reply.
- 6. Within 7 days of receipt of the Defence's reply (or in the case where there is no reply from the Defence: no less than 7 days but no more than 14 days after serving the Defence with the Prosecution's skeleton argument and / or case law), the Prosecution shall file all of the exchanged materials as a joint hearing bundle for the Court.

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TIMELINE TO FILE AND SERVE

- 7. FORM 1 must be filed and served by the Prosecutor no later than within 70 days from the day on which the Accused person was sent to the Supreme Court from the Magistrates' Court (see section 29(3) Criminal Jurisdiction and Procedure Act 2015 (CJPA)).
- 8. While FORM 1 has an ultimate 70 day deadline, it should be remembered that section 29(1) CJPA requires the Prosecution to '*disclose its case...as soon as is reasonably practicable*'.

¹ An ex parte hearing is permissible in the most limited circumstances eg. when the Court has granted leave for an application under section 8 DCR (Public Interest) to be made on an ex parte basis.

9. The reference in section 29(1) CJPA: ‘...*the prosecution must disclose its case in accordance with section 4* DCR (unused material)...*as soon as is reasonably practicable*’ is plausibly a drafting slip as the Prosecution’s duty to disclose *its case* arises under section 3 DCR. Section 4 imposes a duty on the Prosecution to disclose all relevant unused material in the Crown’s possession.
10. In any event, the statutory duty for the Prosecution to disclose *as soon as is reasonably practicable* its case and all relevant unused material in the possession of the Bermuda Police Service or the Prosecution is clear.
11. The 70 day deadline should not be treated as an opportunity for the Crown to move at a molasses pace in filing FORM 1. Section 29(3) CJPA allows for compliance with the Crown’s disclosure obligations no later than 70 days after the date on which the person was sent for trial. However, this should not prevent the Crown from taking all reasonable steps to file FORM 1 sooner than the 70 day timeframe.
12. The Prosecutor should also appreciate the potential impact of delayed disclosure, which may lead to:
 - (i) delay in arraigning the Accused as a measure of caution that the Defence may wish to make a section 31 CJPA application after service of ‘*copies of the documents containing the evidence on which the charge or charges are based*²’;
 - (ii) obstruction to the administrative efficiency of listing a section 504 application in the same hearing as a section 31 CJPA application, as the latter can only be made after evidence has been served;
 - (iii) delay in the fixing of a trial date;
 - (iv) delay in proceeding to case management directions;
 - (v) prolongation of the remand period for Accused persons not on bail; and
 - (vi) prolongation of the period within which the Accused is charged with an indictable offence but has no knowledge of the evidence against him/her:

² See section 31 CJPA which allows the application to be made after the Crown has effectively discharged its section 3 DCR duties.

(Under the old committal inquiry regime, an Accused person would be served in the Magistrates' Court with a schedule of Prosecution witness names and exhibits which served as notice of the evidence which the Crown intended to rely on.

Under the new '*sending*' regime, the said schedule of information is no longer required to be served on the Defence at the Magistrates' Court stage of the committal process.

Therefore, when disclosure of the Crown's case is delayed it potentially prolongs the period of time within which an Accused person is wholly unaware of the evidence against him/her in support of the charge.

Notably, the Director of Public Prosecution is required under section 37 PACE to be satisfied on the sufficiency of the evidence before an Accused is charged with an offence.)

13. It should ultimately be remembered that section 6 of the Bermuda Constitution Order 1968 gives every person charged with a criminal offence the right to be afforded a fair hearing within a reasonable time.
14. Hence, all reasonable efforts should be made to avoid delay disclosures.

FORM 1 (PROSECUTION DISCLOSURE NOTICE)

(Questions 1-8)

DISCLOSURE OF CROWN'S CASE CHECKLIST

15. This portion of FORM 1 applies to the Prosecution's section 3 DCR duty to disclose its case.
16. Section 3(1) DCR calls for the Prosecutor to serve on the Accused:
 - (a) *a written summary of the prosecution case;*
 - (b) *a written copy of the charges that are to be pursued...at trial;*
 - (c) *a written copy of the evidence on which the prosecutor intends to rely at trial; and*

(d) such other particulars or materials as may be required under regulations and which reasonably relate to disclosure by the prosecution

17. It must be remembered that the Prosecutor has a right under section 3(4)(a) DCR to amend the Crown's case (provided that an amended written summary is served). Such an amended summary should be made in writing and it should be filed and served as soon as is reasonably practicable in all circumstances.
18. Section 3(4)(b) DCR allows the Crown to seek leave of the Court to pursue fresh charges notwithstanding the case originally disclosed to the Defence in accordance with sections 3(1) and 3(3) DCR.

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(Questions 9-22)

DISCLOSURE OF UNUSED MATERIAL CHECKLIST

19. This portion of FORM 1 relates to the Prosecution's statutory duty to disclose all relevant unused material pursuant to section 4 DCR.
20. Unused material is defined in section 2 DCR:
"Material" means materials of all kinds, including but not limited to information and objects
"Unused material" means material that the prosecutor does not intend to use as evidence in the trial of the accused person.
"Relevant unused material" means any unused material that might reasonably be considered capable of-
 - (a) Undermining the case for the prosecution against the accused person; or*
 - (b) Assisting the case of the accused person*
21. Late or non-disclosure of the following categories of unused material has previously provoked trial delays, adjournments and even the exclusion of evidence:
 - (i) police notes;
 - (ii) search reports;
 - (iii) custody records;
 - (iv) notes/records of exculpatory statements made by the accused;
 - (v) expert notes and unused reports;

- (vi) unused photographs;
 - (vii) warrants and underlying information and documentation;
 - (viii) police disciplinary records
 - (ix) antecedent records in relation to civilian witnesses
 - (x) details surrounding mental or psychological history of witnesses³
22. Questions 9-22 require the Prosecution to specify its position on these various types of unused material as an alert to both sides to consider and hopefully resolve any such issues well in advance of the start of the trial.
23. Of course, it should not be forgotten that the Crown has a continuing duty to disclose unused material under section 6 DCR. The Prosecutor must, therefore, keep under review the question whether there is relevant unused material which has not been disclosed to the Defence.
24. Any further unserved relevant unused material which is identified by the Prosecution must be served as soon as is reasonable practicable or within such time as the Court may order.
25. Section 6 applies continuously throughout the process until the conclusion of the case against the Accused.

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(Questions 23-24)

PUBLIC INTEREST NOTICE

26. Questions 23-24 call for the Crown to state whether it is asserting Public Interest (PI) under section 8 DCR. Where the Prosecution is asserting PI, the Prosecutor must make an application to the Court for an order that the relevant material in its possession shall not be disclosed to the Defence (ie the Accused and his/her legal representative(s)).
27. The Prosecutor is required to give the Defence prior notice of the application in compliance with section 8(2) DCR, unless the Court otherwise orders.

³ See *R v Wolda Gardner (Court of Appeal) No. 12 of 2014 paras 20-26*

28. Where the Court has granted such an order relieving the Prosecution of its section 8(2) notice obligation, the Prosecutor may select N/A (*not applicable*) in answer to question 23. The N/A reply in these circumstances would not expose the Crown's reprieve by the Court as N/A is also what would otherwise be selected where the Crown does not intend to assert PI.
29. Where the Prosecution is seeking a Court order to be excused from having to give notice of a s.8 application, the Prosecutor should make all reasonable attempts to be heard before a Judge well in advance of the the day on which FORM 1 is due to be filed and served.

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(Questions 25-29)

APPLICATION FOR EXTENSION OF TIME

30. Questions 25-29 relate to section 30 CJPA applications by the Prosecution for an order allowing the Prosecution more time to comply with its disclosure duties as required by section 29 CJPA: “...*the prosecution must **disclose its case in accordance with section 4(DCR)** as soon as is reasonably practicable.... The prosecution duty of disclosure mentioned in subsection (1) must be complied with no later than 70 days after the date on which the person was sent for trial.”*
31. As previously stated, the Prosecution's duty to disclose its case arises under section 3 DCR not section 4 DCR. Hence, the underlined wording in the preceding paragraph, as extracted from section 29 CJPA, is an anomaly. It follows that section 29 is, by intention, a reference to both the Prosecution's duty under section 3 DCR (the Prosecution's case) and under section 4 DCR (unused material).
32. Section 30 is effectively a request by the Crown for an extension of the 70 day deadline. Section 30(2) CJPA requires the Crown to put the Defence on notice (at the same time as notice is given to the Court) if a s. 30 application is to be made.
33. The notice by the Prosecution may be made orally in Court or in writing. Section 30(3) CJPA requires all written applications to specify the grounds for which the extension is being sought.

34. The Defence should be mindful of the 3 day deadline under section 30(3) CJPA to respond to a written application by the Prosecution for an extension of time for service to be made.
35. Any Notices of Additional Evidence for filing after the stated 70 day deadline should only be filed with leave of the Court order under section 30 CJPA.
36. In any event, the Prosecutor should have continuous regard to the points outlined in paragraphs 38-40 above on the potential impact of delayed disclosure.

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(Questions 30-33)

JOINDER OF CHARGES APPLICATION

37. Supporting affidavit evidence must be filed with FORM 1 where the Prosecution seeks to be heard on a joinder application.
38. This part of FORM 1 is intended to prompt the Prosecution to give early notice of any joinder applications. Early notice of joinder applications is crucial for two principal reasons:
 - (i) Trial date fixtures are often withheld or unconfirmed until after the disposition of the joinder application and
 - (ii) Disclosure obligations may be unclear prior to the order allowing or disallowing the joinder application.
39. Joinder applications under section 480 CC permit charges to be joined in the same Indictment with other charges (where they may otherwise be lawfully be included) if:
 - (a) *those charges are founded on the same act or omission; or*
 - (b) *if those charges are founded on separate acts or omissions which together constitute a series of acts done or omitted to be done in the prosecution of a single purpose; or*

(c) if those charges are founded on separate acts or omissions which together constitute a series of offences of the same or of a similar character.

Where the grounds for a joinder of charges are discovered not to be founded on any one of the above, the joinder application will not be allowed.

40. Section 481 CC:

‘A person who counsels or procures another person to commit an offence, or who aids another person in committing an offence, or who becomes an accessory after the fact to an offence, may be charged in the same indictment with the principal offender, and may be tried with him or separately, or may be indicted and tried separately, whether the principal offender has or has not been convicted, or is not amenable to justice.’

41. Section 482 CC:

‘Any number of persons charged with committing or with procuring the commission of the same offence, although at different times, or with being accessories after the fact to the same offence, although at different times, may be charged with substantive offences in the same Indictment, and may be tried together notwithstanding that the principal offender is not included in the same indictment, or is not amenable to justice.’

42. See section 483 for specific reference to joinder of charges with respect to stealing and receiving.

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PROSECUTOR’S SIGNATURE

43. The Prosecutor’s signature, which must be placed at the bottom of FORM 1, certifies the fullness, accuracy and veracity of each reply made. The signature is made on behalf of the Crown altogether and not merely the individual prosecutor who affixed it. Therefore, it is crucial that the Prosecutor who signs FORM 1 is satisfied that all of the replies have been correctly and fully entered.

44. Prosecuting Counsel must apply a great level of care and attention to ensure that FORM 1 is a true representation of the Crown’s position.

FORM 1 must be completed separately in respect of each Accused person