

## PROSECUTION DUTY OF DISCLOSURE

### Introduction

1. The Prosecution's duty of disclosure was considered by the Law Society of Hong Kong, after a review of recent court decisions and the Prosecution's practice and Code on disclosure of evidence to the Defence.
2. We ask the Department of Justice to immediately consider a review of its policy on disclosure, including and in particular the disclosure of unused material.

### Common Law Principles apply to Hong Kong

3. The following definitions are used in this submission.

**Unused material** is any material, including information, which is accumulated or gathered in the course of investigation by a law enforcement agency and which does not form part of the Prosecution case against the Defence.

**Disclosure** refers to providing the Defence with copies of, or access to, any materials and information which might reasonably be considered capable of undermining the case for the Prosecution against the Defence or to have some bearing on the case for the Prosecution or of assisting the case for the Defence which has not previously been disclosed. Disclosure is not limited to material or information which is or could be admissible at trial.

4. Unlike England and Wales, which has a statutory regime provided for under the Criminal Procedure and Investigations Act 1996, the Code of Conduct and the Criminal Justice Act 2003, Hong Kong has no statutory regulation of

Prosecution disclosure of unused material. The Common Law principles apply in Hong Kong.

5. The duty of disclosure by the Prosecution was considered by the Hong Kong Court of Final Appeal (“HKCFA”), specifically in connection with an application for stay of proceedings, in *HKSAR v LEE Ming Tee and Another* (2003) 6 HKCFAR 336. The following extracts of the said HKCFA Judgment on the duty to disclose (as summarized in *HKSAR v Ying Jim Ming Jimmy HCMA 432/2009*) are relevant.
- *“155. The principles relating to disclosure articulated by the English courts are based on the defendant's common-law right to a fair trial and on the principle of openness. It is, therefore, appropriate that this court should have regard to them in ascertaining the common law of Hong Kong. The principles recognize that the Prosecution is under a duty of disclosure to the Defence which extends to material in the possession or control of the Prosecution which may undermine its case or advance the Defence case.”*
  - *157. ... the Basic Law and the Bill of Rights do not take the duty of disclosure further than it is taken by the common law.*
  - *159. The duty rests with the Prosecution or prosecuting counsel. The duty should be considered as one imposed on the Prosecution generally (so in this case it was the DOJ), though it is generally performed by counsel who is briefed and conducts the Prosecution. It would be unduly restrictive to say that the duty is confined to prosecuting counsel.*
  - *161. The Prosecution's duty is to disclose to the Defence material (including information) in its possession or control. That will ordinarily include materials that have been gathered by the investigating agency... and it is the responsibility of the Prosecution to make the investigating agency aware of the need to make available all relevant materials. In this sense, the prosecutor's duty is to disclose to the Defence all relevant material in its possession or control and in the possession or control of the investigating agency.*
  - *162. In order to ensure that all disclosable material is provided to the Defence, prosecuting counsel should instruct investigating officers and,*

*where appropriate, witnesses to bring to counsel's attention any material that may be disclosable. ..."*

[Emphasis supplied]

6. The disclosure by the Prosecution is not limited to relevant materials in the possession or control of the investigating agency concerned. This is repeated in a subsequent HKCFA case *Brian Alfred Hall v HKSAR* FACC 12/2008. In that case the HKCFA re-affirmed that the materials to be disclosed extend to such materials "in the possession or control of any other government department or agency if there are particular circumstances suggesting that it may have such materials" (at p.564 E-F per Bokhary PJ).
7. As for the scope of disclosure, the HKCFA in the case *Brian Alfred Hall (supra)* reiterated that

*"3. The Prosecution's duty is to disclose to the Defence relevant material (including information) which may undermine its case or advance the Defence case. The duty is not limited to the disclosure of admissible evidence. Information not itself admissible may lead by a train of inquiry to evidence which is admissible: R v Preston [1994] 2 AC 130 at pp.163-164, per Lord Mustill. And material which is not admissible may be relevant and useful for cross-examination of a Prosecution witness on credit."*

See also the Court of Appeal in *HKSAR v So Kam Tong* CACC 126/2009.

8. The above principles were most recently considered and echoed in the case of *香港特別行政區 訴 A* CACC 400/2013 (a judgment in Chinese delivered on 16 September 2015). In the case, the appellant was convicted of conspiracy to commit robbery. He appealed against his conviction. In the Court of Appeal, the appellant argued that the Prosecution has failed to discharge its duty to disclose evidence which might undermine the Prosecution case or strengthen the Defence case (the evidence at issue were some telephone records). The Court of Appeal agreed that the non-disclosure of this evidence amounted to material irregularity and considered that the conviction was unsafe. The appeal was therefore allowed. The Court of Appeal also considered the Prosecution Codes on disclosure which will be discussed below.

## Prosecution Code (2013 version)

9. Paragraph 3.1 the Prosecution Code of Conduct (2013 version, as currently available at the DOJ website<sup>1</sup>)(“2013 Code”) provides that:

*“A prosecutor acts on behalf of the community in an impartial manner and as a “minister of justice”. To this end, a prosecutor must fairly and objectively assist the court to arrive at the truth and to do justice between the community and the accused according to law.”*

10. Paragraphs 12.1 and 12.2 of the 2013 Code state that

*“12.1 Article 87 of the Basic Law gives to any accused the right to a fair trial. One of the guarantees of fairness is the full and timely disclosure to the Defence of all relevant or possibly relevant material (or material information – and not confined to admissible evidence) available or known to the Prosecution, whether it assists in the proof of the Prosecution case or, on a sensible appraisal by the Prosecution, may reasonably be regarded as:*

- (a) being relevant or possibly relevant to an issue in the case;*
- (b) raising or possibly raising a new issue whose existence is not apparent from the evidence that the Prosecution proposes to use; or*
- (c) holding out a real (as opposed to fanciful) prospect of providing a lead to evidence which goes to (a) or (b).*

*12.2 The duty to disclose is a positive and continuing duty on the Prosecution that begins pre-trial and carries through to the end of the criminal process before the courts.”*

11. In the interest of ensuring a fair trial and assisting the court to come to a reasoned and informed decision on guilt or innocence, the Prosecution is required to be **pro-active** in disclosing unused material.
12. There is a **positive duty** on the Prosecution to disclose the existence of any unused material. Failure to do so may lead to a successful claim of abuse of process by the Defence, see e.g. *HKSAR v Lau Ngai Chu* CACC 228/2001 and cases referred to in the judgment.

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<sup>1</sup> <http://www.doj.gov.hk/eng/public/pubsoppapcon.html#intro>; last revised on 4 November 2015

13. Prosecutors are expected to consider what, if any, unused material **may** assist the Defence. This is all part of Prosecution's responsibility under the 2013 Code. Even if the Defence case is not apparent at the outset, it may become apparent at directions appointments; disclosure of unused material is a **continuing obligation**.

#### **Prosecution Code (2009 Version)**

14. A revisit of the predecessor to the 2013 Code is revealing. The previous edition of the Prosecution Code which was issued in 2009 ("2009 Code") has a 10-pages discourse on what the Prosecution ought to do on disclosure, e.g.
  - (a) The Prosecution must make *fair* disclosure (§20.2) and the Prosecution must be alert to the need to make *advance disclosure* (§20.4).
  - (b) The materials to be disclosed are *specific* (§§ 20.4, 20.5, 20.9, 20.10).
  - (c) If in doubt, the Prosecution should *err on the side of caution* and in any event, "issue in the case" should be *construed widely* (§20.16).
  - (d) Various cases on disclosure as well as relevant overseas reference have helpfully been cited in the 2009 Code (but not the 2013 Code).

The above list is not exhaustive and the 2009 Code should be revisited, insofar as disclosure is concerned.

15. Indeed almost all of the above on disclosure appear in an earlier (2002) version of the Prosecution Code.<sup>2</sup>
16. An extract of the 2009 Code on duty of the Prosecution to disclose is attached to this submission as **Appendix A**.
17. While we welcome the general language introduced in paragraphs 12.1 and 12.2 of the 2013 Code, those materials set out and cited in the 2009 Code could serve as handy indicia and useful guidelines for both the Prosecution and the Defence. There is no reason proffered on abridging or removing those helpful passages from the 2009 Code. **We ask the Department of Justice to reinstate and put back those paragraphs in an amended Code or any new Code to be formulated in future.**

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<sup>2</sup> "The Statement of Prosecution Policy and Practice" published by DOJ in 2002: Chapter 18.

18. We also refer to the case *香港特別行政區 訴 A* (supra), where the Court of Appeal similarly noted the relevant guidelines on disclosure in the 2009 Code are absent from the 2013 Code. Those guidelines in the 2009 Code were described by the Court of Appeal to be direct and clear. Although the Court of Appeal had not discussed or compared the two versions, the Court of Appeal has clearly stated that it anticipates the Secretary for Justice to review and to consider improvement to the 2013 Code (see §27 of the Judgment). We join the Court of Appeal to ask for a review.
19. Additionally and on the other hand, we take note of the latest “Yearly Review of the Prosecution Division 2014” published and released by the Department of Justice on 30 December 2015. In the said Yearly Review, it is stated that the application of the Prosecution Code in relation to criminal proceedings forms part of the Department’s performance pledge<sup>3</sup>. The reference to Prosecution Code in the performance pledge makes the proper and fair disclosure of materials, used and unused, all the more important.

#### **Practice and Procedural Issues**

20. Apart from the above cardinal principles, the Law Society also wishes to draw the Department of Justice’s attention to the practice and procedures on disclosure.
21. During the investigation of an offence the police should keep an accurate record of what is done. That record should include a short summary of all materials gathered during the investigation and the date the materials were gathered. The prosecutor will be assisted by such a summary in deciding what evidence to call and to identify unused material which may assist the Defence. **That summary should be revealed to the Defence in a timely manner.**
22. In any event, when the Prosecution is to make disclosure to the Defence,
  - (a) there should be reasonably clear descriptions of the items to be disclosed
  - (b) the Prosecution should make use of **searchable pdf files** or other similar means that could provide easy and quick access to documents and materials.

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<sup>3</sup> See page 11, *Prosecutions In Hong Kong 2014*

23. It is an abuse of process for the Prosecution to simply deluge the Defence with masses of unused material without providing some indication of what it is. This is an important area where the Prosecution must play fair, both for reasons of basic equity and also in light of the fact that often the Defence will not have comparable resources or statutory basis for investigations, the gathering or the seeking out of information. The overriding objective must be to achieve a fair trial rather than maximising the conviction rate. We strongly recommend that the DOJ adopt the approach of having a fair “Disclosure Management Document” for cases in the District Court and above, of the type used in the UK<sup>4</sup>. A “deluge” approach would simply waste Defence resources, be unfair and would be a matter to be considered under the Costs in Criminal Cases Ordinance, Cap 492. Where the Prosecution seeks costs on a conviction such record is important to substantiate what work had been carried out by the Prosecution.

## UK Experience

24. The UK has a *statutory* scheme on disclosure (see § 4 above). Among others, there is an office of a “*disclosure officer*” which is responsible for examining materials retained by the police during the investigation; revealing materials to the prosecutor and disclosing materials to the accused (see § 2.1 of the Code of Practice under the Criminal Procedure and Investigation Act 1996).
25. The same UK code also sets out a duty to disclose “*negative information*” (§ 4.3) – those information on, e.g. the non-involvement of the accused. An example: in a gang fight, where a number of witness statements have been taken, the police would have the duty to disclose not only those statements which record a gang fight, but also those statements which record that the witnesses did not see the accused involved in the gang fight.
26. The above are only two issues that we ask to be examined and considered, with the view to considering a timely introduction of a comparable and apposite

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<sup>4</sup> See UK: Attorney General’s Guidelines on Disclosure (December 2013): ([https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/262994/AG\\_Disclosure\\_Guidelines\\_-\\_December\\_2013.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/262994/AG_Disclosure_Guidelines_-_December_2013.pdf))

regime that could cope with the growing demands for scrutiny on Prosecutions by the general public.

## Conclusion

27. *“Even if not attributable to any breach by the prosecutor of his duty of disclosure, the non-disclosure to the Defence of relevant material can result in material irregularity and an unsafe conviction”* (pp.382J-383A of *Lee Ming Tee (supra)*, as quoted by Bokhary PJ in *Brian Alfred Hall (supra)*; p.564E, with emphasis supplied).
28. Fair and proper disclosure of materials by the Prosecution including those unused material would inter alia help continue to maintain and instill public confidence in the prosecution system in Hong Kong.
29. We ask the Department of Justice to
  - (a) revisit its policy on disclosure, including the proper and fair disclosure of unused material, and
  - (b) resurrect in the Prosecution Code those paragraphs on disclosure that have been removed from the 2009 Code.
30. The above are main concerns to practitioners and the review should be given priority.

**The Law Society of Hong Kong**  
**29 March 2016**



Department of Justice  
Hong Kong

**The  
Statement of  
Prosecution Policy  
and Practice**

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**Code for Prosecutors**

2009

~~In deciding where the balance lies, these factors are relevant :~~

- ~~(a) the significance to a successful prosecution of the evidence which it is hoped to obtain;~~
- ~~(b) the degree of involvement of the accomplice in the criminal activity in question compared with that of the accused;~~
- ~~(c) whether any inducement has been offered to the person concerned;~~
- ~~(d) the likely credibility of the accomplice as a witness;~~
- ~~(e) whether the accomplice has made, or is prepared to make, full disclosure of all facts and matters within his or her knowledge;~~
- ~~(f) the nature and strength of any corroborative or other evidence.~~

19.6 An immunity should only be given if the interests of justice so require. The Director of Public Prosecutions and his Deputies are authorized to grant full or partial immunity to persons suspected or accused of offences in return for their undertakings to give truthful evidence on behalf of the prosecution. The immunity will be in writing and where necessary translated. A copy of the immunity should be provided by the prosecutor to the court and the defence at trial.

## **20. *The Duty of Disclosure***

20.1 In *HKSAR v Lee Ming-tee and Securities and Futures Commission* (2003) 6 HKCFAR 336, the court stated :

*“A strong obligation of disclosure will preserve the criminal trial as the appropriate forum for determining the truth or falsity of criminal allegations.”*

- 20.2 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.
- 20.3 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.
- 20.4 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 early 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 the accused to make a pre-committal application to stay the proceedings as an abuse of process;
  - (c) material which may enable the accused 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 accused and the legal advisers to make an informed decision as to plea, and if necessary, to make preparations for trial which may be significantly less effective if disclosure is delayed.

20.5 The prosecution should make known to the defence any witness whom they do not propose to call but whom they consider could give material evidence that tends either to weaken the prosecution case or strengthen the defence case. If the prosecutor possesses 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.

20.6 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.

20.7 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).

- 20.8 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.

20.9 The ultimate arbiter of what must be disclosed is the court and not the prosecutor. Subject to that, the material which the prosecution are required to disclose is that what 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;
- (c) to hold a real (as opposed to fanciful) prospect of providing a lead on evidence which goes 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.

20.10 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* [2000] 1 WLR 121).

20.11 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.

20.12 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.

20.13 The Criminal Procedure and Investigations Act 1996 does not apply to Hong Kong but the following principles (contained in 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 or her 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.



20.14 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.

20.15 In *HKSAR v Lee Ming-tee and Securities and Futures Commission* (2003) 6 HKCFAR 336, the court reviewed the disclosure obligations of the prosecution :

- (1) The prosecution is under a duty of disclosure to the defence which extends to material or information in the possession or control of the prosecution (which expression includes the investigating agency) which may undermine its case or advance the defence case;
- (2) The duty rests with the prosecution or the prosecutor. The duty should be considered as one imposed upon the prosecution generally and it would be unduly restrictive to say that the duty is confined to the prosecutor;
- (3) The prosecution's duty is to disclose to the defence, material (including information) in its possession or control, subject to relevance, privilege and public interest immunity. That will ordinarily include material that has been gathered by the investigating agency and it is the responsibility of the prosecution to make the investigating agency aware of the need to make available all relevant materials;
- (4) In order to ensure that all disclosable material is provided to the defence, prosecuting counsel should instruct investigating officers and, where appropriate,

witnesses to bring to counsel's attention any material that may be disclosable. In other words, disclosable material known to a witness, including an expert witness, should be channeled through prosecuting counsel who should take appropriate steps to facilitate that happening;

- (5) The prosecution's duty of disclosure extends to material in the possession or control of any other government department or agency if there are particular circumstances suggesting that it may have such material;
- (6) The duty is not limited to the disclosure of admissible evidence. Information not itself admissible may lead by a train of inquiry to evidence which is admissible. And material which is not admissible may be relevant and useful for cross-examination of a prosecution witness on credit;
- (7) The fact a prosecution witness is the subject of a disciplinary or other inquiry may or may not be disclosable. Every case must be judged according to its own particular circumstances. What has to be kept in mind is that, on credit, only significant material that a reasonable jury or tribunal of fact could regard as tending to shake confidence in the reliability of the witness is disclosable and that the answers of the witness in cross-examination on credibility alone generally cannot be rebutted by evidence;
- (8) If a dispute as to disclosable material arises, it is for the court, not the prosecutor, to decide if the withholding of disclosure of relevant material is justified.

20.16 In deciding the type of material to be disclosed, the prosecutor should err on the side of caution. Although disclosure should only be of material relevant to an '*issue in the case*', this term is to be construed widely. It covers convictions and other matters, including disciplinary records, relating to the reliability of a witness (*HKSAR v Chan Kau-tai* [2006] 1 HKLRD 400).

20.17 In *HKSAR v Gao Hejia* [2003] 1 HKC 522, the scope of disclosure in the Magistrates Court was reviewed :

- (1) the common law principles relating to disclosure apply to all levels of court;
- (2) the prosecution's duty to disclosure is pro-active, and does not depend upon the request of the defendant;
- (3) in a normal prosecution in Hong Kong the witness statement of a substantive witness should be disclosed to the defence before trial;
- (4) in relation to statements of persons not called as witnesses, these should either be served or made available for inspection;
- (5) previous convictions of prosecution witnesses should be disclosed to the defence;
- (6) the brief facts of case should be disclosed to the defence;
- (7) the form of disclosure is not important. It can be done by providing copy documents or simply allowing the defence to view the documents. Whether information has been adequately disclosed is a question of fact in each case.

- 20.18 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.
- 20.19 The obligation relates to information that comes to the attention of or into the possession of prosecutor and continues after conviction, including after appeals have been decided or the time of appeal has elapsed.
- 20.20 Material non-disclosure may cause injustice, and in *Hampton v R* [2004] EWCA Crim 2139, the court stated :

*“Those responsible for disclosure decisions must bear this in mind and must also bear in mind that a failure to disclose when disclosure should have been made may well put at risk a conviction only obtained after a great deal of emotional stress for the victim of the crime or for his or her family and friends and after the expenditure of a great deal of time and money.”*

## ~~21. The Prosecutor and the Unrepresented Accused~~

- 21.1 The prosecutor should exercise particular care in dealing with an accused who is not legally represented. The duty of fairness requires the prosecutor to ensure that the accused is fully informed of the prosecution case. Relevant witness statements and materials should be provided in the usual manner, and *‘the prosecution’s duty to disclose is pro-active. It is not a duty which needs to be exercised only upon the request of the defendant’* (*HKSAR v Gao Hejia* [2003] 1 HKC 522).