

**DIRECTOR OF PUBLIC PROSECUTIONS AMENDMENT (DISCLOSURES) BILL  
2012**

PROOF 17 OCTOBER 2012

**Bill introduced on motion by Mr Greg Smith, read a first time and printed.  
Second Reading**

**Mr GREG SMITH** (Epping—Attorney General, and Minister for Justice) [10.30 a.m.]: I move:

That this bill be now read a second time.

The Government is pleased to introduce the Director of Public Prosecutions Amendment (Disclosures) Bill 2012. The purpose of the bill is to clarify the obligations of law enforcement officers to disclose to the Director of Public Prosecutions sensitive material, being material that is subject to a claim of privilege, public interest immunity or statutory immunity. Such material might include, for example, documents revealing the identity of an informant or undercover police officer, in which case the immunity is claimed to protect their safety. The amendments also put in place arrangements for the disclosure of material subject to a statutory publication restriction.

The requirements for disclosure of material by the police to the Director of Public Prosecutions are set out in section 15A of the Director of Public Prosecutions Act 1986. Pursuant to that section, a police officer is obliged to disclose to the Director of Public Prosecutions all relevant information, documents or other things obtained during the investigation that might reasonably be expected to assist the case for the prosecution or the case for the accused. For many years it has been the practice in this State that in order to comply with their requirements pursuant to section 15A in relation to sensitive material, police have advised the Director of Public Prosecutions of the existence of this material but have not been required to produce it to the Director of Public Prosecutions. Police would advise of the existence of the material that has not been provided in the brief of evidence provided to the Director of Public Prosecutions by way of a disclosure certificate prescribed by the Director of Public Prosecutions Regulation. The Director of Public Prosecutions will then inform the defence of the existence of the sensitive material, who in turn may issue a subpoena to the police for the disclosure of the material. Any challenge by the police to the request in the subpoena for disclosure is argued before the court, with the Crown Solicitor's Office representing the police.

However, in the 2011 case of *The Queen v Lipton*, the Court of Criminal Appeal stated that in order to comply with their duty of disclosure, police officers are required to provide copies of sensitive material to the Director of Public Prosecutions not simply to disclose its existence. Implementing the obligation imposed by the Lipton case would have impacted heavily upon current practices of both the police in providing all material, not only non-sensitive material, and the Director of Public Prosecutions, with an increased workload, in having to review this additional material. The Government decided to preserve the existing disclosure practices and introduced the Director of Public Prosecutions Amendment (Disclosures) Act 2011 for that

purpose. That Act amended section 15A to provide that where a police officer has sensitive material, he or she is not obliged to disclose it to the Director of Public Prosecutions, but must inform him of its existence. The amending provisions sunset on 1 January 2013.

Following last year's amendments, the Government undertook a review of disclosure practices between the police and the Director of Public Prosecutions. Following consultation with the relevant agencies, this review was extended to other agencies engaged in investigating indictable matters, being the Police Integrity Commission, the New South Wales Crime Commission and the Independent Commission Against Corruption. The amendments proposed in this bill reflect a consideration of the law, current practice and how best to respond to the operational needs of the agencies concerned. This last point has been an important part of the Government's deliberations. The amendments proposed today strike a balance between an investigatory body's need to protect the safety of its witnesses and its investigative processes, and the prosecution's duty of disclosure and the need to ensure a fair trial for the accused.

I now turn to the main detail of the bill. Item 1 of schedule 1 amends sections 15A (1), (3), (4) and (5) of the Director of Public Prosecutions Act to replace the words "police officers" with "law enforcement officers". At present, the disclosure obligations in section 15A apply only to police officers. However, agencies other than the NSW Police Force, such as the Police Integrity Commission, the New South Wales Crime Commission and the Independent Commission Against Corruption, also carry out investigations into criminal behaviour. Prosecutions resulting from their investigations are undertaken by the Director of Public Prosecutions where indictable offences are charged. It is sensible, therefore, to extend the disclosure obligations in section 15A to these agencies. Proposed new subsection (9) of section 15A found in item 3 of schedule 1 defines the term "law enforcement officer" to include a police officer, or an officer of the Police Integrity Commission, New South Wales Crime Commission or the Independent Commission Against Corruption, who is responsible for an investigation into the suspected commission of an alleged indictable offence. Such law enforcement officers will be subject to the duty imposed by section 15A (1) to disclose all relevant material that might reasonably be expected to assist the case for the prosecution or the case for the accused to the Director of Public Prosecutions. Item 2 of schedule 1 inserts a proposed new subsection (1A) clarifying that a law enforcement officer's duty of disclosure arises when the Director of Public Prosecutions exercises any functions under the Act with respect to the prosecution of offences. Those functions include instituting, conducting and taking over criminal proceedings.

Proposed new subsection (6) of section 15A in item 3 of schedule 1 confirms the current practice that the law enforcement officer must disclose to the Director of Public Prosecutions the existence of sensitive material. It further requires the law enforcement officer to inform the Director of Public Prosecutions of the nature of both the material and the claim of privilege or immunity. Proposed subsection (7) provides that the Director of Public Prosecutions may access sensitive material, in that an officer must provide copies of the sensitive material to the Director of Public Prosecutions on request.

Items 1 and 2 of schedule 2 to the bill amend the regulation to provide for a new form of disclosure certificate to be completed by law enforcement officers. The new certificate includes schedules for the law enforcement officer to complete, describing all material, both sensitive and non-sensitive. Where there is sensitive material, the schedule requires the nature of the immunity or privilege claimed to be described. It is anticipated that the Director of Public Prosecutions will not require copies of the sensitive material to be provided in every case. With the description of sensitive material in the schedule to the new disclosure certificate, the Director of Public Prosecutions will be aided as to when it is appropriate to seek access to the material in order to consider how it might impact on the prosecution or the defence's case. This change reflects the observation of the Court of Criminal Appeal in Lipton that the Director of Public Prosecutions can effectively discharge his role in conducting prosecutions only by having access to all information relevant to issues in the case. The change also takes a common sense approach in not burdening both the police and the Director of Public Prosecutions in having to copy, send and review all sensitive material, but only that material which the Director of Public Prosecutions decides on a case-by-case basis is necessary to review.

Proposed new subsection (8) in item 3 of schedule 1 recognises that there are statutory restrictions on the publication of evidence gathered in the course of hearings undertaken by the Police Integrity Commission, the New South Wales Crime Commission and the Independent Commission Against Corruption. For example, section 45 of the Crime Commission Act allows the commission to direct that evidence given before it must not be published. It also provides for the commission to give permission for the evidence to be provided to such persons as the commission specifies. Similar provisions exist in the Police Integrity Commission Act and the Independent Commission Against Corruption Act, and are defined as a statutory publication restriction in proposed new subsection (9).

There may be occasions when evidence given to one of the commissions at a hearing might meet the test for disclosure in a particular prosecution, in that it might reasonably be expected to assist the case for the prosecution or the case for the accused person. In those circumstances, subsection (8) applies and requires the law enforcement officer to inform the Director of Public Prosecutions of the existence and nature of the material by completing the schedule provided in the disclosure certificate, but only to the extent not prohibited by the statutory publication restriction.

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As I said, this bill broadens the obligations relating to disclosure of material to the Director of Public Prosecutions by applying it to all law enforcement officers who brief the Director of Public Prosecutions and strikes a balance between the investigator's need to protect the safety of its witnesses and investigative processes with the Director of Public Prosecutions' duty to ensure a fair trial for the accused. I commend the bill to the House.

**Debate adjourned on motion by Ms Cherie Burton and set down as an order of the day for a later hour.**