



LAW REFORM COMMISSION

Report

Disclosure in Criminal Proceedings

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Port Louis, Republic of Mauritius

4th Floor, Cerné House

Tel: (230) 212-3816/212-4102

Fax: (230) 212-2132

E-Mail: lrc@mail.gov.mu

URL <http://lrc.gov.mu>

About the Commission

The Commission consists of –

- (a) a Chairperson, appointed by the Attorney-General;
- (b) a representative of the Judiciary appointed by the Chief Justice;
- (c) the Solicitor-General or his representative;
- (d) a barrister, appointed by the Attorney-General after consultation with the Mauritius Bar Council;
- (e) an attorney, appointed by the Attorney-General after consultation with the Mauritius Law Society;
- (f) a notary, appointed by the Attorney-General after consultation with the Chambre des Notaires;
- (g) a full-time member of the Department of Law of the University of Mauritius, appointed by the Attorney-General after consultation with the Vice-Chancellor of the University of Mauritius; and
- (h) two members of the civil society, appointed by the Attorney-General.

The Chief Executive Officer has responsibility for all research to be done by the Commission in the discharge of its functions, for the drafting of all reports to be made by the Commission and, generally, for the day-to-day supervision of the staff and work of the Commission.

The Secretary to the Commission is responsible, under the supervision of the Chief Executive Officer, for the administration of the Commission and taking the minutes of all the proceedings of the Commission.



LAW REFORM COMMISSION

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(I) Introductory Note: Background to this Report

1. Last year, the Commission, as part of its Criminal Justice Reform Program, released an Issue Paper on ‘Disclosure in Criminal Proceedings’ - to which was attached a draft Criminal Procedure (Amendment) Bill - containing our provisional proposals for a statutory regime for disclosure in criminal proceedings by prosecution and defence, on lines similar to those in force in UK.¹
2. We intimated in the Issue Paper that we would report on this project after consultation with stakeholders. The Commission has had the opportunity since then to consult² and to reflect further on the issues at stake, in the light of developments in other parts of the Commonwealth.³ We now make final recommendations for reform of this aspect of the law [a draft Criminal Procedure (Amendment) Bill, which gives effect to our reform proposals, is attached as an Annex to this Report] after examining some of the issues, which have given rise to concern amongst stakeholders and call for clarification.

¹ The UK Criminal Procedure and Investigations Act 1996 deals with the disclosure by the prosecution of ‘unused material’; it also covers the duty of the defence to make disclosure of the case upon which it will rely at trial. The statutory regime is set out in part I of the Act [sections 1-21], as supplemented by the Code of Practice issued under part II of the Act [sections 22 to 27]. The relevant provisions of the Criminal Procedure and Investigations Act 1996 have subsequently been amended by the Criminal Justice Act 2003, Part 5. The rules applicable to disclosure before magistrates’ courts are governed by the Criminal Procedure Rules 2005.

The 1997 Code has subsequently been revised in 2005. The Attorney General in UK has also issued Guidelines in 2000 and new set of guidelines in 2005. Joint Operational Instructions for the Disclosure of Unused Material have also been issued to assist CPS [Crown Prosecution Service] and police officers to perform their disclosure duties consistently and effectively.

² The Home Affairs Division of the Prime Minister’s Office, the Office of Commissioner of Police, the Independent Commission against Corruption (ICAC), the Office of the Director of Public Prosecutions, the Judiciary and the Association of Magistrates, the Chairperson of the Mauritius Bar Association.

³ Vide, for instance, New Zealand Criminal Disclosure Act of 2008.

We have paid attention to the analysis of other law reform agencies on the matter: vide South African Law Commission in its Fifth Interim Report on Simplification of Criminal Procedure [August 2002] and the New Zealand Law Commission Reports on ‘Disclosure and committal (1990) and ‘Criminal Pre-Trial Processes: justice through Efficiency’ (2005).

(II) Matters calling for Clarification

3. The question has been raised whether a statutory obligation on the accused to disclose his/her case would not contravene the right to silence as guaranteed by section 10(7) of the Constitution. Section 10(7) of the Constitution deals with the right of an accused not being compelled to give evidence at his trial.

The proposed section 88B [regarding disclosure by accused of the case on which he/she shall rely at trial after initial (primary) disclosure by prosecution of unused prosecution material], taken together with the proposed new sections 88C to 88D [about contents of defence statement and notification of intention to call defence witnesses] aim at narrowing down the issues at trial and in no way affects the right of an accused whether or not to give evidence at his trial.

Equality of arms between the parties in the conduct of criminal or any other proceedings before court or tribunal is a fundamental human rights principle, which is enshrined in section 10 of our Constitution. It may require of an accused party that he or she discloses, in certain circumstances, the case upon which he or she will rely at trial.

4. In UK the Royal Commission on Criminal Justice,⁴ chaired by Viscount Runciman advanced the following reasons for defence disclosure:

“If all the parties had in advance an indication of what the defence would be, this would not only encourage earlier and better preparation of cases but might well result in the prosecution being dropped in the light of the defence disclosure, and earlier resolution through a plea of guilty, or the fixing of an earlier trial date.”⁵

⁴ Report of the Royal Commission on Criminal Justice, July 1993, cm. 2263.

⁵ Ibid., at chapter 6, para. 59.

It would also keep "ambush defences" to a minimum.⁶ Defence disclosure would entail the "disclosure of the substance of their defence in advance of the trial or to indicate that they will not be calling any evidence but will simply be arguing that the prosecution has failed to make out its case."⁷ As a sanction for non-disclosure, adverse inferences could be drawn.⁸ The Commission was convinced that the duty did not compromise the accused's right against self-incrimination. It was merely disclosing the substance of a defence sooner rather than later.⁹

These recommendations were endorsed by the Home Office. In a consultation document¹⁰ defence disclosure was couched essentially in a truth-finding framework:

“By clarifying the issues before the trial starts, these proposals should help to ensure that those who are guilty are convicted, without prejudicing the acquittal of the innocent. If the Defendant is telling the truth in the line of argument he discloses, that will trigger prosecution disclosure of any material which tends to support that defence and thereby enable the defence to run its case more effectively.”¹¹

The recommendations were duly enacted in the Criminal Justice and Investigations Act of 1996.

For some time, commentators debated on whether defence disclosure was compatible with the European Convention on Human Rights. Although some argued that the duty runs fundamentally counter to adversarial theory in weakening the privilege against self-

⁶ Loc. Cit.

⁷ Op. cit., note 4, at chapter 6, para. 66.

⁸ Ibid., at chapter 6, para. 70.

⁹ Ibid., at chapter 6, para. 60.

¹⁰ Home Office, *Disclosure: A Consultation Document* (1995) cm 2864.

¹¹ Ibid., at para. 27.

incrimination, others regarded it as legitimate in view of full prosecution disclosure.¹² In the light of the European Court's decision in *Murray v United Kingdom*,¹³ which holds that the right to remain silent is not absolute and silence through the proceedings has implications for the evaluation of inculpatory evidence, the conclusion is that compelled defence disclosure after primary prosecution disclosure will not fall foul of Article 6(2) of the Convention,¹⁴ on which section 10(7) of our Constitution is modeled.

5. The view has been expressed whether there should be ‘secondary disclosure’ by the prosecution after the defence has disclosed its case since (i) by that time a copy of the brief on which the prosecution will rely to conduct its case would already be in possession of the defence; (ii) secondary disclosure based on Defence’s disclosure may not be practicable as it may lead to an unnecessary dragging of the process which will invariably cause delay to the administration of justice, and that the Defence may be tempted to use the new proposed procedure as a delaying tactic.

Suffice to say that (i) the proposed legislation is about ‘disclosure of unused materials’, not about materials which the prosecution will rely upon at trial: ‘unused materials’ may still not have been disclosed to defence; (ii) the proposed provisions call for greater professionalism on the part of prosecutors as well as defence lawyers: there is no reason why the requirement laid down would slow the process.

¹² Vide, for instance, GD Mackinnon ‘Accelerating Defence Disclosure: A Time for Change’ (1996) 1 *Canadian Criminal Law Review* 59, and S Costom ‘Disclosure by the Defence: Why should I tell you’ (1996) 1 *Canadian Criminal Law Review* 73.

¹³ Decision of 8 February 1996, (1996) 22 *EHRR* 29.

¹⁴ J Sprack commented in 1998 in an article, ‘Will defence disclosure snap the golden thread?’ 2 *International Journal of Evidence and Proof* 224, that the question whether there should be defence disclosure is no longer on the legal or political agenda; there is consensus that defence disclosure is desirable “particularly because of its powerful potential as a tool for trial management”.

The current law on the matter, which imposes on the prosecution the duty to disclose all material which it intends to adduce as evidence,¹⁵ but also all ‘unused material’,¹⁶ may well impose a heavy burden on the prosecution to comb through large masses of material, and may well allow the defence to cause delays by successive requests for more material.¹⁷

We share the view of the Runciman Commission in UK that in order to strike a "reasonable balance"¹⁸ between the duty of prosecution disclosure and the rights of the accused, there must, first, be an automatic primary duty of prosecution disclosure of "all material relevant to the offence or to the offender or to the surrounding circumstances of

¹⁵ An accused party is entitled, by virtue of section 10(2)(c) of the Constitution, to be given adequate time and facilities for the preparation of his defence. This implies there is an obligation on the prosecuting party to make available to the defence the evidence on which the prosecution case is based.

¹⁶ Our case law suggests there is a duty on the prosecution to disclose even ‘unused materials’. The issue cropped up in *State v Bacha* (1996) SCJ 79 [MR 239], where Sik Yuen SPJ [as he then was] had this to say:

“From the stand point of the defence, the medical evidence of the late wife of accused no 1 would in all probability be relevant but it is the contention of the State that relevance must be linked with admissibility. The general principle on the duty of the prosecution to disclose “unused materials” is that the prosecution is obliged to make available to the defence materials not led in evidence by them which may *assist* the accused.

A similar situation arose in *R v Preston & Ors* (1994) 98 Cr. App. R 405 in which Counsel for the Crown, upon advice from the Attorney-General was of the opinion that it was not his duty to acquaint himself with any intercepted material which might exist for the purpose of considering whether any part of that material need be disclosed on the ground that in any event, such evidence would be inadmissible.

The House of Lords, analyzing the situation on appeal had the following to say at P. 423:

In the first place, the fact that an item of information cannot be put in evidence by a party does not mean that it is worthless. Often, the train of inquiry which leads to the discovery of evidence which is admissible at a trial may include an item which is not admissible, and this may apply, although less frequently, to the defence as well as to the prosecution. As the Court of Appeal pointed out in *Ward* (supra) (1993) 96 Cr.App.R. 1, 25, [1993] 1 W.L.R. 619, 645, it is of help to the accused to have the opportunity of considering all the material evidence which the prosecution have gathered and from which the prosecution have made their own selection. In my opinion the test is materiality, not admissibility.

I rule that the statements recorded by the Police from the medical practitioners and para-medical staff, mentioned by learned Counsel for the defence in his address must be communicated to the defence.”

¹⁷ Vide observations of the Runciman Commission in UK on the law and practice on this subject-matter prior to the changes brought about by the Criminal Justice and Investigations Act 1996: *op. cit.* note 4, at chapter 6 para. 42.

¹⁸ *Ibid.*, at chapter 6, para. 50.

the case, whether or not the prosecution intends to rely upon that material";¹⁹ second, a duty on the defence to disclose its line of defence; and third, depending on disclosure by the defence, secondary disclosure by the prosecution.

6. The point has also been made that, from a practical point of view, if the principle were to be strictly applied in the lower courts, numerous cases of lesser importance could as a result be affected by delay. There might be delay caused by motions for communication followed by argument and also delay caused by the trial being protracted as a result of the canvassing of additional issues raised. However, it seems to make sense to us that when we are dealing with a principle which has a bearing on fairness of the trial, no distinction should be made as to whether a case is being tried in a lower or higher court.
7. One stakeholder has opined that the Code of Practice [in the proposed new section 88M] should be made by Judges, the more so as in Mauritius ministries do not have legal departments.

We understand that the Honourable Chief Justice may, under section 198(1) of the Courts Act, enact Rules for the practice and procedure before any Court of disclosure by prosecution or defence of the case on which they will rely at trial. But we do not consider it is for Judges to lay down a Code of Practice for police interviews of witnesses notified by accused [as is provided under the new section 88M]. The Code of Practice relates to the performance of an executive function, not a judicial function. Indeed, in UK such task has been entrusted to the Secretary of State [section 23(1) UK Criminal Procedure and Investigations Act 1996, as amended by Criminal Justice Act 2003].

¹⁹ Ibid., at chapter 6, para. 51.

(III) Final Recommendations for Reform

8. The Commission reiterates its opinion that a statutory regime which sets out a staged approach to disclosure must be adopted. The new legislative scheme would provide as follows:
- (a) There would be a statutory duty on a police officer, or other law enforcement officer, investigating an offence to record and retain information and other material gathered or generated during the investigation [the proposed new section 88N of the Criminal Procedure Act deals with the duty of police and other law enforcement officers during criminal investigations];
 - (b) The prosecution would be under the obligation to disclose to an accused any prosecution material which it does not intend to use at trial and 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 [the proposed new section 88A of the Criminal Procedure Act deals with ‘Primary Disclosure by Prosecutor’]. (This is distinct from the obligation on the prosecution to inform the defence of material which it intends to use at trial). If there is no such material the prosecutor must inform the defence in writing;
 - (c) An accused would then have a duty to inform the prosecution of the case upon which he or she will rely at trial and provide a defence statement and a notice of intention to call witnesses [the proposed new section 88B is about Disclosure by Accused, the proposed new section 88C deals with the Contents of Defence Statement, and the proposed new section 88D is about Notification of Intention to Call Defence Witnesses]. Defence disclosure has two purposes: it assists in the management of the

trial by helping to identify the issues in dispute; it also provides information that the prosecutor needs to identify any remaining material that falls to be disclosed at the secondary stage. To that end the proposed new section 88E makes further provision as to Disclosure by Accused.

- (d) The defence disclosure would trigger off a duty on the part of the prosecution to present further material to the defence [The proposed new section 88 F deals with ‘Secondary Disclosure by Prosecutor’]: When deciding what to disclose at this stage, the prosecutor will consider the defence statement to see if there is any material not yet disclosed which might be reasonably expected to assist the accused's defence as disclosed by the defence statement;
- (e) There would be a continuing duty on the part of the prosecutor to disclose to the defence any material not yet disclosed, which is capable of undermining its case or assisting the case for the accused [the proposed new section 88G];
- (f) The circumstances when (i) there could be an application by accused for disclosure [the proposed new section 88H]; (ii) the sanctions for non-compliance with disclosure requirements, such as Delay in Disclosure by Prosecutor [the proposed new section 88I] and Faults in Disclosure by Accused [the proposed new section 88J]; (iii) there would not be disclosure in the public interest [the proposed new section 88K], (iv) the information or material disclosed to be treated with confidentiality [the proposed new section 88L];
- (g) A Code of Practice and Guidelines would be prepared by the Secretary for Home Affairs, which would provide guidance to police officers and other law enforcement officers, inter alia, as to the manner in which an officer investigating an offence shall record and retain information and other material gathered or generated during an

investigation [the new section 88N(3)], and regarding interview of witnesses notified by accused [the proposed new section 88 M requires of the Secretary for Home Affairs that he prepares a Code of Practice for Police Interviews of Witnesses notified by Accused].

(IV) Concluding Remarks

9. Disclosure is one of the most important issues in the criminal justice system, the application of proper and fair disclosure is a vital component of a fair criminal justice system. We are confident the proposals contained in this Report would ensure there is a fair system for the disclosure of material, which would not overburden the parties and would enable Courts to focus on all important issues in the criminal trial. Moreover there would be effective equality of arms between the parties to the proceedings.

10. Our proposals call for greater professionalism on the part of all criminal justice professionals. The effective implementation of the new proposed legislative framework requires that there be electronic recording of statements from suspects and witnesses.

ANNEX:

THE CRIMINAL PROCEDURE (AMENDMENT) BILL

(No of 2009)

Explanatory Memorandum

The object of this Bill is to amend the Criminal Procedure Act to make provision for –

- (a) a duty upon the police officer, or other law enforcement officer, investigating an offence to record and retain information and other material gathered or generated during the investigation;
- (b) a staged approach to disclosure of unused material by prosecution ;
- (c) the disclosure by an accused of the case upon which he will rely at trial;
- (d) the procedure for an accused to apply for disclosure to the courts;
- (e) the non-disclosure in the public interest of unused material by the prosecution;
- (f) the consequences of non-compliance with disclosure requirements; and
- (g) other related matters.

2009

Attorney-General

THE CRIMINAL PROCEDURE (AMENDMENT) BILL

(No. of 2009)

ARRANGEMENT OF CLAUSES

Clause

1. Short title.
2. Criminal Procedure Act amended
3. Commencement

A BILL

To amend the Criminal Procedure Act to make provision for the disclosure of unused material by the prosecution and the disclosure by an accused of the case upon which he will rely at trial.

ENACTED by the Parliament of Mauritius, as follows –

1. Short title.

This Act may be cited as the Criminal Procedure (Amendment) Act 2009.

2. Criminal Procedure Act amended

The Criminal Procedure Act is amended by inserting immediately after section 88 the following new Part IVA–

PART IVA – DISCLOSURE

88A Primary disclosure by prosecutor

- (1) Where an accused is charged with an offence before the Supreme Court or has pleaded not guilty to a charge before a Court other than the Supreme Court, the prosecutor shall-
- (a) disclose to the accused any prosecution material of whatever kind, including in particular information and objects of all descriptions, which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused, or
 - (b) give to the accused a written statement that there is no material of a description mentioned in paragraph (a).

- (2) Where there is more than one accused in any proceedings this Part applies separately in relation to each of the accused.
- (3) For the purposes of this Part, prosecution material is material which is in the prosecutor’s possession, and came into his possession in connection with the case for the prosecution against the accused.
- (4) Where material consists of information which has been recorded in any form the prosecutor discloses it for the purposes of this section—
 - (a) by securing that a copy is made of it and that the copy is given to the accused, or
 - (b) 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.
- (5) Where material consists of information which has not been recorded the prosecutor discloses it for the purposes of this section by securing that it is recorded in such form as he thinks fit and—
 - (a) by securing that a copy is made of it and that the copy is given to the accused, or
 - (b) 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.
- (6) Where material does not consist of information the prosecutor discloses it for the purposes of this section 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.
- (7) Material must not be disclosed under this section to the extent that the Court, on an application by the prosecutor, considers it is not in the public interest to disclose it and orders accordingly.

88B Disclosure by accused

- (1) The accused shall, when legally represented, within a reasonable time to be determined by the Court after the prosecution has discharged its obligation under section 88A(1), give a defence statement to the Court and the prosecutor.
- (2) Where there are other accused in the proceedings and the Court so orders, the accused must also give a defence statement to each other accused specified by the Court and within such period as the court may specify.
- (3) The Court may make an order under subsection (2) either of its own motion or on the application of any party.
- (4) Where an accused is not legally represented and is himself conducting his case the Court shall, before the opening of the case for the prosecution-
 - (a) ascertain the prosecution has fulfilled its duty under section 88A(1), and
 - (b) ask the accused to make an oral statement from the dock as to his defence and shall record same.

88C Contents of defence statement

- (1) For the purposes of this Part, a defence statement is a written statement-
 - (a) setting out the nature of the accused’s defence, including any particular defences on which he intends to rely,
 - (b) indicating the matters of fact on which he takes issue with the prosecution,
 - (c) setting out, in the case of each such matter, why he takes issue with the prosecution, and
 - (d) indicating any point of law (including any point as to the admissibility of evidence or an abuse of process) which he wishes to take, and any authority on which he intends to rely for that purpose.
- (2) A defence statement that discloses an alibi must give particulars of it, including—

- (a) the name, address and date of birth of any witness the accused believes is able to give evidence in support of the alibi, or as many of those details as are known to the accused when the statement is given;
 - (b) any information in the accused’s possession which might be of material assistance in identifying or finding any such witness in whose case any of the details mentioned in paragraph (a) are not known to the accused when the statement is given.
- (3) For the purposes of this section evidence in support of an alibi is evidence tending to show that by reason of the presence of the accused at a particular place or in a particular area at a particular time he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission.

88D Notification of intention to call defence witnesses

- (1) In accordance with the provisions of section 60, the accused must give to the Court and the prosecutor a notice indicating whether he intends to call any persons (other than himself) as witnesses at his trial and, if so—
- (a) giving the name, address and date of birth of each such proposed witness, or as many of those details as are known to the accused when the notice is given;
 - (b) providing any information in the accused’s possession which might be of material assistance in identifying or finding any such proposed witness in whose case any of the details mentioned in paragraph (a) are not known to the accused when the notice is given.
- (2) If, following the giving of a notice under this section, the accused—
- (a) decides to call a person (other than himself) who is not included in the notice as a proposed witness, or decides not to call a person who is so included, or
 - (b) discovers any information which, under subsection (1), he would have had to include in the notice if he had been aware of it when giving the notice, he must give an appropriately amended notice to the Court and the prosecutor.

88E Further provisions as to disclosure by defence

- (1) Where an accused’s barrister or attorney, as the case may be, purports to give on behalf of the accused a defence statement under section 88B the statement shall, unless the contrary is proved, be deemed to be given with the authority of the accused.

- (2) The judge in a trial before a judge and jury—
 - (a) may direct that the jury be given a copy of any defence statement, and
 - (b) if he does so, may direct that it be edited so as not to include references to matters evidence of which would be inadmissible.

- (3) A direction under subsection (2)—
 - (a) may be made either of the judge’s own motion or on the application of any party;
 - (b) may be made only if the judge is of the opinion that seeing a copy of the defence statement would help the jury to understand the case or to resolve any issue in the case.

88F Secondary disclosure by prosecutor

- (1) This section applies where the accused gives a defence statement under section 88B.
- (2) The prosecutor must—
 - (a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might be reasonably expected to assist the accused’s defence as disclosed by the defence statement given under section 88B, or
 - (b) give to the accused a written statement that there is no material of a description mentioned in paragraph (a).

- (3) Material must not be disclosed under this section to the extent that the Court, on an application by the prosecutor, considers it is not in the public interest to disclose it and orders accordingly.

88G **Continuing duty of prosecutor to disclose**

- (1) This section applies at all times—
- (a) after the prosecutor has complied with section 88A or purported to comply with it, and
 - (b) before the accused is acquitted or convicted or the prosecutor decides not to proceed with the case concerned.
- (2) The prosecutor must keep under review the question whether at any given time (and, in particular, following the giving of a defence statement) there is prosecution material which—
- (a) might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused, and
 - (b) has not been disclosed to the accused.
- (3) If at any time there is any such material the prosecutor must disclose it to the accused as soon as is reasonably practicable.
- (4) In applying subsection (2) by reference to any given time the state of affairs at that time (including the case for the prosecution as it stands at that time) must be taken into account.
- (5) Material must not be disclosed under this section to the extent that the Court, on an application by the prosecutor, considers it is not in the public interest to disclose it and orders accordingly.

88H Application by accused for disclosure

- (1) This section applies where the accused has given a defence statement under section 88B and the prosecutor has complied with section 88G or has purported to comply with it or has failed to comply with it.
- (2) If the accused has at any time reasonable cause to believe that there is prosecution material which is required by section 88G to be disclosed to him and has not been, he may apply to the Court for an order requiring the prosecutor to disclose it to him.
- (3) Material must not be disclosed under this section to the extent that the Court, on an application by the prosecutor, considers it is not in the public interest to disclose it and orders accordingly.

88I Delay in disclosure by prosecutor

A Court shall, on its own motion or on motion of a party, consider whether excessive delays on the part of the prosecutor for disclosing material do not constitute a ground for staying the proceedings for abuse of process, in particular if it involves such delay by the prosecutor that the accused is denied a fair trial.

88J Faults in disclosure by accused

- (1) This section applies where-
 - (a) the accused, who is legally represented, fails to give a defence statement under section 88B(1) or within the reasonable time determined by the Court;
 - (b) sets out inconsistent defences in his defence statement;
 - (c) at his trial—

- (i) puts forward a defence which was not mentioned in his defence statement or is different from any defence set out in that statement,
 - (ii) relies on a matter which, in breach of the requirements imposed by or under section 88C, was not mentioned in his defence statement,
 - (iii) adduces evidence in support of an alibi without having given particulars of the alibi in his defence statement, or
 - (iv) calls a witness to give evidence in support of an alibi without having complied with section 88C(2) as regards the witness in his defence statement; or
- (d) at his trial calls a witness (other than himself) not included, or not adequately identified, in a witness notice.
- (2) Subject to subsections (3) to (7), where this section applies—
- (a) the Court or any other party may make such comment as appears appropriate;
 - (b) the Court or jury may draw such inferences as appear proper in deciding whether the accused is guilty of the offence concerned.
- (3) Where this section applies by virtue of subsection 1(c)(ii) and the matter which was not mentioned is a point of law (including any point as to the admissibility of evidence or an abuse of process) or an authority, comment by another party under subsection (2)(a) may be made only with the leave of the court.
- (4) Where this section applies by virtue of subsection (1)(d), comment by another party under subsection (2)(a) may be made only with the leave of the court.
- (5) Where the accused puts forward a defence which is different from any defence set out in his defence statement, in doing anything under subsection (2) or in deciding whether to do anything under it the Court shall have regard—
- (a) to the extent of the differences in the defences, and
 - (b) to whether there is any justification for it.
- (6) Where the accused calls a witness whom he has failed to include, or to identify adequately, in a witness notice, in doing anything under subsection (2) or in deciding

whether to do anything under it the Court shall have regard to whether there is any justification for the failure.

- (7) A person shall not be convicted of an offence solely on an inference drawn under subsection (2).

88K Public interest in non-disclosure

- (1) At any time—

- (a) after a court makes an order under section 88A(7), 88F(3) or 88G(5), and
- (b) before the accused is acquitted or convicted or the prosecutor decides not to proceed with the case concerned,

the accused may apply to the Court for a review of the question whether it is still not in the public interest to disclose material affected by its order.

- (2) The Court, on hearing of any application under section 88A(7), 88F(3), or 88G(5), or under subsection (1), shall afford an opportunity to be heard to any party claiming having an interest in the material who applies to be heard by the Court, and who shows he was involved (whether alone or with others and whether directly or indirectly) in the prosecutor's attention being brought to the material.
- (3) In such a case the Court must review that question, and if it concludes that it is in the public interest to disclose material to any extent it shall so order.
- (4) Where the prosecutor is informed of an order made under subsection (3) he must act accordingly having regard to the provisions of this Part (unless he decides not to proceed with the case concerned).

88L Confidentiality of disclosed information

(1) If the accused is given or allowed to inspect a document or other object under—

(a) section 88A, 88F, 88G or 88H, or

(b) an order under section 88K,

then, subject to subsections (2) to (4), he must not use or disclose it or any information recorded in it.

(2) The accused may use or disclose the object or information—

(a) in connection with the proceedings for whose purposes he was given the object or allowed to inspect it,

(b) with a view to the taking of further criminal proceedings (for instance, by way of appeal) with regard to the matter giving rise to the proceedings mentioned in paragraph (a), or

(c) in connection with the proceedings first mentioned in paragraph (b).

(3) The accused may use or disclose—

(a) the object to the extent that it has been displayed to the public in open court, or

(c) the information to the extent that it has been communicated to the public in open court;

but the preceding provisions of this subsection do not apply if the object is displayed or the information is communicated in proceedings to deal with a contempt of court under subsection (7).

- (4) If—
- (a) the accused applies to the Court for an order granting permission to use or disclose the object or information, and
 - (b) the Court makes such an order,
- the accused may use or disclose the object or information for the purpose and to the extent specified by the Court.
- (5) An application under subsection (4) may be made and dealt with at any time, and in particular after the accused has been acquitted or convicted or the prosecutor has decided not to proceed with the case concerned.
- (6) Where—
- (a) an application is made under subsection (4), and
 - (b) the prosecutor or a person claiming to have an interest in the object or information applies to be heard by the Court,
- the Court must not make an order granting permission unless the person applying under paragraph (b) has been given an opportunity to be heard.
- (7) It is a contempt of court for a person knowingly to use or disclose an object or information recorded in it if the use or disclosure is in contravention of this section.

88M Code of Practice for police interviews of witnesses notified by accused

- (1) The Secretary for Home Affairs shall prepare a Code of Practice which gives guidance to police officers, and other persons charged with the duty of investigating offences, in relation to the arranging and conducting of interviews of persons—
 - (a) particulars of whom are given in a defence statement in accordance with section 88C(2), or
 - (b) who are included as proposed witnesses in a notice given under section 88D.

- (2) The Code must include (in particular) guidance in relation to—
 - (a) information that should be provided to the interviewee and the accused in relation to such an interview;
 - (b) the notification of the accused’s legal representative of such an interview;
 - (c) the attendance of the interviewee’s legal representative at such an interview;
 - (d) the attendance of the accused’s legal representative at such an interview;
 - (e) the attendance of any other appropriate person at such an interview taking into account the interviewee’s age or any disability of the interviewee.

- (3) Any police officer or other person charged with the duty of investigating offences who arranges or conducts such an interview shall have regard to the Code.

- (4) In preparing the Code, the Secretary for Home Affairs shall consult the Mauritius Bar Association and such other persons as he thinks fit.

- (5) The Secretary for Home Affairs shall cause the Code to be published in the Government Gazette.

88N Duty of police officers during criminal investigations

- (1) A police officer, or other law enforcement officer, investigating an offence shall record and retain information and other material gathered or generated during the investigation.

- (2) For the purposes of this section a criminal investigation is an investigation which police officers or other persons have a duty to conduct with a view to it being ascertained whether—
 - (a) a person should be charged with an offence, or

 - (b) a person charged with an offence is guilty of it.

- (3) The Secretary for Home Affairs may issue guidelines to law enforcement agencies as to the manner in which their officers shall discharge their obligation under subsection(1).

3. Commencement

This Act shall come into operation on a date to be fixed by proclamation