

Criminal Disclosure Bill

Government Bill

As reported from the committee of the whole
House

This bill was formerly part of the Criminal Procedure Bill as reported from the Law and Order Committee. The committee of the whole House has further amended the bill and has divided it into the following bills:

- Crimes Amendment Bill (No 3) comprising clauses 1 and 2, and Part 1
- This bill comprising Part 2, and Schedules 1 and 2
- District Courts Amendment Bill (No 5) comprising Part 3 and Schedule 3
- Juries Amendment Bill comprising Part 4
- Summary Proceedings Amendment Bill (No 4) comprising Part 5, and Schedules 4 to 6
- Victims' Rights Amendment Bill comprising Part 6.

Criminal Disclosure Bill

Key to symbols used in reprinted bill

**As reported from the committee of the whole
House**

text inserted

~~text deleted~~

Hon Annette King

Criminal Disclosure Bill

Government Bill

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Criminal Disclosure Act **2008**.

2 Commencement

This Act comes into force on a date to be appointed by the Governor-General by Order in Council.

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Preliminary provisions

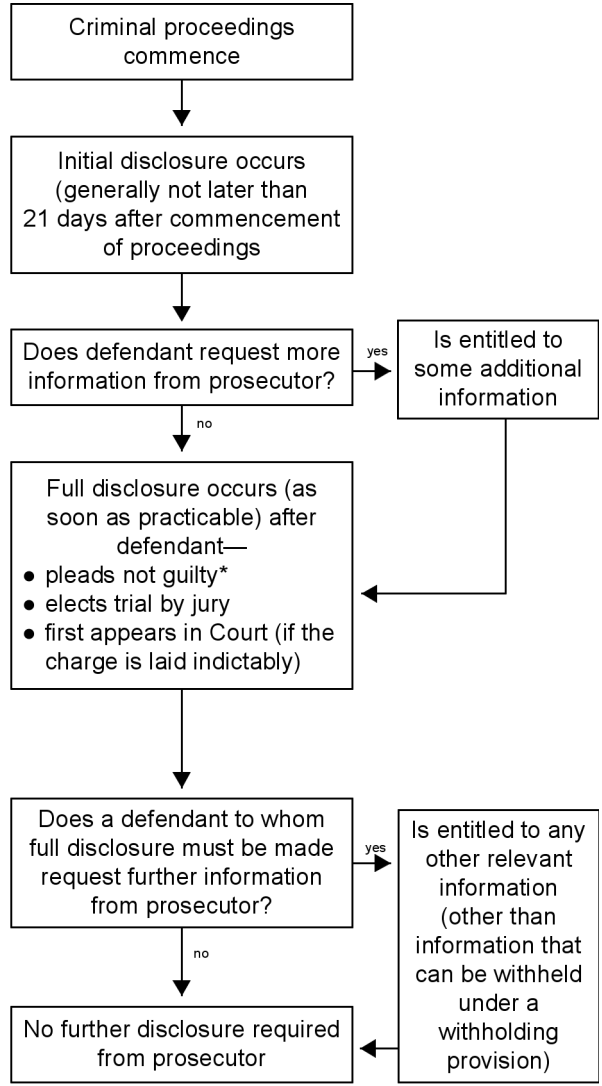
18 Purpose and overview

(1) The purpose of this **Part** is to promote fair, effective, and efficient disclosure of relevant information between the prosecution and the defence, and by non-parties, for the purposes of criminal proceedings. 10

(2) A general overview of the disclosure regime set out in this **Part** is set out in diagrammatic form below. 15

General Overview of Disclosure

Disclosure by prosecutor to defendant

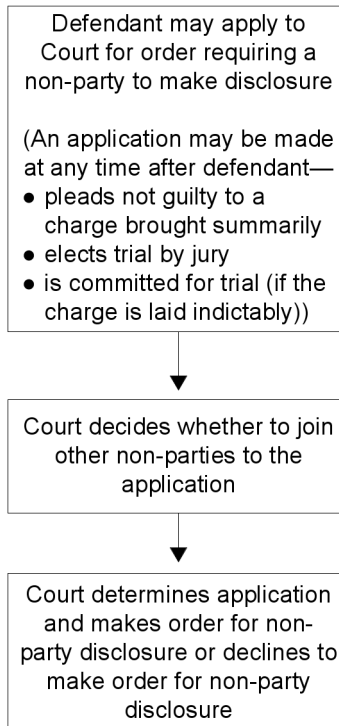


*full disclosure is not required if the defendant pleads guilty instead of not guilty to a charge laid summarily.

Disclosure by defendant to prosecutor

Particulars of an alibi and any expert evidence called on behalf of the defendant must be disclosed to the prosecutor

Disclosure by non-parties to the defendant



Note: This general overview of disclosure is by way of indication only. Detailed rules in the Act determine how the disclosure regime operates.

19 Application of Part

- (1) This **Part** applies to all criminal proceedings that are commenced on or after the date on which this **Part** comes into force.
- (2) This section is subject to **section 56**.

5

20 Part binds the Crown

This **Part** binds the Crown.

*Interpretation provisions***21 Interpretation**

- (1) In this **Part**, unless the context otherwise requires,— 5
- brief of evidence** means—
- (a) a written statement, whether signed or unsigned, made by a witness that is intended to be used by the prosecutor or the defendant for the purpose of a hearing or trial; and
 - (b) a document prepared by the prosecutor or the defendant from a statement or statements made by a witness and that is intended to be used by the prosecutor or the defendant as the basis for eliciting the testimony of the witness at a hearing or trial 10
- child** means a child as defined in section 2(1) of the Children, Young Persons, and Their Families Act 1989 15
- counsel** means a barrister and solicitor as those terms are defined in section 2(1) of the Law Practitioners Act 1982
- Court** has the meaning given to it in **section 22**
- criminal proceedings**— 20
- (a) means—
 - (i) proceedings for an offence for which a conviction may be entered, or for an infringement offence; and
 - (ii) proceedings before a Youth Court where a child or young person is charged with an offence; and 25
 - (b) includes any appeal against conviction or sentence; but
 - (c) does not include—
 - (i) any matter ancillary to proceedings (for example, an application for bail or an application for name suppression or an application under section 344A of the Crimes Act 1961); or 30
 - (ii) any proceedings under the Armed Forces Discipline Act 1971 or any other enactment for any other offence under military law 35
- defendant** includes an accused person in proceedings taken by way of indictment

evidence in support of an alibi means evidence tending to show that, by reason of the presence of the defendant at a particular place or in a particular area at a particular time, the defendant 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 5

exhibit means an article or object of any kind that is capable of being produced as evidence on behalf of either the prosecutor or the defendant

expert witness includes a person who will give opinion evidence of a medical, scientific, or technical nature 10

informant means a person who provides verbal or written information (whether or not in recorded form) to a law enforcement officer

international organisation means any organisation of States or Governments of States or any organisation or agency of any such organisation, and includes the Commonwealth Secretariat 15

Judge has the meaning given to it in **section 22**

prosecutor means the person who is for the time being in charge of the file or files relating to a criminal proceeding; and includes— 20

- (a) any other employee of the person or agency by whom the prosecutor is employed who has responsibilities for any matter directly connected with the proceedings; and 25
- (b) any counsel representing the person who laid the information in the proceedings; and
- (c) in the case of a private prosecution, the person who laid the information and any counsel representing that person 30

publicly available information means information that is contained in a publicly available publication

publicly available publication means a magazine, book, newspaper, website, or other publication that is or will be generally available to members of the public, and includes a public register as defined in section 2(1) of the Privacy Act 1993 35

Registrar—

- (a) means the Registrar of the Court concerned; and
- (b) includes any Deputy Registrar of that Court

relevant has the meaning given to it in **section 23**

young person means a young person as defined in section 2(1) of the Children, Young Persons, and Their Families Act 1989. 5

- (2) In this **Part**, a reference to **information** means any recorded information—

- (a) in whatever form it is contained, for example, in a report, statement, list, or interview; and 10
- (b) in whatever medium it is recorded, for example, in hard copy, electronic form, or as a sound or visual recording.

- (3) To avoid doubt, and without limiting **section 28(7)**, in this **Part** a reference to a defendant who has pleaded not guilty to an offence includes any defendant in respect of whom a plea of not guilty has been entered by the Court on behalf of the defendant. 15

22 Meaning of Court and Judge

In this **Part**, unless the context otherwise requires,—

Court means,— 20

- (a) if the defendant has been committed for trial on indictment, the Court before which the defendant is to be tried; and
- (b) in any other case, the District Court or Youth Court

Judge means,— 25

- (a) if the defendant has been committed for trial on indictment, a Judge of the Court before which the defendant is to be tried; and
- (b) in any other case, a District Court Judge or a Youth Court Judge. 30

23 Meaning of relevant

In this **Part**, **relevant**, in relation to information or an exhibit, means information or an exhibit, as the case may be, that tends to support or rebut, or has a material bearing on, the case against the defendant. 35

24 Time of commencement of criminal proceedings

For the purposes of this **Part**, criminal proceedings are commenced at the earliest of—

- (a) the service of a summons (including a summons issued under, or in accordance with, section 20A(8) of the Summary Proceedings Act 1957): 5
- (b) the first appearance of the defendant in Court following his or her arrest, or in response to the laying of an information or the making of a complaint:
- (c) the setting out of particulars on a charge sheet under section 12(2) of the Summary Proceedings Act 1957: 10
- (d) the filing of a notice of hearing under, or in accordance with, section 21(8) of the Summary Proceedings Act 1957.

General provisions about disclosure of information 15

25 Service

- (1) Information required to be disclosed to, and any notice or application required to be given to or served on, any person under this **Part** may be given to or served on the person— 20
 - (a) by personal delivery to that person or, if the person refuses to accept the document or notice, by bringing the document or notice to that person's attention; or
 - (b) by post or facsimile addressed to that person, or by electronic means, at an address nominated by the person or, if no such address has been nominated, at the person's last known postal address or place of residence or business. 25
- (2) Information required to be disclosed to, and any notice or application required to be given to or served on, a defendant under this **Part** may, if the defendant is represented by counsel, be given by any of the methods described in **subsection (1)** to the defendant's counsel. 30
- (4) If information or a notice or application is posted to any person (whether physically or by electronic means), it will be treated as having been received by that person not later than 4 days after the date on which it was posted, unless the person proves 35

that, otherwise than through fault on the person's part, it was not so received.

- (5) Information required to be disclosed under this **Part** may be disclosed in whatever form (including electronically) that the person disclosing the information holds it in at the time the obligation to disclose arises and that is readily accessible to the defendant. 5

26 Exercise of defendant's rights and duties by defendant's counsel

- (1) A right or duty conferred on a defendant by this **Part** may be exercised or performed by counsel representing the defendant. 10
- (2) A notice or report purporting to be given under this **Part** on behalf of the defendant by his or her counsel is, unless the contrary is proved, deemed to be given with the authority of the defendant. 15

Disclosure by prosecutor

27 Initial disclosure

- (1) At the commencement of criminal proceedings, or as soon as practicable after that time, and in any event not later than the applicable date, the prosecutor must disclose the following information to the defendant: 20
- (a) a summary that is sufficient to fairly inform the defendant of the facts on which it is alleged that an offence has been committed and the facts alleged against the defendant; and 25
- (ab) a summary of the defendant's right to apply for further information under **subsection (2)** before entering a plea; and
- (b) the maximum penalty, and the minimum penalty (if one is provided for), for the offence; and 30
- (c) a list of the defendant's previous convictions that are known to the prosecutor; and
- (d) a list of any previous offences proved to have been committed by the defendant and of a kind to which section 284(1)(g) of the Children, Young Persons, and Their 35

Families Act 1989 applies, that are known to the prosecutor.

- (2) At any time after criminal proceedings are commenced or, in the case of a child or young person who appears in a Youth Court in relation to the commission or possible commission of an offence, at any time after that person's first appearance in the Youth Court, the prosecutor must, if requested by the defendant in writing, as soon as is reasonably practicable disclose the following information to the defendant:
- (a) the names of any witnesses whom the prosecutor intends to call at the hearing or trial; and
 - (b) a list of the exhibits that are proposed to be produced on behalf of the prosecution at the hearing or trial; and
 - (c) a copy of all records of interviews with the defendant; and
 - (ca) a copy of all records of interviews of prosecution witnesses by a law enforcement officer that contain relevant information; and
 - (cb) a copy of job sheets and other notes of evidence completed or taken by a law enforcement officer that contain relevant information; and
 - (cc) a copy of any records of evidence produced by a testing device that contain relevant information; and
 - (cd) a copy of any diagrams and photographs made or taken by a law enforcement officer that contain relevant information and are intended to be introduced as evidence as part of the case for the prosecution; and
 - (ce) a video copy of any video interview with the defendant; and
 - (cf) a copy of relevant records concerning compliance with the New Zealand Bill of Rights Act 1990; and
 - (d) a copy of any statement made by, or record of an interview with, a co-defendant in any case where the defendants are to be proceeded against together for the same offence; and
 - (e) a list of any information described in **paragraphs (a) to (d)** that the prosecutor refuses under **section 30, 31, 32, or 33** to disclose to the defendant, together with—
 - (i) the reason for the refusal; and

- (ii) if the defendant so requests, the grounds in support of that reason, unless the giving of those grounds would itself prejudice the interests protected by **section 31, 32, or 33** and (in the case of the interests protected by **section 33**) there is no overriding public interest. 5
- (3) This section does not apply to a defendant who is charged with a minor offence as defined in section 20A(12) of the Summary Proceedings Act 1957 or with an infringement offence as defined in section 2(1) of that Act. 10
- (4) In this section, **applicable date** means—
- (a) the date that is 21 days after the commencement of criminal proceedings;
- (b) in the case of a child or young person who is required to appear in a Youth Court in relation to the commission or possible commission of an offence, the date on which that person first appears in that Court: 15
- (c) any later date that the Court or Registrar allows, on application by the prosecutor, for the purposes of disclosure under this section. 20
- 28 Full disclosure**
- (1) The prosecutor must disclose to the defendant the information described in **subsection (2)** as soon as is reasonably practicable after a defendant has—
- (a) pleaded not guilty to an offence proceeded against summarily; or 25
- (b) elected trial by jury under section 66 of the Summary Proceedings Act 1957; or
- (c) if the information has been laid indictably, made his or her first appearance in Court in relation to the offence. 30
- (2) The information referred to in **subsection (1)** is—
- (a) any relevant information, including, without limitation, the information (**standard information**) described in **subsection (3)**; and
- (b) a list of any relevant information that the prosecutor refuses under **section 30, 31, 32, or 33** to disclose to the defendant together with— 35
- (i) the reason for the refusal; and

- (ii) if the defendant so requests, the grounds in support of that reason, unless the giving of those grounds would itself prejudice the interests protected by **section 31, 32, or 33** and (in the case of the interests protected by **section 33**) there is no overriding public interest. 5
- (3) The standard information referred to in **subsection (2)(a)** is—
- (a) a copy of any statement made by a prosecution witness; and 10
- (b) a copy of any brief of evidence that has been prepared in relation to a prosecution witness; and
- (c) the name and, if disclosure is authorised under **section 32**, the address of any person interviewed by the prosecutor who gave relevant information and whom the prosecutor does not intend to call as a witness; and— 15
- (i) any written account of the interview, whether signed or unsigned, and any other record of the interview; and
- (ii) any statement made to the prosecutor by the person; and 20
- (d) any convictions of a prosecution witness that are known to the prosecutor and that may affect the credibility of that witness; and
- (e) a list of all exhibits that the prosecutor proposes to have introduced as evidence as part of the case for the prosecution; and 25
- (f) a list of all relevant exhibits in the possession of the prosecutor that the prosecutor does not propose to have introduced as evidence; and 30
- (g) a copy of any information supplied to the prosecutor in connection with the case by any person or persons whom the prosecutor proposes to call to give evidence as an expert witness or witnesses; and
- (h) a copy of any relevant information supplied to the prosecutor by a person or persons whom the prosecutor considered calling to give evidence as an expert witness or witnesses, but elected not to do so. 35

- (4) The obligation to disclose information to the defendant under this section as soon as is reasonably practicable is subject to any order made under **section 45 or 47**.
- (5) If information referred to in **subsection (2)** comes into the possession or control of the prosecutor, or is prepared in recorded form, after the prosecutor has disclosed information in accordance with **subsection (1)** and before the hearing or trial is completed, the prosecutor must disclose the information to the defendant as soon as is reasonably practicable.
- (6) The entitlement of a defendant to information under this section continues while the criminal proceedings are in progress (including any appeal against conviction) and during the period from the conviction until the expiry of the time for lodging an appeal against conviction.
- (7) A reference To avoid doubt, a reference in **subsection (1)** to pleading not guilty includes—
- (a) denying the charge under, or in accordance with, section 20A(5) of the Summary Proceedings Act 1957; or
 - (b) requesting a hearing in accordance with section 21(6) of that Act (unless the request is accompanied by an admission of liability); or
 - (c) denying the charge during any appearance before the Youth Court under Part 4 of the Children, Young Persons, and Their Families Act 1989.

29 Request for additional disclosure 25

- (1) At any time after the duty to make full disclosure has arisen under **section 28**, the defendant may request that the prosecutor disclose any particular information, identified by the defendant with as much particularity as possible.
- (2) The prosecutor must disclose information requested by the defendant under **subsection (1)** unless—
- (a) the information is not relevant; or
 - (b) the information may be withheld under **section 30, 31, 32, or 33**; or
 - (c) the request appears to be frivolous or vexatious.
- (3) If a request under **subsection (1)** is declined by the prosecutor under **subsection (2)**, the prosecutor must, as soon as is

reasonably practicable after making the decision to decline the request, inform the defendant of that decision, together with—

- (a) the reason for the decision; and
- (b) if the defendant so requests, the grounds in support of that reason, unless the giving of those grounds would itself prejudice the interests protected by **section 30, 31, 32, or 33** and (in the case of the interests protected by **section 33**) there is no overriding public interest.

- (4) Nothing in this section limits the duty to disclose information under **section 28**. 10

30 Prosecutor not required to record information or to obtain information for sole purpose of disclosure

- (1) Nothing in this **Part** requires a prosecutor to disclose information if, at the time a disclosure obligation would, but for this section, arise or at the time a request for disclosure is made, as the case may be,— 15
 - (a) the prosecutor is not in possession or control of that information; or
 - (b) the prosecutor does not hold the information in recorded form. 20

- (2) Nothing in this section limits **section 28(5)**.

31 Reasons for withholding information

- (1) A prosecutor may withhold any information to which the defendant would otherwise be entitled under this **Part** if— 25
 - (a) disclosure of the information is likely to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences; or
 - (b) disclosure of the information is likely to endanger the safety of any person; or
 - (c) the information is— 30
 - (i) material that is prepared by or for the prosecutor to assist the conduct of the hearing or trial; or
 - (ii) a communication dealing with matters relating to the conduct of the prosecution and is between— 35
 - (A) the prosecutor and another person employed by the same person or agency that employs the prosecutor; or

- (B) the prosecutor and any adviser to the prosecutor; or
- (iii) analytical or evaluative material prepared, in connection with an investigation of ~~whether the defendant has committed an offence that led to the defendant being charged,~~ by a person employed by a person or agency for another person employed by that person or agency or for the prosecutor; or
- (d) the information is subject to ~~section 13A of the Evidence Act 1908~~ sections 108 and 109 of the Evidence Act 2006 (which relates to information about undercover police officers); or
- (e) the information is subject to a pre-trial witness anonymity order under ~~section 13B of the Evidence Act 1908~~ section 110 of the Evidence Act 2006 or a witness anonymity order under ~~section 13C of the Evidence Act 1908~~ section 112 of the Evidence Act 2006; or
- (f) the information is subject to section 16 of the Victims Rights Act 2002 (which relates to information about witnesses' addresses); or
- (g) the disclosure of the information would be likely to prejudice—
- (i) the security or defence of New Zealand or the international relations of the Government of New Zealand; or
- (ii) the entrusting of information to the Government of New Zealand on a basis of confidence by the government of any other country or any agency of such a government or any international organisation; or
- (h) disclosure of the information would be likely to facilitate the commission of another offence; or
- (i) disclosure of the information would constitute contempt of Court or contempt of the House of Representatives; or
- (j) the information could be withheld under any privilege applicable under the rules of evidence; or

-
- (k) disclosure of the information would be contrary to the provisions of any other enactment; or
 - (l) the information is publicly available and it is reasonably practicable for the defendant to obtain the information from another source; or 5
 - (m) the information has previously been made available to the defendant; or
 - (n) the information does not exist or cannot be found; or
 - (o) the information—
 - (i) reflects on the credibility of a witness who is not to be called by the prosecutor to give evidence but who may be called by the defendant to give evidence; and 10
 - (ii) is not for any other reason relevant.
- (2) If part only of the information may be withheld, the prosecutor must make the remainder of the information available if it is possible to protect the withheld information by deletion, summary, or otherwise. 15
 - (3) If the prosecutor becomes aware that there has ceased to be any justification for withholding all or part of any information that has been withheld under this **Part**, the prosecutor must, if the criminal proceedings have not yet been completed, disclose that information to the defendant as soon as reasonably practicable. 20
- 32 Restriction on disclosing address of witness or informant** 25
- (1) This section applies to information that identifies, or that may lead to the identification of, the address of the place where a witness or informant lives (for example, his or her postal address, residential address, email address, fax number, or phone number). 30
 - (2) The information may be disclosed to the defendant only with the consent of the witness or informant or with the leave of the Court.
 - (3) The Court—
 - (a) must not grant leave unless it is satisfied that the disclosure of the information is necessary in the interests of justice and outweighs any prejudice to the witness's or informant's interests, or any harm to the witness or 35

- informant, that is likely to be caused by the disclosure of the information; and
- (b) may, if it grants leave, impose conditions in relation to the disclosure of the information.
- (4) This section applies to an informant regardless of whether the prosecutor intends to call the informant as a witness. 5
- 33 Trade secrets may be withheld**
- (1) The prosecutor may withhold any information to which the defendant would otherwise be entitled under this **Part** if disclosing the information— 10
- (a) would disclose a trade secret; or
- (b) would be likely to unreasonably prejudice the commercial position of the person who supplied, or who is the subject of, the information.
- (2) Despite **subsection (1)**, information must not be withheld under this section if, in the circumstances of the particular case, the interests in **subsection (1)** protected by the withholding of that information are outweighed by other considerations that make it desirable in the public interest to disclose the information. 15 20
- (3) In this section, **trade secret** has the same meaning as in section 230(2) of the Crimes Act 1961.
- 34 Inspection of exhibit by defendant**
- (1) The prosecutor must, on request by the defendant,— 25
- (a) allow the defendant to inspect any exhibit in the possession or control of the prosecutor that is specified by the defendant and is referred to in a list of exhibits supplied under **section 28(3)(e) or (f)**, unless **subsection (3)** applies; and
- (b) if that exhibit is reasonably capable of reproduction, disclose a copy of it to the defendant. 30
- (2) The inspection by the defendant under **subsection (1)** is subject to—
- (a) any conditions that the prosecutor considers necessary for the purpose of— 35

- (i) ensuring the security and integrity of the exhibit or otherwise maintaining its evidential value; and
- (ii) in the case of an exhibit needed for use on an ongoing basis for law enforcement purposes, ensuring that the exhibit can continue to be used on an ongoing basis for law enforcement purposes: 5
- (b) any conditions imposed by the Court under **section 46**.
- (3) The prosecutor may refuse to allow the defendant to inspect an exhibit if—
 - (a) that exhibit is needed for use on an ongoing basis for enforcement purposes; and 10
 - (b) the imposition of conditions under **subsection (2)(a)** would not enable the inspection to take place without prejudicing ongoing law enforcement.

Disclosure by defendant

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35 Notice to defendant of disclosure requirements in sections 37 and 38

The Court or the Registrar must give written notice of the requirements of **sections 37 and 38** to a defendant—

- (a) if the defendant pleads not guilty to an offence proceeded against summarily; or 20
- (b) if the defendant elects trial by jury under section 66 of the Summary Proceedings Act 1957; or
- (c) when the defendant, if the information has been laid indictably, makes his or her first appearance in Court in relation to the offence; or 25
- (d) when the defendant, if he or she is a child or young person, makes a first appearance in a Youth Court.

36 Notice to defendant of disclosure requirement in section 176 of Summary Proceedings Act 1957

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The Court or the Registrar must give written notice of the requirements of **section 176** of the Summary Proceedings Act 1957 to a defendant if the defendant—

- (a) elects trial by jury under section 66 of the Summary Proceedings Act 1957; or 35

- (b) if the information has been laid indictably, makes his or her first appearance in Court in relation to the offence.

37 Notice of alibi

- (1) If a defendant intends to adduce evidence in support of an alibi, the defendant must give written notice to the prosecutor of the particulars of the alibi. 5
- (2) The notice under **subsection (1)** must be given—
- (a) within 14 days after the defendant pleads not guilty to an offence proceeded against summarily; or
- (b) within 14 days after the defendant elects trial by jury under section 66 of the Summary Proceedings Act 1957; or 10
- (c) if the information has been laid indictably, within 14 days after the defendant is committed for trial.
- (3) Without limiting **subsection (1)**,— 15
- (a) the notice under **subsection (1)** must include the name and address of the witness or, if the name and address is not known to the defendant when the notice is given, any matter known by the defendant that might be of material assistance in finding that witness; or 20
- (b) if the name or the address is not included in the notice, the defendant must have, before giving the notice, taken all reasonable steps, and after giving the notice continue to take all reasonable steps, to ensure that the name and address is ascertained; or 25
- (c) if the name or the address is not included in the notice, but the defendant subsequently discovers the name or address or becomes aware of any other matter that might be of material assistance in finding the witness, the defendant must as soon as practicable give written notice of the name, address, or other information, as the case may require; or 30
- (d) if the defendant is notified by the prosecutor that the witness has not been traced by the name or at the address given, the defendant must as soon as practicable give written notice of any other matter known to the defendant that might be of material assistance in finding that witness or, on subsequently becoming aware of any 35

such matter, give written notice of it as soon as practicable.

- (4) To avoid doubt, a reference in **subsection (2)(a)** to pleading not guilty includes—
- (a) denying the charge under, or in accordance with, section 20A(5) of the Summary Proceedings Act 1957; or 5
 - (b) requesting a hearing in accordance with section 21(6) of the Summary Proceedings Act 1957 (unless the request is accompanied by an admission of liability); or
 - (c) denying the charge during any appearance before the Youth Court under Part 4 of the Children, Young Persons, and Their Families Act 1989. 10

38 Disclosure by defendant of evidence to be given by expert witness

- (1) If a defendant proposes to call a person as an expert witness, the defendant must, at least 14 days before the date fixed for the defendant’s hearing or trial or within any further time that the Court may allow, disclose to the prosecutor— 15
- (a) any brief of evidence to be given, or any report provided by that witness; or 20
 - (b) if that brief or any such report is not then available, a summary of the evidence to be given and the conclusions of any report to be provided.
- (2) Where the defendant, under **subsection (1)(b)**, provides only a summary of evidence to be given or conclusions of any report to be presented, the defendant must disclose to the prosecutor the brief of evidence to be given or the report provided by that witness as soon as possible after it becomes available. 25

Disclosure by non-parties

- 39 Application for non-party disclosure hearing** 30
- (1) This section applies at any time after a defendant has—
- (a) pleaded not guilty to an offence proceeded against summarily; or
 - (b) elected trial by jury under section 66 of the Summary Proceedings Act 1957; or 35

- (c) if the information has been laid indictably, been committed for trial; or
 - (d) in the case of a child or young person, made a first appearance in a Youth Court.
- (2) The defendant may apply to the Court for an order granting a hearing to determine whether information that is held by a person or agency other than the prosecutor should be disclosed to the defendant. 5
- (3) The application must—
- (a) describe with as much particularity as possible the information that the defendant seeks to have disclosed, and state the name of the person or agency that the defendant alleges holds the information; and 10
 - (b) set out the grounds on which the defendant relies to establish that the information is relevant; and 15
 - (c) contain written evidence indicating that the defendant has made reasonable efforts to obtain the information from the person or agency that the defendant alleges holds the information.
- (4) The defendant must give a copy of the application to the prosecutor, and the prosecutor must be allowed a reasonable time to make written submissions to the Court concerning the application. 20
- (5) The Court may seek and consider written submissions from the person or agency that the defendant alleges holds the information or any other person or agency that the Court believes would have knowledge of the existence of the information, its whereabouts, and its likely relevance to the proceedings. 25

40 Determination of application for non-party disclosure hearing 30

If a defendant makes an application in accordance with **section 39**, the Court may grant the application if—

- (a) it is satisfied that all or part of the information that the defendant seeks—
 - (i) is likely to be held by the person or agency that the defendant alleges holds the information; or 35
 - (ii) is likely to be held by another person or agency; and

- (b) all or part of the information appears to the Court to be relevant.

41 Service of application and summons if application for hearing granted

- (1) If an application for a non-party disclosure hearing is granted under **section 40**, the Court or the Registrar must, at least 7 days before the hearing under **section 42**,— 5
- (a) serve on the person or agency referred to in the application under **section 39** (being the person or agency who the defendant alleges holds the information) and on any other person or agency who the Court or the Registrar is satisfied is likely to hold the information— 10
- (i) a copy of the application; and
- (ii) a summons under section 20(1) of the Summary Proceedings Act 1957; and 15
- (iii) a copy of the order made by the Court under **section 40**; and
- (b) serve the application on the prosecutor and on any other person to whom, to the knowledge of the defendant or the Registrar, the information relates. 20
- (2) The Judge who granted the application under **section 40** or the Judge who will preside over the non-party disclosure hearing under **section 42** may at any time before or during the non-party disclosure hearing order that the application be served on any person or agency whom the Judge considers is likely to hold the information or any other person to whom the Judge considers the information may relate. 25
- (3) The summons referred to in **subsection (1)(a)(ii)** must—
- (a) require the attendance of the person, or a representative of the agency, that allegedly holds or may hold the information at a particular Court at a particular time; and 30
- (b) describe the relevant material with as much particularity as possible, and require the person to bring the material to the Court.

42 Non-party disclosure hearing 35

- (1) The following persons may call evidence or make submissions in any non-party disclosure hearing:

- (a) the prosecutor:
 - (b) the defendant:
 - (c) the person or agency who the defendant alleges holds the information sought by the defendant:
 - (d) any person or agency who has been served with a copy of the application under **section 41(1) or (2)**: 5
 - (e) with the leave of the Court, any other person who may be affected by, or have an interest in, any order that the Court may make under **section 44**.
- (2) The Judge may, if he or she considers it appropriate to do so, examine the information in the possession of— 10
- (a) the person or agency from whom the information is sought; or
 - (b) any other person or agency who holds the information sought, or part of it. 15
- (3) The Judge may, if he or she considers that there are special circumstances that warrant it, and on such conditions as he or she directs, permit the prosecutor and, if appropriate, the defendant to view the information—
- (a) for the purpose of arguing the application; and 20
 - (b) in order to assist the Court in determining whether the information should be disclosed.
- (4) The following persons are not compellable as witnesses at the hearing, and no order for costs may be made against any of them: 25
- (a) the person, or any representative of the agency, from whom information is sought:
 - (b) any other person who may be affected by any order that the Court may make under **section 44**.
- (5) The hearing conducted under this section must not be open to the public. 30

43 Procedure if Judge subsequently satisfied that another person holds information sought

- (1) If a non-party disclosure hearing is granted under **section 40(a)(i)** but at any time before or during the non-party disclosure hearing the Judge is satisfied that all or part of the information sought by the defendant is likely to be held by a 35

person or agency other than the person or agency alleged by the defendant, the Judge may—

- (a) order that a copy of the application be served on that person or agency; and
 - (b) adjourn the proceedings for that purpose. 5
- (2) If the Judge makes an order under **subsection (1)**, **sections 41(3), 42, and 44** apply with any necessary modifications.

44 Determination of Court following non-party disclosure hearing

- (1) After the hearing under **section 42**, the Judge may order the person or agency who holds the information to disclose it, or part of it, to the defendant, subject to any conditions imposed under **subsection (4)**, if the Judge is satisfied that—
 - (a) the information or part of it is relevant; and
 - (b) the disclosure of the information or part of it is necessary in the public interest. 15
- (2) The Judge may refuse to order disclosure of the information, or part of it, if the Judge is satisfied that—
 - (a) any of the reasons described in **section 31** or **33** for which information could be withheld apply to the information; or
 - (b) the application of **section 32** requires that the information not be disclosed. 20
- (3) In addition to **subsections (1) and (2)**, in determining whether to order the disclosure of the information or part of the information to the defendant, the Judge must take into account—
 - (a) the extent to which the information will assist the defendant to properly defend the charge; and
 - (b) the probative value of the information; and
 - (c) the nature and extent of any reasonable expectation of privacy with respect to the information, including any expectation of the person to whom the information relates; and
 - (d) the effect of the determination on the fairness of the trial or hearing process. 30 35
- (4) If the Judge orders the disclosure of the information or part of the information to the defendant, the Judge may impose condi-

tions on the disclosure to protect the public interest and, to the greatest extent possible, any privacy interests of any person to whom the information relates, including, for example, any of the following conditions:

- (a) that the information be edited as directed by the Judge: 5
 - (b) that a copy of the information, rather than the original, be disclosed:
 - (c) that the defendant not disclose the information to any other person, except with the approval of the Court:
 - (d) that the information be disclosed only to counsel for the defendant and not to the defendant himself or herself: 10
 - (e) that no copies of the information be made, or that restrictions be imposed on the number of copies of the information that may be made:
 - (f) that details relating to any named person in the information, such as the person's address, telephone number, or place of employment, not be disclosed. 15
- (5) If any information is disclosed under this section to the defendant's counsel and, before the proceedings are determined, that counsel ceases to act for the defendant, the counsel must return the information and any copies of it in the possession of the defendant or the defendant's counsel to the Court or Registrar, together with a declaration that those copies have been returned. 20
- (6) If any person fails to comply with **subsection (5)** without reasonable excuse the Court may, on its own motion or on the application of the prosecutor, deal with the failure as a contempt of Court. 25

General powers of Courts in relation to disclosure

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45 Court order for disclosure of information

- (1) The defendant may apply to the Court for an order that a particular item of information or type of information in the possession or control of the prosecutor be disclosed on the grounds that— 35
- (a) the defendant is entitled to the information under **section 27, 28, or 29**, as the case may be, and—

-
- (i) the prosecutor failed to disclose the information; or
 - (ii) the prosecutor refused under **section 29, 31, 32, or 33** to disclose the information, and—
 - (A) none of the reasons described in **section 31, 32, or 33** for which information could be withheld applies to the information; or
 - (B) in the case of a refusal under **section 32**, the information ought to have been disclosed under **section 32(3)**; or
 - (C) in the case of a refusal under **section 33**, the information ought to have been disclosed under **section 33(2)**; or
 - (b) even though the information may be withheld under this Act, the interests protected by the withholding of that information are outweighed by other considerations that make it desirable, in the public interest, to disclose the information.
- (2) If the Court is satisfied, on an application made under this section, that the defendant is entitled to the disclosure of any particular item of information or type of information, or that any particular item of information or type of information should be disclosed to the defendant under **subsection (1)(b)**, the Court may order that the item or type of information be disclosed to the defendant.
- (3) An order made under this section may be made subject to any conditions that the Court considers appropriate.
- 46 Court order setting conditions for inspection of exhibit**
- (1) The prosecutor or the defendant may apply to the Court or the Registrar for an order as to—
- (a) whether a particular exhibit or exhibits may be inspected by a defendant under this **Part** or in accordance with an order under this **Part**;
 - (b) the conditions that will apply to the inspection of a particular exhibit or exhibits by the defendant under this **Part** or in accordance with an order made under this **Part**.

- (2) In determining whether to permit inspection or in determining the conditions of inspection, the Court or the Registrar must have regard to—
- (a) the public interest; and
 - (b) ensuring the security and integrity of the exhibit and otherwise maintaining its evidential value; and 5
 - (c) in the case of an exhibit needed for use on an ongoing basis for law enforcement purposes, ensuring that the exhibit can continue to be used on an ongoing basis for law enforcement purposes. 10

General provisions

47 Court may make orders setting out timetable for disclosure

- (1) At any time after the duty to provide full disclosure of information has arisen under **section 28**, the Court or the Registrar may, on the Court's or the Registrar's own motion or on the application of the prosecutor or the defendant, give directions regarding the timing of disclosure under that section. 15
- (2) If a non-party disclosure order has been made under **section 44**, the Court may, on the Court's or the Registrar's own motion or on the application of the prosecutor or the defendant or the non-party, give directions regarding the timing of disclosure. 20
- (3) If the defendant or the prosecutor or a non-party fails to comply with directions given under this section, the Court or the Registrar may, on the Court's or the Registrar's own motion or on the application by the prosecutor or the defendant,— 25
- (a) give further directions; or
 - (b) if the Court is satisfied that there is no reasonable excuse for the failure to comply, deal with the failure as a contempt of Court. 30
- (4) **Subsection (3)** does not limit the powers of a Court under any other enactment or rule of law to deal with any failure by a prosecutor or defendant or a non-party to comply with the directions of the Court under this section. 35

48 Appeals

- (1) The prosecutor or the defendant may appeal against a decision of a Court under **section 45 or 46**.
- (2) The defendant or the prosecutor or a non-party may appeal against a decision of a Court under **section 44**. 5
- (3) An appeal under this section may,—
 - (a) if the order was made by a Court (as defined in **section 22(a)**), be made to the Court of Appeal with the leave of that Court, or to the Supreme Court with the leave of that Court; or 10
 - (b) in any other case, be made to the High Court with the leave of that Court, or to the Supreme Court with the leave of that Court.
- (4) If the appeal is made to the Supreme Court or Court of Appeal, subsections (3) to (5) of section 379A of the Crimes Act 1961 apply with any necessary modifications. 15
- (5) If the appeal is made to the High Court, sections 116 to 144 of the Summary Proceedings Act 1957 apply, so far as applicable and with any necessary modifications.

49 Undisclosed information 20

- (1) This section applies if, at the hearing or trial of a defendant, the Court is satisfied that—
 - (a) evidence sought to be adduced by a party is, or is based on, information that should have been disclosed to the other party under this **Part**; and 25
 - (b) that information was not disclosed.
- (2) The Court may—
 - (a) exclude the evidence; or
 - (b) with or without requiring the evidence to be disclosed, adjourn the hearing or trial; or 30
 - (c) admit the evidence if it is in the interests of justice to do so.
- (3) The Court—
 - (a) must not order the exclusion of evidence sought to be adduced by the defendant (whether of an alibi, as expert evidence, or otherwise) if it appears to the Court that the 35

- defendant was not given notice in accordance with this **Part** of the requirements of this **Part**; but
- (b) if **paragraph (a)** applies, must adjourn the hearing if the prosecution requests an adjournment.
- (4) Subject to **subsection (3)**, **subsection (2)** does not limit the powers of a Court under any other enactment or rule of law to deal with any failure by a party to comply with the directions of the Court under this ~~section~~ **Part**. 5

Miscellaneous provisions

- 50 Certain applications must be on notice** 10
- (1) A copy of an application made by the prosecutor under **section 46 or 47** must be served on the defendant by the Court or Registrar before the application is considered and determined.
- (2) A copy of an application made by the defendant under **section 45 or section 46 or 47** must be served on the prosecutor before the application is considered and determined. 15

51 Regulations

The Governor-General may, by Order in Council, make regulations for all or any of the following purposes:

- (a) prescribing the procedure for the service of notices and other documents for the purposes of this **Part**: 20
- (b) prescribing forms for the purposes of this **Part**:
- (c) providing for any other matters contemplated by this **Part**, necessary for its administration, or necessary for giving it full effect. 25

Amendments to other enactments

52 Amendment to Local Government Official Information and Meetings Act 1987

Section 17 of the Local Government Official Information and Meetings Act 1987 is amended by inserting the following paragraph after paragraph (d): 30

- “(da) that the request is made by a defendant or person acting on behalf of a defendant and is—
- “(i) for information that could be sought by the defendant under the Criminal Disclosure Act **2004**; or 35

“(ii) for information that could be sought by the defendant under that Act and that has been disclosed to, or withheld from, the defendant under that Act.”.

53 Amendment to Official Information Act 1982

Section 18 of the Official Information Act 1982 is amended by inserting the following paragraph after paragraph (d):

“(da) that the request is made by a defendant or a person acting on behalf of a defendant and is—

“(i) for information that could be sought by the defendant under the Criminal Disclosure Act **2004**; or

“(ii) for information that could be sought by the defendant under that Act and that has been disclosed to, or withheld from, the defendant under that Act.”.

54 Amendments to Privacy Act 1993

(1) Section 29(1) of the Privacy Act 1993 is amended by inserting the following paragraph after paragraph (i):

“(ia) the request is made by a defendant or a defendant’s agent and is—

“(i) for information that could be sought by the defendant under the Criminal Disclosure Act **2004**; or

“(ii) for information that could be sought by the defendant under that Act and that has been disclosed to, or withheld from, the defendant under that Act; or”.

(2) Section 31 of the Privacy Act 1993 is repealed.

55 Other amendments and repeals

(1) The enactments specified in **Schedule 1** are amended in the manner indicated in that schedule.

(2) The enactments specified in **Schedule 2** are repealed.

Transitional and savings provisions

56 Transitional provision

(1) Criminal proceedings commenced before the date on which this **Part** comes into force continue as if this **Part and Schedules 1, 2, 4, 5, and 6 and 2** had not been enacted.

- (2) Despite **subsection (1)**, if the prosecutor and the defendant agree, by notice in writing lodged with the Court, criminal proceedings commenced before the date on which this **Part** comes into force continue subject to the requirements of this **Part** and the enactments specified in **Schedules 1, 2, 4, 5, and 6** ~~(or and 2~~ (as amended by those schedules). 5
- (3) If there is an agreement under **subsection (2)**, any obligation under this **Part** that would (had the proceedings been conducted subject to the requirements of this **Part** from its commencement) already have fallen due before the date of the agreement, falls due at the date of the agreement (if that obligation has not already been complied with). 10
- (4) Until the commencement of sections 108 and 109 of the Evidence Act 2006, **section 31(1)(d)** must be read as if for “sections 108 and 109 of the Evidence Act 2006” there were substituted “section 13A of the Evidence Act 1908”. 15
- (5) Until the commencement of sections 110 and 112 of the Evidence Act 2006, **section 31(1)(e)** must be read as if for “section 110 of the Evidence Act 2006 or a witness anonymity order under section 112 of the Evidence Act 2006” there were substituted “section 13B of the Evidence Act 1908 or a witness anonymity order under section 13C of the Evidence Act 1908”. 20
- 57 This Part not to limit or affect other enactments relating to availability of information** 25
- (1) Except as expressly provided in this or any other enactment, nothing in this **Part** limits or affects any provision in any other enactment that—
- (a) authorises or requires any information to be made available; or 30
 - (b) imposes a prohibition or restriction in relation to the availability of any information; or
 - (c) regulates the manner in which any information may be obtained or made available.
- (2) Without limiting **subsection (1)**, nothing in this **Part** applies in respect of any videotape made under the Evidence (Video-taping of Child Complainants) Regulations 1990 or any copy 35

or transcript of such a videotape (as that term is defined in those regulations).

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Schedule 1
Enactments amended

s 55(1)

**Children, Young Persons, and Their Families Act 1989 (1989
No 24)**

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Heading to section 321: omit “**and Summary Proceedings Act 1957**” and substitute “**Summary Proceedings Act 1957, Bail Act 2000, and Criminal Disclosure Act 2004**”.

Schedule 1: add:

“4 The **Criminal Disclosure Act 2004**”.

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Crimes Act 1961 (1961 No 43)

Section 367A(1) to (3) and (5) to (7): repeal.

Summary Proceedings Act 1957 (1957 No 87)

Section 20: insert after subsection (1):

“(1A) If an application for a non-party disclosure hearing is granted under **section 40** of the **Criminal Disclosure Act 2004**, the defendant may apply to a District Court Judge or Justice or Community Magistrate or the Registrar for the issue of a summons in the prescribed form calling on any person to appear at that hearing.”

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Section 116(1A): insert “or **section 48** of the **Criminal Disclosure Act 2004**” after “of this Act”.

Criminal Disclosure Bill

Schedule 2
Enactments repealed

s 55(2)

Crimes Amendment Act 1973 (1973 No 118)
Sections 11 and 12(1).

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Legislative history

17 June 2008

Divided from Criminal Procedure Bill (Bill 158–2)
by committee of the whole House as Bill 158–3B
