Explanation of the recent history of disclosure and developments in Public Interest Immunity (PII)

2 May 2012

In this article we attempt to give a short explanation of the recent history of disclosure and developments in Public Interest Immunity (PII) so that those facing the current regime(s) may better understand the reality of what is expected of them, and what they can hope to gain from the current processes.

The Old Law

In the early 1980s, the situation was simple, 'unused material' i.e. material the prosecution were not going to use, was made available to the defence if it was relevant. Sensitive' material could be withheld and that decision was made by the prosecutor - not the Court. Then the early 1990's produced the first of the real watershed 'miscarriage' cases; R v Ward [1993] 1 WLR 619. The Court of Appeal laid down a more generous disclosure regime - all 'material' evidence was to be disclosed - i.e. "evidence which tends either to weaken the prosecution case or to strengthen the defence case." The Court found that where there was sensitive material the Crown should normally inform the defence and the Court would rule on the claim. This would be after an ex parte (private hearing) between the prosecution and the Judge. The case of the M25 three (R v Davis, Rowe and Johnson [1993] 1 WLR 613, 617) refined the PII regime. There were now 3 types of PII applications, the first two are still used today:

1. The first (and for most cases) is where the prosecution tell the defence about the PII application and what category of material it is about. The defence are then entitled to make their own representations to the Judge.

London Office
36 Whitefriars Street
London
EC4Y 8BQ
+44 (0)203 947 1539
enquiries@rahmanravelli.co.uk

Midlands Office
3 Brindley Place
Birmingham, West Midlands
B1 2JB
+44 (0) 121 827 7985

Northern Office
Roma House, 59 Pellon Lane
Halifax, West Yorkshire
HX1 5BE
+44 (0)1422 346 666

Rapid Response Team
24 Hour Emergency Contact
0800 559 3500

Fax +44 (0)1422 430 526
DX16001 HX1

2. The defence are told about the application but not what category of material is involved as that would, in effect, reveal that which the Crown contend should be kept secret.

3. In exceptional cases, where even to reveal the fact that an ex parte application was to be made, could 'give the game away', then the ex parte, hearing could take place without notice to the defence.

This procedure was enshrined in statute in the Criminal Procedure and Investigations Act 1996 and the Rules made under the Act - though now in practice the Rules are replaced by the new Criminal Procedure Rules, see R25.2- which largely replicates the old system. It is arguable that the 3rd procedure, the most severe has, despite being included in the new Rules, in fact been abolished by the House of Lords decision in R v H & C (see below).

The 1996 Act also introduced the two stage test for disclosure. First the Crown had to perform 'primary prosecution disclosure' - disclosure of material which in the prosecutor's opinion might undermine the case for the prosecution. Then the defence would serve a Defence Statement which would set out in general terms the defence and the prosecution would reply with 'secondary prosecution disclosure'. This was material which might reasonably be expected to assist the accused's defence as disclosed by the Defence Statement.

R v H & C and the Golden Rule

London Office
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In the case of Edwards and Lewis v UK the European Court considered the ex parte PII procedures adopted in those cases violated the applicants' right to a fair trial (Article 6). The defence cases involved allegations of entrapment by the police and the Court felt that the ex parte process was not a fair way to deal with the issues as the Judges had to make findings of fact before deciding upon disclosure. Those findings of fact were reached after hearing only one side - the prosecution. The answer, the Strasbourg Court suggested, might lie in the appointment of a 'special' or 'independent' counsel to argue the Defendant's case but who would be duty bound not to reveal the sensitive issues that he has heard about to the defence.

R v H & C [2004] 2 AC 134 was the first domestic case that successfully relied on the argument for special counsel (the authors represented H). The case eventually went to the House of Lords and a seven stage test was laid down for Judges considering disclosure and PII. This effectively limited the use of special counsel to exceptional cases only.

The Lords decided that the prosecution, and not the Courts, should primarily decide on issues of disclosure - i.e. a prosecutor will decide first of all if material is relevant and if it isn't there is no need to disclose or see the Judge, never mind seek a PII ruling if the material is sensitive. This leads to the danger that the prosecution will simply decide that material which is sensitive is actually not relevant anyway and therefore, even if the defence have asked for disclosure of the same, the material is not disclosed and even the Court is excluded.

The New Law

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Northern Office
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The defence however still has a right to apply to the Court for disclosure and the Lords reminded the Crown that the starting point is the 'Golden Rule', i.e. that any material which weakened the prosecution case or strengthened that of the defence should be disclosed and that that rule should be read fairly widely. The Court however warned against Defendants attempting 'try-on' defences, i.e. making "general and unspecified allegations and then seeking far-reaching disclosure in the hope that material may turn up to make them good." Careful drafting is therefore required and a realistic view taken about what may have been held back by the prosecution before rushing to the trial Judge.

Part 5 of the Criminal Justice Act 2003, came into force on 4th April 2005 and applies to all criminal investigations begun on or after that date. All that is said above re R v H and C still applies as the Act does nothing to formalise any special counsel procedure or amend the PII processes. However the disclosure processes have been changed. The two stage process is abolished. The Crown now have to begin the process by disclosing material '..which might reasonably be considered capable of undermining the case for the prosecution...or of assisting the case for the defence.' The defence are then under an obligation to serve a Defence Statement which is required to be more detailed than previously. The Act even requires the defence to set out anticipated arguments of law and admissibility in the Defence Statement!

In addition to the Defence Statement there is also now a requirement for 'updated disclosure' - this is simply a Defence Statement updated to reflect the present state of affairs. As the defence are under increasing pressure to disclose as much of their case as possible, as early as possible, this maybe a chance for Defendants to address any lack of prosecution disclosure evident after service of the original Defence Statement and may well present tactical opportunities for Defendants.

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B1 2JB
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DX16001 HX1

Disclosure now seems to be fast becoming as much a defence duty as a prosecution duty. The defence now even have to disclose details of expert witnesses instructed - not necessarily ones used but just instructed. But perhaps the most worrying manifestation of the trend towards greater and greater disclosure by the defence is the requirement under s34 (inserting s6C into the 1997 Act) that the accused must give to the Court and the prosecution a notice indicating what witnesses he intends to call, together with their names and addresses, and dates of birth! But, what really is likely to put off your witnesses is the fact that the police will be entitled to go and find your witnesses and interview them. Section 40 provides that the Secretary of State will produce a Code of Conduct for officers conducting such interviews - presumably to stop excesses by over zealous officers. The up side is that it does appear that there is no power of compulsion. However, if you call a witness whose details you have not provided to the prosecution then the risk is that the jury will be directed that they can draw an adverse inference from that fact!

In Practice

What does all this mean? Disclosure and PII has always been a difficult topic and one that we are likely to have to re-visit after the first challenges to the new system have been settled. Basically the rule for all Defendants facing trial where disclosure is likely to be an issue is early preparation. The only way to maximise disclosure is to ensure that the Defence Statement is drafted fully and precisely. The document, now more than ever, has to be persuasive; i.e. if it does not persuade the prosecutor then it maybe the platform for representations to the Judge about the proper PII procedure, the Golden Rule, objective relevance and special measures, e.g. edited disclosure, special counsel and so on.

These changes do not mean 'all is lost'. It does mean that those of you facing trial who may have disclosure issues need to be pro-active and ensure you prepare early and draft the all important Defence Statement with real tactical care.

Authors

London Office
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London
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Midlands Office
3 Brindley Place
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Fax +44 (0)1422 430 526
DX16001 HX1

Jonathan Lennon is a Barrister specialising in criminal defence, human rights and Prison Law at 23 Essex Street Chambers in London. He is co-editor of the Prison Law Reports and was junior Counsel in R v H (C.A.).

Aziz Rahman is a Solicitor - Advocate and Partner at the leading Criminal Defence firm Rahman Ravelli Solicitors, specialising in Human Rights, Financial Crime and Large Scale Conspiracies/Serious crime. Rahman Ravelli are members of the Specialist Fraud Panel.