DISCLOSURE, PUBLIC INTEREST IMMUNITY AND THE CRIMINAL JUSTICE ACT 2003

An article by Aziz Rahman, Solicitor and Jonathan Lennon, Barrister

On 20th February 2006 a new 'Protocol' on disclosure was published. Its aim was to set down clear guidance on how Judges and the parties to a criminal case should deal with the issue of disclosure of 'unused' material; i.e. material the police have obtained in their investigation that they do not rely on in their case against you. Clearly such material might be of interest to a suspect who feels that the police will have knowledge or material that undermines the prosecution's case or advances the defence case. However, the powers that be want to limit access to unused material. The authority of the so-called 'Protocol' document as a source of law is far from clear but it does seem that we can expect this document to set the tone for disclosure for the foreseeable future. It advocates a 'sea-change' in the approach to the handling and management of unused material. At first it makes for depressing reading, but as will be seen, proper use of the Protocol could work to a Defendant's advantage.

DIFFERENT REGIMES

Unfortunately any discussion on the current law on disclosure is necessarily complex because there are in fact 3 different regimes in force. We will try here to explain, briefly, the law as disclosure issues remains one of the greatest sources of agitation for those awaiting trial. At the moment we are in between two legislative regimes, both running alongside a pre-existing common-law regime. The amount of unused material that you will be permitted to have may well be dependent on what regime applies. Here is a very rough guide to the three regimes currently in force:

Common-law: This regime applies to cases where the criminal investigation commenced prior to 1st April 1997. The common-law test itself underwent changes through the great miscarriage cases of the 1990s. The test for disclosure ended up being not dissimilar to the test set out in the Criminal Procedure and Investigations Act 1996 (CPIA 1996).

Criminal Procedure and Investigations Act 1996: if the criminal investigation commenced after 1st April 1997 but before 4th April 2005 then the CPIA test, in its original form, will apply. This introduced the concept of the prosecution disclosing any material that, in the prosecutor's opinion, might undermine the case for the prosecution. This is followed by the Defendant completing a Defence Statement where the Defendant sets out: 'in general terms the nature of the accused's defence.' It has to be said that some practitioners took 'general terms' to mean 'say nothing at all'. Sometimes that is the right approach – generally not. The problem is that further disclosure, or 'secondary prosecution disclosure' is dependent on what is said in the Defence Statement, as is any hope a suspect may have of influencing the outcome of any Public Interest Immunity application. The proper drafting of a Defence Statement is absolutely critical – the new Protocol strongly encourages prosecutors and Judges to act firmly with Defendants who submit poor Defence Statements – i.e. by limiting further disclosure to the matters strictly pleaded in the Defence Statement and by encouraging comments to the jury that the Defendant has come up with a new story, or a late defence etc.

Criminal Procedure and Investigations Act 1996 (as amended): Part 5 of the Criminal Justice Act 2003, came into force on 4th April 2005. It amended the above CPIA regime. The new CPIA Mk II applies to all criminal investigations begun on or after that date. It does away with the 2-stage process of disclosure in CPIA Mk I. The Crown now have to begin the process by disclosing material which '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 much 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.

Not all parts of the amendments to the CPIA disclosure regime have been bought into force. The Protocol is not helpful in identifying what is not in force and when it will be in force. This piecemeal approach has been causing much confusion in the profession. Basically, the single test for disclosure is now in force. Provisions not yet in force include mandatory cross-service of Defence Statements with co-Defendants (s5A), the notification to the Crown of the names of any experts instructed by the defence (even if not used by the defence (s6D) and the requirement to provide names, address and dates of birth of all proposed defence witnesses (s6C).

To add to the confusion the Attorney General issued 3

different sets of Guidance on disclosure – the relevant one now being issued in 2005. There are also different Codes of Practice for the two statutory regimes and the Government last year introduced the Criminal Procedure Rules 2005, Part 25 of which deals with the procedures for applications to the Court concerning sensitive and non-sensitive unused material. You can imagine that most criminal practitioners would not welcome another directive – whether it is called a 'Protocol' of a 'code' or whatever. Infact, it is not all doom and gloom. It has long been the complaint of pro-active defenders that the prosecution sometimes approach their disclosure duties with less than full rigour – this was especially so in relation to Public Interest Immunity (PII) applications. The new Protocol reinforces the duties on the Crown, as well as on defenders. Defenders should be using this document to keep the pressure on the Crown to make sure that disclosure is fully and properly addressed.

IMPACT OF THE PROTOCOL

Much of what is in the Protocol is not new – but the repetition of the proper procedure will serve to remind prosecutors that they 'have to get it right' or the defence will be reminding the Judge of which paragraph of the Protocol the Crown have offended. For example there are police duties to gather and record unused material fairly and in accordance to the relevant Code of Practice, and to set out in a Schedule (usually called an MG6C) a list of all the non-sensitive unused material, and for that schedule to be sent to the prosecutor expediously. The Protocol also however underlines that the Crown can't simply comply with their disclosure duties by giving the defence 'everything'. There must be a considered approach. This will include considering the new updated Defence Statements (in CPIA Mk II cases), which, to a pro-active defender, could be seen as an opportunity to maximise the disclosure opportunities by reacting to disclosure served since the original Defence Statement.

The Protocol does make it clear that many so called Defence Statements, up to now, have been so lacking in detail that they hardly qualify for the title. Now Judges are told that they have a duty to make sure Defence Statements are up to the mark and if not the Defendants can expect their juries to hear adverse comments about their defence, as well as affecting the prospects of any application for further disclosure. But the Protocol also reasserts the proper procedure for applications to the Court to order further disclosure. In fact, if done properly, the defence can use the system to, in effect, place a burden on the Crown. The defence apply to the Court for disclosure of the disputed material sending a copy of the application to the Crown. The Crown then have 14 days to agree to provide the disputed material or set out in writing their objections and attend Court. If they fail to reply in time the Court may decide the matter on paper – i.e. only reading the Defendant's argument (see para 44 of the Protocol). This system has in fact been in place for nearly a year (Criminal Procedure Rules) but widely ignored. Hopefully more defenders will now see how pressure can be kept up by using the rules/Protocol to their advantage. As usual it is simply a case of being pro-active, ensuring the Defence Statement is drafted carefully and using the legislation/ rules/ Protocols etc to keep the pressure on.

PUBLIC INTEREST IMMUNITY APPLICATIONS (PII)

This is especially so in the field of PII. There is simply not enough space to go into the complex law on PII but what is just as important as the law is the proper procedure. The Protocol expressly states that no Judge should consider prosecution PII applications without considering the House of Lords case of R v H & C [2004] 2 AC 134 (the authors represented H). In that case the Court considered the use of so-called 'Special Counsel' and set out the proper process for a Judge considering disclosure and PII applications. However, even now, post R v H, it is not unusual to come across practitioners (on both sides) taking a very relaxed view of disclosure and PII procedures. The Protocol, in the right hands, gives ammunition to defenders to shake prosecutors out of any relaxed attitude they might choose to adopt. For example, it ensures that the Crown can be reminded that they must (except in rare cases) disclose at least the 'category' of the material sought to be withheld in a private PII application to the Judge. That information can give your representatives vital ammunition to tell the Judge why the Crown are wrong about a particular category of material and why disclosure is needed by the defence. That opportunity may be missed by a combination of sloppy prosecuting and sloppy defending. The only way to guard against the former is to ensure that the latter never happens in your case.

AUTHORS

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