CRIMINAL PROCEDURE AMENDMENT (MANDATORY PRE-TRIAL DEFENCE DISCLOSURE) BILL 2013

Without any fanfare, significant debate or publicity, the *Criminal Procedure Amendment (Mandatory Pre-Trial Defence Disclosure) Bill* 2013 ("the *Defence Disclosure Bill*") passed through Parliament on the evening of the 21st March 2013. It proceeded through both Houses of Parliament in the shadow of its cognate Bill the *Evidence Amendment (Evidence of Silence) Bill* 2013.

The scope of this new legislation has very substantial ramifications for defendants in criminal trial matters.

The intent of this Bill seems to be unapologetically aimed at enhancing prospects of conviction.

It seeks to achieve this by effectively reversing the onus and requiring the Defence to reveal their hand prior to trial. Failure to do so may lead to the drawing of adverse inferences against the Defendant.

The Bill erodes a fundamental principle of our legal system – that a person is innocent until proven guilty. Whilst it does not require the Defence to prove anything in court it requires the Defence to alert the Crown to the nature of the defence and the factual and legal issues. The effect of this is that instead of having an overarching responsibility to prove guilt beyond reasonable doubt the Crown would have to focus only on discreet areas of contest.

This could potentially backfire in that the Crown may, in focusing on the issues disclosed by the defence, neglect to prove certain matters or overlook certain issues.

The issue is Sections 143 (b), (c) and (d). The remaining matters are more administrative matters, which, whilst making life more onerous for the Defence, could be complied with without compromising fundamental principles of justice.

It is imperative that all Defendants retain a right to defend their case on any possible factual or legal basis that may exist before trial or may even become available during trial. That is the effect of the principle - innocent until proven guilty.

By allowing adverse interest to be drawn from failures to disclose any possible defence that may ultimately be utilised by the Defendant is to deny them that right.

The question of what adverse inferences could possibly be drawn in each individual situation will be a minefield. It is very unlikely that conviction rates will change. However, the rates of appeals will increase significantly – guaranteed – as arguments over what inferences can be drawn and how the Judge/Jury can take them into account will be prolific.

The Amendments in context

Section 15A of the *Director of Public Prosecutions Act 1986 (NSW)* provides the legislative basis for investigating police and other law enforcement officers to divulge relevant information and material to the Office of the Director of Public Prosecution. It provides as follows:

> *"**15A Disclosures by law enforcement officers***
>
> *(1) Law enforcement officers investigating alleged indictable offences have a duty to disclose to the Director all relevant information, documents or other things obtained during the*

investigation that might reasonably be expected to assist the case for the prosecution or the case for the accused person.

(1A) The duty of disclosure arises if the Director exercises any function under this Act with respect to the prosecution of the offence.

(2) The duty of disclosure continues until one of the following happens:

(a) the Director decides that the accused person will not be prosecuted for the alleged offence,

(b) the prosecution is terminated,

(c) the accused person is convicted or acquitted.

(3) Law enforcement officers investigating alleged indictable offences also have a duty to retain any such documents or other things for so long as the duty to disclose them continues under this section. This subsection does not affect any other legal obligation with respect to the possession of the documents or other things.

(4) The regulations may make provision for or with respect to the duties of law enforcement officers under this section, including for or with respect to:

(a) the recording of any such information, documents or other things, and

(b) verification of compliance with any such duty.

(5) The duty imposed by this section is in addition to any other duties of law enforcement officers in connection with the investigation and prosecution of offences.

(6) The duty imposed by this section does not require law enforcement officers to provide to the Director any information, documents or other things that are the subject of a claim of privilege, public interest immunity or statutory immunity. The duty of a law enforcement officer in such a case is to inform the Director of:

(a) the existence of any information, document or other thing of that kind, and

(b) the nature of that information, document or other thing and the claim relating to it.

(7) However, a law enforcement officer must provide to the Director any information, document or other thing the subject of a claim of privilege, public interest immunity or statutory immunity, if the Director requests it to be provided.

(8) The duty imposed by this section does not require law enforcement officers to provide to the Director any information, document or other thing if to do so would contravene a statutory publication restriction. The duty of a law enforcement officer in such a case is to inform the Director of the following, but only to the extent not prohibited by the statutory publication restriction:

(a) the existence of any information, document or other thing of that kind,

(b) the nature of that information, document or other thing.

(9) In this section:

"law enforcement officer" means a police officer, or an officer of one of the following agencies, who is responsible for an investigation into a matter that involves the suspected commission of an alleged indictable offence:

(a) the Police Integrity Commission,

(b) the New South Wales Crime Commission,

(c) the Independent Commission Against Corruption.

"statutory publication restriction" means a prohibition or restriction on publication that is imposed by or under:

(a) section 52 or 53 of the Police Integrity Commission Act 1996 , or

(b) section 45 of the Crime Commission Act 2012 , or

(c) section 112 of the Independent Commission Against Corruption Act 1988 ."

The wording of s.15A(1) requires the police to disclose as a matter of duty to the Director relevant material obtained during the investigation "*that might reasonably be expected to assist the case of the prosecution or the case for the accused*".

Until the introduction of the *Defence Disclosure Bill*, Section 137 of the *Criminal Procedure Act 1986 (NSW)* set out the consequential obligation on the DPP to disclose to the defence relevantly as follows:

"137 Notice of prosecution case to be given to accused person

(1) …

(i) a copy of any information, document or other thing provided by police officers to the prosecutor, or otherwise in the possession of the prosecutor, that may reasonably be regarded as relevant to the prosecution case or the defence case, and that has not otherwise been disclosed to the accused person,

…"

The Prosecution Notice

Pursuant to the Defence Disclosure Bill, Section 137 is to be omitted from the *Criminal Procedure Act 1986 (NSW)* and substantially replaced with a new s.142 which provides that material be produced by the DPP pursuant to a Prosecution Notice. The Notice forms part of a reciprocal procedure under the new mandatory pre-trial disclosure regime. The Prosecution Notice provides as follows:

*"**142 Prosecution's notice***
(1) For the purposes of section 141 (1) (a), the prosecution's notice is to contain the following:

(a) a copy of the indictment,
(b) a statement of facts,
(c) a copy of a statement of each witness whose evidence the prosecutor proposes to adduce at the trial,
(d) a copy of each document, evidence of the contents of which the prosecutor proposes to adduce at the trial,
(e) if the prosecutor proposes to adduce evidence at the trial in the form of a summary, a copy of the summary or, where the summary has not yet been prepared, an outline of the summary,
(f) a copy of any exhibit that the prosecutor proposes to adduce at the trial,
(g) a copy of any chart or explanatory material that the prosecutor proposes to adduce at the trial,
(h) if any expert witness is proposed to be called at the trial by the prosecutor, a copy of each report by the witness that is relevant to the case,
(i) a copy of any information, document or other thing provided by law enforcement officers to the prosecutor, or otherwise in the possession of the prosecutor, that would reasonably be regarded as relevant to the prosecution case or the defence case, and that has not otherwise been disclosed to the accused person,

(j) a list identifying:
(i) any information, document or other thing of which the prosecutor is aware and that would reasonably be regarded as being of relevance to the case but that is not in the prosecutor's possession and is not in the accused person's possession, and
(ii) the place at which the prosecutor believes the information, document or other thing is situated,
(k) a copy of any information in the possession of the prosecutor that is relevant to the reliability or credibility of a prosecution witness, (l) a copy of any information, document or other thing in the possession of the prosecutor that would reasonably be regarded as adverse to the credit or credibility of the accused person,
(m) a list identifying the statements of those witnesses who are proposed to be called at the trial by the prosecutor.

(2) The regulations may make provision for or with respect to the form and content of a statement of facts for the purposes of this section.

(3) In this section, ***law enforcement officer*** *means a police officer, or an officer of one of the following agencies:*
(a) the Police Integrity Commission,
(b) the New South Wales Crime Commission,
(c) the Independent Commission Against Corruption.

The inclusion of "law enforcement officers" as including officers from the Police Force, the Police Integrity Commission, the NSW Crime Commission and/or the Independent Commission against corruption is in line with the provisions as amended in late 2012 of s.15A of the *DPP Act*. Those amendments, and others as to the duty by investigating police to disclose material which might be immune to production by statute or public interest, follow the decision in *R v Lipton* [2011] NSWCCA 247.

The effect of the amended legislation is as follows:

The duty of police to the DPP remains unaffected. The law enforcement official is to provide to the Director of Public Prosecutions Office material which the law enforcement officer considers *might reasonably be expected* to assist the case of the prosecution or the case for the accused.

Previously, under s.137, it was the case that the prosecutor, once seized with the material from the police, had a statutory obligation to provide those standard items nominated in the legislation (and duplicated in s.142) such as a copy of the indictment, statement of facts, statements of each witness etc. and copies of any further information which *may reasonably be regarded* as relevant to the prosecution case or the defence case which hadn't otherwise been disclosed (per the now omitted section 137(1)(i)).

Now, pursuant to s.142, the obligation on the prosecutor is to provide such material that *would reasonably be regarded* as being relevant to the prosecution or defence case that has not otherwise been disclosed.

The difference is an appreciable one. The duty to disclose is based on a fundamental prosecutorial duty to conduct the prosecution fairly by impartially placing before the court all relevant reliable evidence (*R v Smith* [2007] QCA 447).

The "duty of disclosure" has been described as a discretionary responsibility exercised according to the circumstances as the prosecutor perceives them to be. The responsibility is said to be dependent upon what the prosecutor perceives, in light of the facts known to him or her, fairness in the trial process requires (*Cannon v Tahche* [2002] 5 VR 317 (CA)).

The amendment has therefore caused a reshaping of the disclosure obligation on behalf of the Crown insofar that it now requires that the prosecutor with carriage of the matter form a view that there *would* be (as reasonably determined) relevance in the material for either their case or the defence case, rather than the reasonable possibility that such material *may* be relevant to either case. Such a prescription is in my view unduly confining.

The defence disclosure

The real nub of the legislation is to require the defence to respond to the prosecution notice by way of mandatory disclosure of the main issues as perceived by the defence in trial.

It is incumbent upon the Court to set a timetable for pre-trial disclosure after the indictment is presented or filed in the criminal proceedings and prior to trial. The legislation anticipates practice notes issued by the Courts guiding the pre-trial disclosure timetable.

Once the prosecution have complied with the Prosecution's Notice under s.142, it is then incumbent on the legal representatives for the defendant to respond to the Notice pursuant to s.143.

Section 143 provides as follows:

> *"**143 Defence response-court-ordered pre-trial disclosure***
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> *For the purposes of section 141 (1) (b), the notice of the defence response is to contain the following:*
>
> > *(a) the matters required to be included in a notice under section 138,*
> >
> > *(b) a statement, in relation to each fact set out in the statement of facts provided by the prosecutor, as to whether the accused person considers the fact is an agreed fact (within the meaning of section 191 of the Evidence Act 1995) or the accused person disputes the fact,*
> >
> > *(c) a statement, in relation to each matter and circumstance set out in the statement of facts provided by the prosecutor, as to whether the accused person takes issue with the matter or circumstance as set out,*
> >
> > *(d) notice as to whether the accused person proposes to dispute the admissibility of any proposed evidence disclosed by the prosecutor and the basis for the objection,*
> >
> > *(e) if the prosecutor disclosed an intention to adduce expert evidence at the trial, notice as to whether the accused person disputes any of the expert evidence and which evidence is disputed,*
> >
> > *(f) a copy of any report, relevant to the trial, that has been prepared by a person whom the accused person intends to call as an expert witness at the trial,*
> >
> > *(g) if the prosecutor disclosed an intention to adduce evidence at the trial that has been obtained by means of surveillance, notice as to whether the accused person*

proposes to require the prosecutor to call any witnesses to corroborate that evidence and, if so, which witnesses will be required,

(h) notice as to whether the accused person proposes to raise any issue with respect to the continuity of custody of any proposed exhibit disclosed by the prosecutor,

(i) if the prosecutor disclosed an intention to tender at the trial any transcript, notice as to whether the accused person accepts the transcript as accurate and, if not, in what respect the transcript is disputed,

(j) notice as to whether the accused person proposes to dispute the authenticity or accuracy of any proposed documentary evidence or other exhibit disclosed by the prosecutor,

(k) notice of any significant issue the accused person proposes to raise regarding the form of the indictment, severability of the charges or separate trials for the charges,

(l) notice of any consent the accused person proposes to give under section 184 of the Evidence Act 1995 ."

There are numerous authorities to the proposition that the prosecution must disclose to the defence prior convictions of a Crown witness and information which may reflect materially on the credibility of Crown witnesses (*R v K* (1991) 161 LSJS 135 (SACCA); *R v Garafalo* [1992] 2 VR 625(CA)). There had been qualifying common law principles that the prosecution had no duty to disclose matters affecting the credibility of defence witnesses. In *R v Brown* [1998] AC 367 the House of Lords said:

"The common law rules which I have described are designed to ensure the disclosure of material in the hands of the prosecutor which may assist the defence case. But, once that duty has been satisfied, the investigation and preparation of the defence case is a matter for the defence. That includes tracing, interviewing and assessment of possible defence witnesses and material which may assist the defence case can be distinguished from the material which may undermine it or may expose its weaknesses …

To insist on such disclosure would, soon or later, undermine the process of the trial itself. It will protect from challenge those who are disposed to give false evidence in support of a defence which had been fabricated. That would be to tip the scales too far. Justice would not have been done."

By its design, it appears that the Defence Disclosure Bill anticipates that the defence might now more usually present evidence in the defence cause. Subsection 142(1)(l) provides that the prosecution must provide a copy of any information, document or other thing in the possession of the prosecutor that would reasonably be regarded as adverse to the credit or credibility of the accused person.

Section 146(a) governs (very loosely) the ability of the Court to draw adverse inferences against the accused should there be a failure by the defence to disclose in accordance with the pre-trial disclosure regime. Section 146(a) provides as follows:

"Drawing of inferences in certain circumstances

(1) This section applies if:

*(a) the accused person fails to comply with the requirement for **pre-trial** disclosure imposed by or under this Division on the accused person, or*

(b) the accused person is required to give a notice under section 150 (Notice of alibi) and fails to do so.

(2) If this section applies:

(a) the court, or any other party with the leave of the court, may make such comment at the trial as appears proper, and

(b) the court or jury may then draw such unfavourable inferences as appear proper.

(3) A person must not be found guilty of an offence solely on an inference drawn under this section.

*(4) Subsection (2) does not apply unless the prosecutor has complied with the requirements for **pre-trial** disclosure imposed by or under this Division on the prosecution.*

(5) This section does not limit the operation of section 146."

The key words in this section are 'as appear proper'. These words will be the subject of protracted and furious argument in many cases to come. It might be argued that under no circumstances is it 'proper' to make comment or draw an adverse inference where all the defendant did was deny the Prosecution assistance in proving his guilt.

Conclusion

This legislation, like much failed legislation before it, reeks of a kneejerk political reaction to an alleged community perception that offenders are more often than not escaping conviction. The reality could not be any further from that perception. The general conviction rate has always been at around the same rate since our legal system began.

Legislation like this is rarely thought through in a context of deep understanding of the fundamental principles underpinning our system. We don't want a system that ensures everyone is convicted. That is a slippery slope to serious injustice. We want a system that convicts people based on thorough police work and strong evidence. That is, we want a system where the Prosecution bears the onus of proving people guilty.

The Defence Disclosure Bill has not yet come into operation even though it has been passed and assented to. It will commence courtesy of a proclamation to be made in the future. We can only hope that between now and then the Government may consider revisiting the Bill and hearing from legal experts or alternatively monitoring the effects of the Bill closely and amending it once its dysfunctional nature is revealed.

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