

Defence Disclosure in the District Court

Background

A general duty upon defence practitioners to disclose issues in dispute in all trials was introduced by the *Criminal Procedure Amendment (Pre-trial Defence Disclosure) Act 2013*. This Act was introduced together with s89A *Evidence Act 1995 (NSW)* – the special caution.¹

Pre-trial disclosure provisions² apply to all trials in the District Court and the Supreme Court.³

Pre-trial disclosure provisions were first introduced in 2001 but were limited to complex matters. Reform to pre-trial disclosure legislation was recommended by the Trial Efficiency Working Group in 2009 after it reported that existing case management provisions had rarely been used. Further reforms introduced in 2010 were also considered ineffective and rarely used, particularly in the District Court. The most recent amendments mandate defence disclosure in all trial matters without a court order.

In his second reading speech the Attorney General said that defence disclosure will –

allow the parties to focus on the real issues that will be in dispute at trial, with the result that trials are likely to be shorter in length and witnesses will not be called unnecessarily to give evidence from the witness box that can be reduced to writing or tendered in a document.⁴

Defence practitioners raised concerns that the right to silence and presumption of innocence had been seriously abrogated by these reforms.⁵

What must defence disclose?

The following *must* be disclosed⁶ -

- (a) the name of any Australian legal practitioner ...,
- (b) the nature of the accused person's defence, ...
- (c) the facts, matters or circumstances ... with which the accused person intends to take issue,
- (d) points of law ...
- (e) notice of any consent [to]:
 - (i) a statement of a witness ...

¹ *Evidence Amendment (Evidence of Silence) Act 2013*

² ss134-151 *Criminal Procedure Act 1986 NSW* (CPA)

³ s135(1) CPA They apply to Indictments presented after 1 September 2013.

⁴ Hansard Legislative Assembly 13 March 2013 Page 85.

⁵ See Peter O'Brien "Criminal Procedure (Mandatory Pre-trial Disclosure) Bill 2013" www.criminalcpd.net.au.

⁶ s143(1) CPA

- (ii) a summary of evidence ...
- (f) ...Notice of alibi...
- (g) ...Notice of intention to adduce evidence of substantial mental impairment.

The following must be disclosed *only if* the Court makes orders⁷ -

- (a) .. any report, [from an] expert witness ...
- (b) [in relation to evidence] of surveillance, notice as to whether [corroborating witnesses are required],
- (c) notice as to whether the accused person proposes to raise any issue with respect to the continuity of custody of any proposed exhibit ...
- (d) ... notice as to whether the accused person accepts [any] transcript as accurate and, if not, in what respect the transcript is disputed,
- (e) notice as to whether the accused person proposes to dispute the authenticity or accuracy of any proposed documentary evidence ...
- (f) notice of any significant issue ... regarding the form of the indictment, severability of the charges or separate trials ...
- (g) notice of any consent the accused person ... under section 184 of the [Evidence Act 1995](#).

District Court Practice Note 9 provides that the Prosecution’s Notice of Prosecution Case is to be served on the accused no later than *three weeks* before the trial date. The Defence Response should be given no later than *10 days* prior to the trial date. Any response to the defence notice should be given prior to the trial date.

The Notice must be given to the Prosecutor⁸ and filed with the Court.⁹ Disclosure requirements are ongoing.¹⁰ Matters disclosed by defence do not amount to admissions.¹¹

In the recent trial of *Qaumi & Ors (No 23)* [2016] NSWSC 429 Hamill J discussed the pre-trial disclosure provisions. One accused (of 5 co-accused) served a notice which said -

The accused is pleading not guilty on the basis that he denies all the facts, matters and circumstances relied on by the Crown.

The defence at this stage takes issue with all of the facts, matters and circumstances to be relied on by the Crown.

During the course of argument about the admissibility of evidence, counsel for Kalal indicated that he had an interest in the admission of that evidence as the defence of duress *might be raised*. Other pre-trial issues were ventilated including applications for separate trials, and an application for a trial by judge alone.

⁷ s143(2) CPA

⁸ This can be by email, but only if the Prosecutor agrees: s149(3)(d).

⁹ s149(5) CPA

¹⁰ s147 CPA – they continue until either the accused is convicted or the prosecution is terminated.

¹¹ s149F(1)

After the jury was empaneled (new) counsel for Kalal made it clear that his client's defence was one of duress. Hamill J then made case management directions requiring a Defence Response to the NOPC and indicated that he was considering referring the matter to the Bar Association.

While declining to refer the matter he noted -

Legal practitioners must be aware that the case management provisions in s141-143 CPA must be taken seriously. The original defence reply under s143 ... was wholly unsatisfactory... it was misleading

In *Qaumi* (No 24) NSWSC 505 Hamill J further commented that that notice was unfair to Kalal's co-accused. Hamill J said that he failed to see how compliance with s143 infringed the right to silence. The new notice stated that the accused admitted being present at two shootings, but asserted that his participation in those events was the result of threats of death or serious injury; and that he lacked the requisite intent.

Failure to Comply

There are potentially serious consequences for an accused person failing to comply with their duty of disclosure.

Formal provisions allow for pre-trial hearings (s139) and pre-trial conferences (s140) on the application of a party or of its own motion. After a pre-trial conference, the parties must file with the court a document outlining areas of agreement and disagreement.¹² Leave is required to raise issues determined in a pre-trial hearing or agreed in a pre-trial conference.¹³

The Court may make orders resolving any dispute relating to the requirements for pre-trial disclosure and the use of any material disclosed.¹⁴

On or after the commencement of a trial the Court may make any orders, determinations or findings, or give directions or rulings that the court thinks appropriate for the efficient management and conduct of the trial.¹⁵

Sanctions

Potential sanctions for failure to comply with pre-trial disclosure obligations include –

Dispensing with formal proof where facts, matters or circumstances are not advised to be in dispute: s145

Exclusion of evidence not disclosed: s146(1)

Exclusion of expert evidence: s146(2)

12 s140(9) CPA

13 s139(6) & s140(10)

14 s149F(2)

15 s149E(1)

Adjournment: s146(3)

Adverse comment and inferences: s147

Proper compliance with the Prosecution's duty of disclosure is essential for the application of sanctions under s146: s146(4).¹⁶

In *R v LN; R v AW (No 2)* NSWSC 153 Johnson J considered an application not to admit evidence that was not served by the prosecution. The evidence was surveillance device material, which had been served on a USB but the NOPC made no reference to surveillance evidence nor the availability of transcripts.

Johnson J said in his view a s142 Notice ought to refer to evidence of this type:

At the least, there ought to be a clear statement in the notice of an intention to rely upon evidence of this type and of the steps being taken by the prosecution to allow for meaningful disclosure of this material and its preparation for trial. [20]

While Johnson J was of the view that the s142 NOPC was not in strict compliance with the statutory requirements, he was satisfied that the accused was aware of the material and was not taken by surprise. He declined to refuse to admit the evidence but expressed his displeasure with the consequent delay to the start of the trial.

Nerissa Keay
Crown Prosecutor
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¹⁶ Sanctions restricting the Prosecution from calling evidence not disclosed have were also considered, but not imposed in *R v Turnbull (No 25)* NSWSC 831; Johnson J.