Topic

Crown disclosure: best practice

History of Crown disclosure

Until recent times there has been no such thing as disclosure in criminal proceedings. Although in the 18th century the common law recognised a limited form of discovery in civil proceedings, the same did not apply to criminal proceedings.

History cont.

In those times it was perfectly acceptable for the prosecution to conduct a criminal trial by way of ambush. It was thought that this was the best way to get the truth. It was also the product of two fundamental concerns. First, that the accused might tailor a defence to fit the evidence and, second, that the accused might interfere with prosecution witnesses.

History cont.

R v Holland (1972) 4 TR 691 – authority for trial by ambush

History cont.

- In the 19th century the trial by ambush practice began to be challenged

- Example of this practice being hard fought was ***R v Greenslade (1870) 11 Cox CC 412***

History cont.

- By the mid-19th century Judges had made it clear that an accused person was entitled to know the case that was against them.

- The 20th century saw a number of decisions by courts in England and Australia that expanded the prosecution's obligations of disclosure.

History cont.

- Cases such as ***R v Clarke (1930) 22 Cr App R 58*** – was a case regarding failure by a prosecution to disclose prior inconsistent statements and this was reaffirmed in Australia in ***R v Gouldham [1970] WAR 119.***

- ***R v Collister and Warhurst (1955) 39 Cr App R 100*** – disclosure of criminal convictions of prosecution witnesses and this has been reaffirmed in Australia in ***R v K (1991) 161 LSJS***, King CJ and also in ***R v Grey (2001) 184 ALR 593.*** However in ***R v Thompson [1971] 2 NSWLR 213*** held that there was no general duty on the prosecution to be called as a witness for the prosecution.

History cont.

Matters undermining the prosecution case generally – became a disclosurable item

History cont.

That there was an ‘old boys’ school approach to disclosure. In the days of the establishment, lawyers were typically drawn from the same socio-economic class, had attended the same schools, studied at the same colleges and knew each other in a professional capacity…. Great faith and trust was placed in the prosecutor to ‘do the right thing’.

History cont.

- The introduction of guidelines in the 1970's
- ***Laszlo Virag***
- ***Devlin report***
- ***1972 – arson/murder of 3 boys***
- ***Fisher Report in 1977***

History cont.

1979 the Attorney-General formed a working party to formulate a set of guidelines for prosecution disclosure in criminal cases in 1981 the creation of Attorney-General's Guidelines for the Disclosure of 'unused materials to the defence.

- ***1970's significant cases of poor crown disclosure***
- ***Guildford Four***
- ***Birmingham Six***
- ***Maguire Seven***
- ***Judith Ward***

History cont.

- ***1n the 1990's was the introduction of legislation for prosecution disclosure***

The development of the law of disclosure in Australia mirrors that of England

History cont.

- In 1991 was the creation of the ***DPP Act.*** Section 24 of that Act allowed the DPP to issue guidelines on the conduct of prosecutions and on 1 November 1992 was the ***first Statement of Prosecution Policy and Guidelines***

- 1n 1999 was the ***second (2nd) Statement of Prosecution Policy and Guidelines***

- 1n 1999 was the Law Reform Commission of WA published its review of the Criminal and Civil Justice System

History cont.

In September 2002 ***- The Criminal Law (Procedure) Amendment Act 2002*** came into operation. Section 611B of the ***Criminal Code*** (now repealed) set out the prosecution obligation and section. Section 611C of the ***Criminal Code*** (now repealed) set out the accused's obligations of disclosure. ***611B main focus was for the prosecution to disclose every document or exhibit that the prosecution proposed to adduce at trial. However the disclosure obligation did not extend to disclose all documents and exhibits that may be relevant to the matter.***

The present system

2 May 2005 was the creation of the ***Criminal Procedure Act 2004 (WA)***

- Clear statutory obligations for the prosecution at initial and full disclosure
- Clear statutory obligations for the defence.

Recent authorities

- ***The State of Western Australia v JWRL (a child) [2010] WASCA 179***

- Non-disclosure was a ground of the appeal

JWRL

Martin CJ stated “given the evidentiary material available to the State from each of AL and RC, reference to the VROI of JWRL by way of purported justification of the non-disclosure of the evidentiary material obtained from RM is fundamentally misconceived... the ambit of the obligation of disclosure is not to be determined by reference to only part of the evidence – in this case, the State’s view of the evidence that might be given by JWRL in the event that he be called to give evidence – but rather by reference to the totality of the evidence and the issues that might potentially arise at trial. The evidentiary material available to the State placed RC at the scene of the critical events immediately preceding the assaults which resulted in the death of Mr Rowe. His propensity to violence was plainly relevant to the issues likely to arise at trial, given the predictability of an issue arising in respect of self – defence”(73).

JWRL

- Martin CJ stated “Given that evident legislative purpose, no narrow approach is to be taken to the ambit of the obligation posed by the statute. In particular, no narrow approach to be taken to the notion of relevance” (59)

- His Honour then stated “In this context, I mean the expression **‘potentially relevant**’ to embrace relevance to any issue that might possibly or conceivably arise at trial and which is not fanciful or illusionary” (61).

- President McLure and Buss JA in JWRL expressly reserved their positions and expressed doubts as to the obligation extending to potentially relevant material.

Vo v The State of Western Australia [2012] WASCA 6

- The Court of Appeal dismissed an appeal against conviction alleging that the prosecution failed to disclose information that could have assisted the defence at trial.
- In the lead judgment, Hall J (Pullin and Buss JJ agreeing) adopts a somewhat conservative approach in his examination of the obligation finding:
- The obligation to disclose is not, nor could it be, completely unqualified. Whether material may assist an accused's defence requires an assessment by the 'relevant authorised officer' of whether material that is in the possession of the organisation that conducted the investigation has that character … [T]he obligation to disclose arises where, on a sensible appraisal (by the prosecution), it can be reasonably anticipated that the material would assist the defence [28].

Vo cont.

- The obligation is to be assessed by reference to the issues that existed at the time the obligation arose. There may be some available material that clearly raises a new exculpatory issue that will also need to be disclosed however, there may be material that falls into neither of these categories but, rather, only relevant by reason of an issue raised for the first time by the defence at trial. Whether or not the issue is on that could be reasonably anticipated by the prosecution will depend on the circumstances of the case, however, the prosecution is not required to be omniscient and to anticipate every possible issue that the defence may raise, even if remote or apparently foreclosed by the available evidence [33].
- Further, in terms of the continuing obligation to disclose, the prosecution is not required to proactively undertake investigations to discover material relevant to issues that are first raised in the course of the trial [38].

PAH v The State of Western Australia [2015] WASCA 159

- 1 ground of appeal arose out of non-disclosure

- In essence the child in proofing said to the prosecutor and the paralegal that she did not want to proceed with the matter as she does not want her two younger siblings to lose their father and she has not seen her father since she was 7 years old and she knows what it is like not have a father. She is of the view that she is old enough now to deal with the allegations and get on with her life.

PAH Cont.

- Buss JA which the President McLure agreed and Hall J while making reference to Grey stated “the prosecution’s common law duty of disclosure can extend to evidence which solely goes to credit. There was analysis of what constitutes ‘relevant to the charge within the compilation of ‘evidentiary material’. [129]

- In the Court’s opinion the oral statements made by the victim to the prosecutor and the paralegal were additional evidentiary material that is relevant to the charge (139) and should have disclosed it to defence.

- However, applying the proviso there was no miscarriage of justice and the convictions were not overturned.

Hughes v The State of Western Australia [2015] WASCA 164

- Ground of appeal non-disclosure of TI text messages.
- It was agreed that CSN 5, 6 and 595 were not disclosed to defence.
- In a joint judgment ((McLure P, Mazza JA and Chaney J) they made this observation “very oddly, there was no request by or on behalf of the appellants to have access to the intercepted communications that had not been disclosed by the prosecution” (34)

Hughes cont.

- A breach of statutory and common law duty of disclosure was found that resulted in a miscarriage of justice. (62).

- For a number of reasons the conviction was not overturned and the appeal was dismissed.

Best practice

- Case conference with the IO and interrogate the file at committal – difficult in regional areas;

- Offer the defence to inspect the police file;

- Order for inspection of exhibits or this can be waived by the accused – this power is available pursuant to section 137 of the ***CPA;***

Best practice cont.

- In murder cases or high level forensic evidence - there could be attendance of defence counsel or the accused's solicitors for the defence to attend a forensic meeting with the police and the DPP i.e. "Phase V" - this could be ordered at committal stage and reported at first appearance (Supreme Court) or Trial listing hearing (TLH) (District Court);
- Have all subsequent proofing of witnesses in a supplementary statement and not in a "can say" letter;
- Ensure that the IO has complied with "used", "unused" and "sensitive material" tables and UPML and all disclosed to defence;

Best Practice Cont.

- Proof witnesses at least a month in advance before the trial – this is very difficult when you have a back to back trial culture and a lack of resources to provide alternative counsel;
- Proof vulnerable witnesses i.e. sexual assault and domestic violence even earlier except for a “young” child who has a visually recorded interview;
- “Inspection conferences” ordered by the Court to be held at the Court’s precincts or at a police station if too many documents. This can be reported back to a Registrar or a Judge of the Supreme or District Court;

Best Practice Cont.

- Affidavit signed by the IO as to all documents in his/her possession and get rid of the section 45 certificate of compliance;

- A consolidated police system for all indictable criminal matters which includes all police notes, journal entries, draft statements, running sheets and incident reports relating to the matter – where the notes are clearly labelled as to who is the author of them;

- Notification of criminal records by the police to defence at committal of civilian witnesses;

- Access by defence to observe disks such as GPS, site plans, 3D reconstruction murder crime scene videos and so forth;

Best Practice Cont.

- Greater funding to Pathwest (DNA), Chemcentre (toxicology and other experts), fingerprint division (WA Police) and forensic officers in general so that complete reports are completed by first appearance and/or TLH;
- Access to all TI discs – clearly labelled and with basic charts as what calls are to be relied upon at First appearance or TLH; and
- Computer crime and mobile phone reports to be disclosed at First appearance or TLH.

Defence disclosure

- For the prosecution to truly aid and comply with its disclosure obligations defence should be obligated to outline its case well before trial. The accused should not be bound by that case theory but it may have consequences for adjournments or trials being vacated. This is akin to the ***Bail Act*** (1982) WA, section 25 which reads:

- *A statement made by an accused to a judicial officer or authorized officer for the purpose of a decision whether bail be granted to him for any appearance in court for an offence not be admissible in evidence against him at his trial for that offence*

Defence disclosure cont.

- Early disclosure of alibi – at TLH or first appearance;

- Defence case statement – setting out briefly the accused's case, element or elements in issue for each charge, factual elements that the prosecution may not be able to prove, evidence that is objected to by a proposed prosecution witness and defences – this should be complied within one month after the State has filed a trial brief or after the first appearance or TLH whichever is later

Summary

- Disclosure obligations have changed significantly since 18th century and for good reasons;

- The statutory obligations and guidelines by the various DPPs in Australia ensures that disclosure is a significant part of the criminal justice process and places onus on the police and the DPP to comply;

Summary disclosure cont.

- The interpretation of disclosure and disclosing “relevant” material has had a broad interpretation;
- What needs to be disclosed will depend on the nature of the case;
- The prosecutor must be considerate of the defence case and disclose all relevant material;

Summary cont.

- A lack of funding for the police, DPP and associated agencies is placing pressure on all concerned and will lead to errors and potential injustices;

- More interaction between parties whether together or court intervention is essential; and

- If Defence can be clear as to their case and issues well in advance this will aid in appropriate and thorough disclosure of the relevant material.