

Aggressive Compliance

The defence witness notice provisions, which came into force on May 1, 2010 under Notification of Intention to Call Defence Witness (Time Limits) (Regulations) 2010 SI 2010/214, have been low on the judicial radar. Practitioners involved in the criminal justice system however, should not be complacent. Given the increasing use of case management powers, Judges are encouraged to take an increasingly aggressive approach towards compliance. This can be seen in Leveson LJ's, *Essential Case Management – Applying the Criminal Procedure Rules*. It is important to note that all participants in criminal cases, including magistrates, District Judges and justices clerks must follow and apply the Criminal Procedure Rules. The rules he said were not mere guidance, compliance is compulsory – “The word must in the rules means must”. An understanding of the technical detail required by the defence witness notice provisions is important for future good practice.

Notice

Disclosure duties for both prosecution and defence have for many years been governed by the Criminal Procedure Investigations Act 1996 (CPIA 1996), as amended by the Criminal Justice Act 2003 (CJA 2003). Section 34 of the CJA 2003 inserts a new s.6C into the CPIA 1996 requiring a defendant to provide the prosecutor and court with written notice of the name, address and date of birth of any witnesses they intends to call. This includes character witnesses. Notification must be provided within 14 days of the prosecution complying with its disclosure obligations. Any application to extend the time limit must be made prior to the 14-day period. The new requirements apply to any case in which the defendant pleads not guilty in the magistrates' court or the case is sent or transferred to the Crown Court on or after May 1, 2010. The written notice is not part of a defence statement and so must be served in both the magistrates and Crown Courts. The provision of witness details will not be considered to infringe legal privilege – *R (Kelly) v Warley Magistrates' Court* [2008] 1 Cr App R 14.

Failure to Comply

Where notice is not given, the court or any other party may make any appropriate comment. The court or jury may draw such inferences as appear proper in deciding whether the defendant is guilty of the offence charged, as *per* CPIA 1996, s.11 as amended by CJA 2003, s.39. Failure to comply with the notice provisions cannot form the sole basis for a conviction (CPIA 1996, s.11(10)). In deciding whether or not to draw an inference, where the defendant calls a witness whom they have failed to include or to identify adequately, in a witness notice, the court shall have regards to whether there is any justification for the failure.

Interviewing Defence Witnesses.

One of the interesting areas for future development involves the interviewing of defence witnesses prior to trial by investigators. Pursuant to CPIA 1996, s.21A (as amended by the CJA, s.40) the Code of Practice for Arranging and Conducting Interviews of Witnesses Notified by the Accused (the Code) has been issued, with some interesting omissions.

Firstly, the decision on whether or not to interview a defence witness is at the discretion of the investigator. The Code, however, is silent on how this discretion should be exercised, possibly leading to uncertainty of approach.

Second, there is no definition of the term “interview”. Given the risk of informal talks between an investigator and a defence witness, it would have been prudent to define an interview. There is also no guidance on how such interviews should be conducted and the treatment of defence witnesses.

Third, the recording of such interviews can be by way of tape, in writing or written summary. The latter may result in disputes as to what was actually said, with potential conflicting sets of notes from investigator, witness representative and defendant advisor. The compulsory taping of such interviews would solve any factual disputes.

Fourth, the attendance of the defendant's solicitor is not automatic but subject to the agreement of the witness (see Code 3.2), which may lead to a defence solicitor being excluded from the interview process. If agreement is reached to allow the defence solicitor to attend they can only act as an observer (see Code 8.2).

Fifth, although the witness is entitled to have a legal representative present during the interview, there is no state funding in place for the legal representation of either the witness or defendant at such interviews. The Legal Services Commission is not compelled by the Code to provide state funding.

Practical Difficulties

An informed decision on whether or not to call a defence witness depends on full evidential disclosure by the prosecution. Delays in proper disclosure are rife, leading to difficult tactical defence decisions on whether or not to comply with the notice provisions. The prospect of further financial cuts to investigator's budgets may force investigators to be selective in which defence witnesses they interview. This maybe a loss to the investigation as statements taken by the police in such interviews can be adduced in evidence as a prior inconsistent statement.

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