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**HSE Disclosure
- An Agreed Perspective**

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HSE Disclosure- An Agreed Perspective

The purpose of this presentation is to explain:

- The position in which the Office of the DPP finds itself vis á vis Non-Party Disclosure
- The efforts made to date with a number of parties, both statutory and non-governmental organisations, with the aim of developing agreements designed to ameliorate or eliminate some of the most common difficulties which arise
- The current status of the Draft Memorandum of Understanding with the Health Service Executive to promote consistency of practice in relation to the disclosure of material to the defence in criminal proceedings, and in relation to making such material available to the prosecutor

1. The position in which the Office of the DPP finds itself vis á vis Non-Party Disclosure

1.1. Disclosure- Prosecutor's Duties

The prosecution has a duty in law to disclose, where possible, any material in its possession having the character of **relevant** evidence¹ irrespective of whether the prosecution intends to adduce/rely on such evidence.

As yet no legislative regime has been established to give effect to this obligation², rather the duty is an amalgam of Constitutional protections³, statutory provisions, inter alia; the duty to serve the book of evidence⁴, custody record⁵, certificate of analysis of concentration of alcohol in drink driving cases⁶, a copy of the visual record from apparatus used to determine speed in a prosecution under s.21(2) of the RTA 2002 (as amended) which combine with the Prosecutor's common law duty to disclose:

“ ...all relevant evidence, parol or otherwise, *in its possession*, so that if the prosecution does not adduce such evidence, the defence may, if it wishes, do so”⁷

For example, the prosecution must obtain⁸ and consider for disclosure all criminal convictions for all witnesses cited for trial (including civilian, Garda and professional, expert or official witnesses) in all cases, whether summary or indictable.

1.2. The (Ordinary) Difficulties with Disclosure

¹ The Irish courts tend to use the word 'relevant evidence'; the courts in England & Wales tend to use the word 'relevant material' but they are both used interchangeably in each jurisdiction

² Mullan, Gráinne, “The Duty to Disclose in Criminal Prosecutions”, Bar Review, January/February 2000, at page 174

³ Article 38, including the right to prepare a defence as established in *State (Healy) v O'Donoghue* [1976] IR 325

⁴ S.4B(1) 1967 Criminal Procedure Act

⁵ Regulation 24 (2) Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Stations)

⁶ ss.17(2) and 19 (3) of the Criminal Justice Act 1994 see also Evidential Breath Testing Prosecutions - Intoxilyzer/Intoximeter: Disclosure of Documents and Inspection of Machines (HQ Directive 33/05)

⁷ *The People (D.P.P.) v Tuite* [1983] 2 Frewen 175 (McCarthy J. at page 181).

⁸ That duty may not extend to 'exhaustive or widespread enquiries' Finlay C.J. *The People (DPP) v Kelly* [1987] I.R. 596 at 599

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Setting the parameters of what is disclosable within the realm of material in the possession of the prosecution is potentially problematic. As Walsh (2002) comments:

" . . . It follows that the prosecution is not bound to disclose everything just because it has been gathered in the course of the investigation which led to the charge being preferred. Beyond that, however, it is very difficult to offer a definition which clearly distinguishes between that which must be revealed from that which need not be revealed"⁹

However, it is clear that An Garda Síochána has a duty to submit **all relevant information** gathered in the course of an investigation to the Office of the DPP¹⁰. This duty is informed by an assessment of relevance after all necessary investigation has been undertaken. On receipt of that material, the prosecution's disclosure duty then extends:

- i) throughout the investigation and any criminal proceedings;
- ii) to **all** information received and known to the Prosecution in the course of the investigation and any criminal proceedings;
- iii) to the conclusion of any trial and any subsequent appeal proceedings, and even beyond the final disposal of a case; Any *new* information received by the Prosecution at *any stage* in the preparation of a case, during trial or any subsequent appeal proceedings, or even after the final disposal of a case, may require previous decisions in relation to disclosure to be reviewed¹¹.

In relation to material held by non-parties this difficult task becomes entangled in a web of further complexity.

1.3. The (Extra-Ordinary) Difficulties with Non-Party Disclosure

If the Gardai or prosecutor seeks access to material or information, but the third party declines or refuses disclosure it, as the law currently stands, the non-party cannot be compelled to hand over the material (other than by execution of a search warrant) within their possession or procurement.

Yet, where the Gardaí or Prosecutor believes that a non-party (for example, a hospital, local authority, social services department, doctor or school) has relevant material or information relating to an investigation/proposed prosecution which might reasonably be considered capable of undermining the prosecution case or, assisting the case for the accused, or giving a lead on material capable of doing either of those two, prosecutors must take what steps they regard as appropriate in the particular case to obtain same (similarly, a request for such non-party information may originate from the accused).

⁹ Walsh, D. (2002) *Criminal Procedure*, Dublin, p. 717

¹⁰ *McKeown v Judges of Dublin Circuit Court and DPP* [2003] I.E.S.C. 26, per McCracken J.

See also Garda HQ circular 161/02

¹¹ *DPP v Nevin*, Unreported, CCA, 14th March 2003.

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*People (DPP) v Sweeney (2001)*¹²

Was one of the first cases to consider third party material disclosure at High Court and Supreme Court level, followed very quickly by:

*H.(D.) v His Honour Raymond Groarke and the DPP, the North Eastern Health Board and S.H. (2002)*¹³

With the benefit of a recent master class from Paul Anthony McDermot (presenting ‘*The Interaction Between Criminal and Civil Proceedings*’ to a recent Legal Network Meeting, 9 May 2012) instead of explaining these last two cases at length, as I had planned to do, I will just say, the Supreme Court were asked: Is there third party discovery in Criminal cases? The first time, 3 of them said ‘No’, and the second time, 5 of them said ‘No’ [For those who wish to peruse the original, longer version that I had planned to deliver, prior to hearing Paul Anthony’s succinct précis, please see Appendix 1]

Sweeney (2001) decided that the High Court does not have the power to order third party discovery in criminal cases, a point of law reinforced by *H.(D) (2002)* wherein Keane CJ also stated that the issue of third party criminal discovery is bound to arise repeatedly until a solution in the public interest is found.

Thus the Prosecution finds itself in the position of having responsibility without authority (i.e. no process akin to third party *discovery* to assist them in this duty).

Ultimately, whilst “*The fact that discovery in the form provided for in the rules for civil litigation is not available in criminal proceedings does not have as a necessary consequence an erosion of the fair procedures to which defendants are entitled*”¹⁴ it may have, and as such, the unavailability of such material to the prosecution, to at least consider relevance, may be irreconcilable with fair trial procedures, and accordingly, as the courts have made very clear, an unfair trial will not be countenanced¹⁵.

This lacuna has not escaped judicial notice as per Hardiman J.:

“ It also occurs to me that a defendant may be needlessly prejudiced by the absence of any provision, in criminal cases, for discovery or something closely analogous to it. Nor is there in this jurisdiction a firm protocol for disclosure. This, in my opinion, is a considerable anomaly¹⁶

The most recent decision on non-party disclosure is represented by *HSE v His Honour Judge White and the DPP*. The High Court (Edwards J.) quashed the trial Judge’s order for third party disclosure/discovery against the HSE, finding the trial Judge lacked jurisdiction to so

¹² Unreported, Supreme Court, Geoghegan J. 9th October 2001.

¹³ 3 IR 522

¹⁴ Keane CJ (giving the judgment of a Supreme Court of five judges with Murphy, Murray, Geoghegan and Fennelly JJ concurring) *H.(D.) v His Honour Raymond Groarke and the DPP, the North Eastern Health Board and S.H.* [2002] 3 IR 522 at 531-532

¹⁵ *People (DPP) v Kelly* [2006] I.E.S.C.20; unreported, Supreme Court, April 4, 2006

¹⁶ *JB v DPP* [2006] I.E.S.C. 66; unreported, Supreme Court, November 29, 2006.

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order (Judge White having followed the *obiter dictum* of *F.(J) v Judge Michael Reilly, the DPP and the Midland Health Board [2007] IESC 32*). *F (J)* is a case in and of itself worthy of its own presentation (perhaps I will get lucky again and Paul Anthony McDermot might oblige!) raising a number of important points, not least a rejection of the use of *subpoena duces tecum* as an appropriate mechanism for obtaining non-party attendance/access to material, and further, raising (the still unresolved) issue of whether courts or the prosecution can demand documents from a third party which is a state body or state funded. The court held that this was not the appropriate case to determine such key issue and that an appropriate test case could be the solution. A case with the court trying the defendant with the DPP, Attorney General and the body in question as notice parties was suggested as a suitable setting.

Ultimately in *HSE v His Honour Judge White*, as in the interim disclosure was made on a voluntary basis by the HSE, the Supreme Court did not have to adjudicate on the key issue, and as such, Edwards J's judgment remains the most recent authoritative statement of the law on non-party disclosure.

2. The efforts made to date with a number of parties, both statutory and non-governmental organisations, with the aim of developing agreements designed to ameliorate or eliminate some of the most common difficulties which arise.

2.1 I thought it might be useful to contextualise our work with the HSE into the boarder picture of our efforts towards agreements with a number of entities, including the Dublin Rape Crisis Centre and a number of other NGO's and especially the two assessment units, St. Louise's & St. Clare's units, all of whom are engaged in dialogue with the Office on the issue of disclosure, we very much hope that this engagement will culminate in agreed protocols in the future. It would only be fair to mention that whilst there is a great deal of agreement over many areas (e.g. in relation to the disclosure of medical reports, assessment reports and notes etc.) the position regarding therapy and counseling notes is, understandably, significantly more challenging. Therapy and counseling, to quote a member of staff at one of the assessment units:

“is not concerned with making judgments or assessing the actual veracity of what is shared in sessions. Essentially, it is simply a particular kind of human engagement, where the exploration of the client's thoughts and feelings at a particular point in time is facilitated, with the aim of addressing patterns of behaviour or responses that have become unhelpful, burdensome or troubling in the client's living experience”.

There are many who would argue for a privilege for therapy (including a former Deputy Director of the Office of the DPP¹⁷) but that is a subject for another day and another presentation.

3. Development of Disclosure Protocol with the Health Service Executive

3.1. The formation, in March 2010, of the Office of Legal Services of the HSE, led by Eunice O'Raw, provided the context within which the Office, having experienced a number of cases with difficult non-party disclosure issues, embarked on negotiations with a view to the

¹⁷ O'Leary, S., *A Privilege for Psychotherapy* Part 1 (2007) 12 (1) BR 33 & Part 2 (2007) 12 (2) BR76.)

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development of an agreed disclosure protocol. Those negotiations produced an early draft document some time ago. Meanwhile a lot of effort has gone into seeking to finalise a Memorandum of Understanding.

This period saw a number of issues arise for the HSE in relation to:

- The locus standi of the HSE to be heard by the court on matters pertaining
- The necessity to ensure the validity of the consent of the patient/client (i.e. freely given by a person with competence and capacity sufficient to choose)
- Informant Privilege

In the interim the HSE have been grappling with these issues and, as I will be handing over to Eunice O’Raw shortly, it is perhaps best if I leave these points to her for further exploration as part of her address to you about the provisions of the current Memorandum of Understanding, but before doing so, I would like to leave you to reflect on the following:

Statutory Disclosure (England & Wales)

It is perhaps tempting to believe that the reason so many disclosure difficulties arise is for want in our jurisdiction of a formal [statutory] third party disclosure regime. An examination of our near neighbor’s scheme, where just such a statutory regime has existed since 1996 reveals that such legislative measures alone may not be the panacea against all ills.

The Inspectorate’s Report on the Thematic Review of the Disclosure of Unused Material¹⁸ recommended, following the an in-depth study of the way in which the Crown Prosecution Service (CPS) dealt with its statutory duty of disclosure, as introduced by the Criminal Procedure and Investigations Act 1996¹⁹(CPIA) recommends:

“the benefit that can be gained from entering into protocols with the appropriate bodies about how third party material should be dealt with”²⁰

And, at 8.31:

“ CCP’s [Chief Crown Prosecutors] consult with local organisations which commonly hold third party material in order to develop protocols on its handling, and that the development of these protocols should be co-ordinated by the Director of Policy”.

Whilst the CPIA 1996 was substantially amended by the Criminal Justice Act 2003, under the former the prosecution operated two different tests, primary and secondary stages, the latter triggered by the defence furnishing a ‘defence statement’ to the court and the prosecutor, the Criminal Justice Act 2003 abolished the primary and secondary disclosure tests, creating a single prosecution disclosure test, which applies throughout, in relation to material held by non-parties, it really has not moved the matter any further. Where the prosecutor believes that there is material that satisfies the disclosure test in the control of third parties who are

¹⁸ 2/2000 available at www.hmcp.si.gov.uk/documents/reports

¹⁹ S.66 of CPIA amended s.2 of the Criminal Procedure (Attendance of Witnesses) Act 1965.

²⁰ At Chapter 8, ‘Third Party Material’, 8.9

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unwilling to co-operate, the prosecutor really only has recourse to make an application for a witness summons (the statutory conditions for which are set down in section 97 of the Magistrates' Court Act 1980 or in the Crown court, section 2 Criminal Procedure (Attendance of Witnesses) Act 1965 as amended. These provisions empower the Court to compel a reluctant witness to attend and if required, produce such any document or thing as required (*subpoena duces tecum*).

CPS Guidance notes:

“Before applying for the witness summons it may be appropriate to make a formal request directly to the third party The request should explain:

- what material or information it is thought that the third party holds
- the reasons why access to the material is sought
- the known or suspected issues in the case
- what will happen to the material if it is released
- that views are invited from the third party on whether the material is considered sensitive

Any material provided by a third party at the request of the investigator and supplied to the investigator will also be subject to the requirements of the Act”.

Thus much of the above puts prosecutors in no better position than their counterparts here when it comes to disclosure of third party material (although in relation to the requirements for defence statements it is a whole different matter!) however, in relation to **‘scope of relevant material’** under the new code (for cases where the investigation began on or after 4 April 2005) material relating to the private life of a witness may fall in the category of **sensitive material** and as such may not be disclosed or may be subject to radical editing before disclosure. This may be the solution to the problem often encountered by prosecuting lawyers where, to quote our new Director (always a wise thing to do as one draws near to the end of a presentation, particularly is one aspires to be promoted to ‘Director of Policy’)

‘there is constant conflict between ensuring all relevant material is disclosed but at the same time trying to protect the privacy of information which is arguably irrelevant’.

Finally, to quote a CPS source (well, more friend than ‘source’) who, in answer to the question: What has worked for you in England? Offered:

The Attorney General’s Guidelines on Disclosure (April 2005) – although these do not have the force of law (R v Winston Brown [1995] 1 Cr. App. R. 191; [1994] 1 WLR 1599) they are given due weight.

The guidelines example material that might reasonably be considered capable of undermining the prosecution case or of assisting the case for the accused as:

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- i. Any material casting doubt upon the accuracy of any prosecution evidence.
- ii. Any material which may point to another person, whether charged or not (including a co-accused) having involvement in the commission of the offence.
- iii. Any material which may cast doubt upon the reliability of a confession.
- iv. Any material that might go to the credibility of a prosecution witness.
- v. Any material that might support a defence that is either raised by the defence or apparent from the prosecution papers.
- vi. Any material which may have a bearing on the admissibility of any prosecution evidence.

It should also be borne in mind that while items of material viewed in isolation may not be reasonably considered to be capable of undermining the prosecution case or assisting the accused, several items together can have that effect.

And:

Defence statements (which must comply with the requirements of section 6A of the 2003 Act). A comprehensive defence statement assists the participants in the trial to ensure that it is fair. The trial process is not well served if the defence make general and unspecified allegations and then seek far-reaching disclosure in the hope that

material may turn up to make them good. The more detail a defence statement contains the more likely it is that the prosecutor will make an informed decision about whether any remaining undisclosed material might reasonably be considered capable of

undermining the prosecution case or of assisting the case for the accused, or whether to advise the investigator to undertake further enquiries. It also helps in the management of the trial by narrowing down and focusing on the issues in dispute.

And Finally,

‘A number of Crown Court centres have developed local protocols, usually in respect of sexual offences and material held by social services and health and education authorities. Where these protocols exist they often provide an excellent and sensible way to identify relevant material that might assist the defence or undermine the prosecution’.

Over to Eunice.

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Appendix 1

H.(D.) v His Honour Raymond Groarke and the DPP, the North Eastern Health Board and S.H. [2002] IESC 63

The applicant in *D.H.* had been returned for trial in the Circuit Court on charges that on various dates between June 1983 and June 1989 he committed offences of indecent or sexual assault on the complainant. The complainant had had interactions with two social workers at the relevant time. The applicant required the presence of both the social workers at the preliminary examination in the District Court and examined them on oath. They were persons who had made statements. In their depositions they referred to notes which they made of their conversations with the complainant. The applicant issued a notice of motion seeking discovery of such notes from the DPP and the Health Board. The Circuit Court refused the application on the basis that the applicant was not entitled to the material sought from the health board in advance of the trial. The applicant unsuccessfully sought judicial review of this refusal in the High Court.

On appeal, Keane CJ (giving the judgment of a Supreme Court of five judges with Murphy, Murray, Geoghegan and Fennelly JJ concurring) observed that, of its nature, the question of third party discovery was an issue which was bound to come before the courts again and it was therefore clearly in the public interest that the law in the matter should be clear beyond doubt. The Chief Justice proceeded to carefully examine the judgment which Geoghegan J had delivered in *Sweeney*. He noted that the reluctance of the Supreme Court to depart from its earlier decisions would be greater where the earlier decision was that of a court of five or a court of seven, but stated:

“However, even where the earlier decision was that of a court of three, I am satisfied that it should not be over ruled - again to cite the language of Henchy J – ‘merely because a later court inclines to a different conclusion.’

In the present case, it is not suggested that any relevant statutory provision or authority was overlooked so that the judgment could have been regarded as having been given per incuriam. It certainly cannot be said, given the relatively short time which has elapsed since it was decided, that the circumstances in which an application for discovery of this nature comes before the court have altered to such an extent as to require reconsideration of the correctness or otherwise of the decision.”²¹

Counsel for the applicant argued that the necessity of observing fair procedures in criminal trials mandated by the Constitution should have led to a different construction of the Rules of the Superior Courts so as to permit the making of discovery orders against bodies such as health boards in cases such as the present. Keane CJ responded by stating that in his judgment in *Sweeney*, Geoghegan J had adverted to the modern developments in case law under which the prosecution are bound to furnish the accused with any documents relevant to the prosecution, even though they do not assist the prosecution case and will not be used by them at the trial. Geoghegan J had drawn a distinction between this and the inappropriate use of the civil machinery of discovery.

²¹ [2002] 3 IR 522 at 530

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What is of particular interest in *D.H.* is the strong endorsement that the Chief Justice gave the decision in *Sweeney*²²:

“I am, in any event, satisfied that the decision in The People (DPP) v Sweeney [2001] 4 IR 102 was correct in point of law. The function of discovery in civil proceedings, whether it be inter parties or third party discovery, is to enable both parties to advance their own case or damage their opponent’s case. The court in such cases is normally in a position to ascertain from a consideration of the pleadings what the issues are between the parties and accordingly what documents will be relevant to those issues and, specifically, whether, if discovered and inspected, they will enable a party to advance his own case or damage that being made by his opponent. In a trial on indictment, such as the present, the issue which the court has to determine is not defined until the accused has been arraigned and has pleaded to the counts laid against him. Even then, he is not required to do more than plead guilty or not guilty. There are some rare statutory exceptions to that, such as the requirement to notify the prosecution in advance of a proposed alibi. But in every other respect, while the prosecution must disclose comprehensively and in detail the case they propose to make against the accused, he is under no such obligation. Discovery, accordingly, in a trial on indictment would be a wholly one-sided process, which was certainly not what was envisaged by the procedure for inter parties and third party discovery provided under the Rules of Court. It is clear, accordingly, that, in the case of the Rules of Court dealing with discovery, to treat the word “cause” as extending to criminal proceedings would be clearly repugnant to the context in which it was being used.”²³

Chief Justice stated:

“The fact that discovery in the form provided for in the rules for civil litigation is not available in criminal proceedings does not have as a necessary consequence an erosion of the fair procedures to which defendants are entitled. Thus, in the present case, it was open to the solicitor for the applicant to ensure at the deposition stage that any relevant records or notes in the possession of the social workers were produced and, to at least a limited extent, that was done. Moreover, the social workers can be required by the applicant to attend the trial and produce any relevant documents by the issue of a subpoena duces decum.”²⁴

noting that the trial judge had performed a proper balancing test:

“... it is clear from the transcript that [the trial judge] carefully balanced the undoubted public interest in ensuring that such communications to bodies such as health boards remained confidential against the public interest in the administration of justice with its consequent necessity of ensuring that an accused person is not unfairly hindered in the conduct of his defence. He was clearly entitled to form the view that it had not been established that the documents would be of any particular significance in the conduct of the applicant’s defence, other than the possibility that they might afford material for testing the credibility of the complainant. Even assuming a discovery jurisdiction existed, that would not, of itself, justify the making of the third party order sought in the present case

²² *People (DPP) v Sweeney* (unreported, Supreme Court, Geoghegan J. 9th October 2001)

²³ [2002] 3 IR 522 at 531

²⁴ [2002] 3 IR 522 at 531-532