

# Defence Statements

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## **The Legislative regime – Criminal Procedure and Investigations Act 1996**

### **5. Compulsory disclosure by accused.**

1) Subject to subsections (2) to (4), this section applies where

- a) this Part applies by virtue of section 1(2), and
- b) the prosecutor complies with section 3 or purports to comply with it.

2) Where this Part applies by virtue of section 1(2)(b), this section does not apply unless

- a) a copy of the notice of transfer, and
- b) copies of the documents containing the evidence,

have been given to the accused under regulations made under section 5(9) of the Criminal Justice Act 1987.

3) Where this Part applies by virtue of section 1(2)(c), this section does not apply unless

- a) a copy of the notice of transfer, and
- b) copies of the documents containing the evidence,

have been given to the accused under regulations made under paragraph 4 of Schedule 6 to the Criminal Justice Act 1991.

3A) Where this Part applies by virtue of section 1(2)(cc), this section does not apply

unless

- a) copies of the documents containing the evidence have been served on the accused under regulations made under paragraph 1 of Schedule 3 to the Crime and Disorder Act 1998; and
- b) a copy of the notice under subsection (1) of section 51D of that Act has been served on him under that subsection.

4) Where this Part applies by virtue of section 1(2)(e), this section does not apply unless the prosecutor has served on the accused a copy of the indictment and a copy of the

set of documents containing the evidence which is the basis of the charge.

- 5) Where this section applies, the accused must give a defence statement to the court and the prosecutor.

**6. Voluntary disclosure by accused.**

- 1) This section applies where

- a) this Part applies by virtue of section 1(1), and
- b) the prosecutor complies with section 3 or purports to comply with it.

- 2) The accused

- a) may give a defence statement to the prosecutor, and
- b) if he does so, must also give such a statement to the court.

- 3)

.....

- 4) If the accused gives a defence statement under this section he must give it during the period which, by virtue of section 12, is the relevant period for this section.

**6A. Contents of defence statement**

- 1) For the purposes of this Part a defence statement is a written statement

- a) setting out the nature of the accused's defence, including any particular defences on which he intends to rely,
- b) indicating the matters of fact on which he takes issue with the prosecution,
- c) setting out, in the case of each such matter, why he takes issue with the prosecution, and
- d) indicating any point of law (including any point as to the admissibility of evidence or an abuse of process) which he wishes to take, and any authority on which he

intends to rely for that purpose.

- 2) A defence statement that discloses an alibi must give particulars of it, including
  - a) the name, address and date of birth of any witness the accused believes is able to give evidence in support of the alibi, or as many of those details as are known to the accused when the statement is given;
  - b) any information in the accused's possession which might be of material assistance in identifying or finding any such witness in whose case any of the details mentioned in paragraph (a) are not known to the accused when the statement is given.
- 3) For the purposes of this section evidence in support of an alibi is evidence tending to show that by reason of the presence of the accused at a particular place or in a particular area at a particular time he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission.
- 4) The Secretary of State may by regulations make provision as to the details of the matters that, by virtue of subsection (1), are to be included in defence statements.

#### **6E. Disclosure by accused: further provisions**

- 1) Where an accused's solicitor purports to give on behalf of the accused
  - a) a defence statement under section 5, 6 or 6B, or
  - b) a statement of the kind mentioned in section 6B(4),the statement shall, unless the contrary is proved, be deemed to be given with the authority of the accused.
- 2) If it appears to the judge at a pre-trial hearing that an accused has failed to comply fully with section 5, 6B or 6C, so that there is a possibility of comment being made or inferences drawn under section 11(5), he shall warn the accused accordingly.

- 3) In subsection (2) “pre-trial hearing” has the same meaning as in Part 4 (see section 39).
- 4) The judge in a trial before a judge and jury
  - a) may direct that the jury be given a copy of any defence statement, and
  - b) if he does so, may direct that it be edited so as not to include references to matters evidence of which would be inadmissible.
- 5) A direction under subsection (4)
  - a) may be made either of the judge’s own motion or on the application of any party;
  - b) may be made only if the judge is of the opinion that seeing a copy of the defence statement would help the jury to understand the case or to resolve any issue in the case.
- 6) The reference in subsection (4) to a defence statement is a reference
  - a) where the accused has given only an initial defence statement (that is, a defence statement given under section 5 or 6), to that statement;
  - b) where he has given both an initial defence statement and an updated defence statement (that is, a defence statement given under section 6B), to the updated defence statement;
  - c) where he has given both an initial defence statement and a statement of the kind mentioned in section 6B(4), to the initial defence statement.

#### **7A. Continuing duty of prosecutor to disclose**

- 1) This section applies at all times
  - a) after the prosecutor has complied with section 3 or purported to comply with it, and
  - b) before the accused is acquitted or convicted or the prosecutor decides not to proceed with the case concerned.
- 2) The prosecutor must keep under review the question whether at any given time (and, in

particular, following the giving of a defence statement) there is prosecution material which

- a) might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused, and
  - b) has not been disclosed to the accused.
- 3) If at any time there is any such material as is mentioned in subsection (2) the prosecutor must disclose it to the accused as soon as is reasonably practicable (or within the period mentioned in subsection (5)(a), where that applies).
- 4) In applying subsection (2) by reference to any given time the state of affairs at that time (including the case for the prosecution as it stands at that time) must be taken into account.
- 5) Where the accused gives a defence statement under section 5, 6 or 6B
- a) if as a result of that statement the prosecutor is required by this section to make any disclosure, or further disclosure, he must do so during the period which, by virtue of section 12, is the relevant period for this section;
  - b) if the prosecutor considers that he is not so required, he must during that period give to the accused a written statement to that effect.
- 6) For the purposes of this section prosecution material is material
- a) which is in the prosecutor's possession and came into his possession in connection with the case for the prosecution against the accused, or
  - b) which, in pursuance of a code operative under Part 2, he has inspected in connection with the case for the prosecution against the accused.
- 7) Subsections (3) to (5) of section 3 (method by which prosecutor discloses) apply for the purposes of this section as they apply for the purposes of that.
- 8) Material must not be disclosed under this section to the extent that the court, on an application by the prosecutor, concludes it is not in the public interest to disclose it and

orders accordingly.

- 9) Material must not be disclosed under this section to the extent that it is material the disclosure of which is prohibited by section 17 of the Regulation of Investigatory Powers Act 2000 (c. 23).

#### **8. Application by accused for disclosure.**

- 1) This section applies where the accused has given a defence statement under section 5, 6 or 6B and the prosecutor has complied with section 7A(5) or has purported to comply with it or has failed to comply with it.
- 2) If the accused has at any time reasonable cause to believe that there is prosecution material which is required by section 7A to be disclosed to him and has not been, he may apply to the court for an order requiring the prosecutor to disclose it to him.
- 3) For the purposes of this section prosecution material is material
  - a) which is in the prosecutor's possession and came into his possession in connection with the case for the prosecution against the accused,
  - b) which, in pursuance of a code operative under Part II, he has inspected in connection with the case for the prosecution against the accused, or
  - c) which falls within subsection (4).
- 4) Material falls within this subsection if in pursuance of a code operative under Part II the prosecutor must, if he asks for the material, be given a copy of it or be allowed to inspect it in connection with the case for the prosecution against the accused.
- 5) Material must not be disclosed under this section to the extent that the court, on an application by the prosecutor, concludes it is not in the public interest to disclose it and orders accordingly.
- 6) Material must not be disclosed under this section to the extent that it is material the disclosure of which is prohibited by section 17 of the Regulation of Investigatory

Powers Act 2000.

**10. Prosecutor's failure to observe time limits.**

- 1) This section applies if the prosecutor
  - a) purports to act under section 3 after the end of the period which, by virtue of section 12, is the relevant period for section 3, or
  - b) purports to act under section 7A(5) after the end of the period which, by virtue of section 12, is the relevant period for section 7A.
- 2) Subject to subsection (3), the failure to act during the period concerned does not on its own constitute grounds for staying the proceedings for abuse of process.
- 3) Subsection (2) does not prevent the failure constituting such grounds if it involves such delay by the prosecutor that the accused is denied a fair trial.

**11. Faults in disclosure by accused.**

- 1) This section applies in the three cases set out in subsections (2), (3) and (4).
- 2) The first case is where section 5 applies and the accused
  - a) fails to give an initial defence statement,
  - b) gives an initial defence statement but does so after the end of the period which, by virtue of section 12, is the relevant period for section 5,
  - c) is required by section 6B to give either an updated defence statement or a statement of the kind mentioned in subsection (4) of that section but fails to do so,
  - d) gives an updated defence statement or a statement of the kind mentioned in section 6B(4) but does so after the end of the period which, by virtue of section 12, is the relevant period for section 6B,
  - e) sets out inconsistent defences in his defence statement, or

- f) at his trial
  - i) puts forward a defence which was not mentioned in his defence statement or is different from any defence set out in that statement,
  - ii) relies on a matter which, in breach of the requirements imposed by or under section 6A, was not mentioned in his defence statement,
  - iii) adduces evidence in support of an alibi without having given particulars of the alibi in his defence statement, or
  - iv) calls a witness to give evidence in support of an alibi without having complied with section 6A(2)(a) or (b) as regards the witness in his defence statement.
- 3) The second case is where section 6 applies, the accused gives an initial defence statement, and the accused
  - a) gives the initial defence statement after the end of the period which, by virtue of section 12, is the relevant period for section 6, or
  - b) does any of the things mentioned in paragraphs (c) to (f) of subsection (2).
- 4) The third case is where the accused
  - a) gives a witness notice but does so after the end of the period which, by virtue of section 12, is the relevant period for section 6C, or
  - b) at his trial calls a witness (other than himself) not included, or not adequately identified, in a witness notice.
- 5) Where this section applies
  - a) the court or any other party may make such comment as appears appropriate;
  - b) the court or jury may draw such inferences as appear proper in deciding whether the accused is guilty of the offence concerned.
- 6) Where
  - a) this section applies by virtue of subsection (2)(f)(ii)(including that provision as it applies by virtue of subsection (3)(b)), and

- b) the matter which was not mentioned is a point of law (including any point as to the admissibility of evidence or an abuse of process) or an authority,  
comment by another party under subsection (5)(a) may be made only with the leave of the court.
- 7) Where this section applies by virtue of subsection (4), comment by another party under subsection (5)(a) may be made only with the leave of the court.
- 8) Where the accused puts forward a defence which is different from any defence set out in his defence statement, in doing anything under subsection (5) or in deciding whether to do anything under it the court shall have regard
- a) to the extent of the differences in the defences, and
  - b) to whether there is any justification for it.
- 9) Where the accused calls a witness whom he has failed to include, or to identify adequately, in a witness notice, in doing anything under subsection (5) or in deciding whether to do anything under it the court shall have regard to whether there is any justification for the failure.
- 10) A person shall not be convicted of an offence solely on an inference drawn under subsection (5).
- 11) Where the accused has given a statement of the kind mentioned in section 6B(4), then, for the purposes of subsections (2)(f)(ii) and (iv), the question as to whether there has been a breach of the requirements imposed by or under section 6A or a failure to comply with section 6A(2)(a) or (b) shall be determined
- a) by reference to the state of affairs at the time when that statement was given, and
  - b) as if the defence statement was given at the same time as that statement.
- 12) In this section
- a) “initial defence statement” means a defence statement given under section 5 or 6;
  - b) “updated defence statement” means a defence statement given under section 6B;

- c) a reference simply to an accused's "defence statement" is a reference
  - i) where he has given only an initial defence statement, to that statement;
  - ii) where he has given both an initial and an updated defence statement, to the updated defence statement;
  - iii) where he has given both an initial defence statement and a statement of the kind mentioned in section 6B(4), to the initial defence statement;
- d) a reference to evidence in support of an alibi shall be construed in accordance with section 6A(3);
- e) "witness notice" means a notice given under section 6C.

## **The Case Law – some cases of note.**

### R v Wheeler [2001] 1 Cr.App.R 10

It is wise, in all cases, to ensure that a defence statement has been signed by the defendant personally. This case was decided before section 6E was inserted in the CPIA by the CJA 2003 but remains pertinent, as a way of protecting the interests of both the defendant and his solicitors.

### R (Sullivan) v Maidstone Crown Court [2002] 2 Cr.App.R.31

Although it may be wise to ensure that a defence statement is signed by the defendant, the court has no power to insist that the defence statement is signed.

### R v V (2005) 149 SJ 301

This case, again decided before section 6E, decided that, if the defendant denied knowledge of his defence statement or its contents it should not be held against him unless it could be proved that he did know of the statement. The principle remains under section 6E, but with a reversed burden of proof. If the defendant can satisfy the court that he did not know of the statement or its contents then it should not be used against him.

### DPP v Wood; DPP v McGillicuddy [2006] EWHC 32 (Admin)

1. Time for service of a defence statement runs from the Crown's notice of initial disclosure, even if that notice is defective. If the defendant believes that the notice is defective he should apply for an extension of time in which to serve his defence statement. Failure to serve a defence statement within 14 days even of a defective notice of initial disclosure potentially opens the defendant to adverse comment.

2. A defence statement served out of time is still a defence statement and therefore may

still be used in a section 8 application. (In Wood; McGillicuddy the defence statement was served 18 months after initial disclosure).

R v Bryant [2005] EWCA Crim 2079

*“In passing we note that the defence case statement was woefully inadequate. It consisted of a general denial of the counts in the indictment, accompanied by the sentence “The defendant takes issue with any witness purporting to give evidence contrary to his denials”. That sort of observation is not worth the paper it is written on. It is not the purpose of a defence case statement.”*

### **Tactical Considerations**

The defence statement can be the easiest, or most difficult, document to draft. It is very easy simply to rattle off a shortened version of the defendant’s proof of evidence but that may not always be the most effective way of putting the defendant’s case.

Start with the provisions of section 6A -Begin by including no more and no less than is required to fulfil the defendant’s obligations. Consider the wording of the section carefully; e.g. set out the *nature* of the accused’s defence, not every fact on which he will rely.

Does the defendant have anything to gain from adding more information? Is this a case of a simple dispute as to fact? Is there really likely to be additional material in the hands of the prosecutor that will be of genuine use to you? Giving away aspects of the defendant's case in order to obtain further disclosure is only beneficial to the defendant if the further disclosure can actually be of practical use at his trial. The exception, of course, is alibis, where details *must* be included.

If unsure as to whether a particular piece of information should be included, consider what the sanction may be. Is the judge really going to allow adverse comment if you don't include it? Even if he is, is it the sort of point that will really matter?

Knowing the defendant is everything! How will the defendant behave in the witness box? How consistent is his account likely to be between now and trial? Have you decided already that this is a man who should never be let near a witness box?!

Get it signed! Serving a defence statement late but signed rather than on time but unsigned is often in the best interests of you and your client.

If unsure and counsel has been instructed, get counsel to do it! But see below...

### **'Get counsel to do it'!**

The get-out clause! Barristers vary in their approach; many of us actually prefer to be able to draft the defence statement if we are to run the trial. However, the circumstances in which we can do so are limited, to some extent, by the Bar Council. The Bar Council's guidance to counsel is set out below, but note three things in particular:

If you draft the defence statement yourself, if at all possible consider sending it to counsel for comment before lodging it with the court;

Be aware that if counsel is to draft the defence statement we will need to see all of the Crown's papers that have been disclosed to you and a signed proof of evidence.

If we send you a draft defence statement under cover of a note that tells you quite how important defence statements are, please don't think we are insulting your intelligence! We are simply following Bar Council guidance.

## **The Preparation of Defence Case Statements Pursuant to the Criminal Procedure and Investigations Act 1996**

### **Guidance on the Duties of Counsel**

**(As approved by the PCCC on 24 September 1997)**

1 It is becoming increasingly common for solicitors to instruct counsel to draft or settle Defence Case Statements, required under section 5 of the Criminal Procedure and Investigations Act 1996. Often these instructions are given to counsel with no or little previous involvement in the case shortly before the expiry of the time limit.

2 The relevant legislation is set out at §12-82 et seq. of the 1997 edition of Archbold. In summary, however:

(i) The time limit for compliance is short - 14 days from service of prosecution material or a statement that there is none. The permitted grounds for an extension of time are limited;

(ii) The contents of the Defence Case Statement are obviously of great importance to the defendant. An inaccurate or inadequate statement of the defence could have serious repercussions for the defendant, if the trial judge permits “appropriate” comment;

(iii) Whilst it will be the natural instinct of most defence counsel to keep the Defence Case Statement short, a short and anodyne statement may be insufficient to trigger any obligation on the prosecution to give secondary disclosure of prosecution material.

3 Normally it will be more appropriate for instructing solicitors to draft the Defence Case Statement, since typically counsel will have had little involvement at this stage.

4 However, there is nothing unprofessional about counsel drafting or settling a Defence Case Statement, although it must be appreciated that there is no provision in the current regulations for graduated fees allowing for counsel to be paid a separate fee for his work. This most unsatisfactory situation (which has arisen, as a result of the 1996 Act, since the graduated fees regulations were negotiated) is being addressed urgently by the Fees and Legal Aid Committee. A barrister has no obligation to accept work for which he will not be paid. The absence of a fee will justify refusal of the instructions of counsel who are not to be retained for the trial and are simply asked to do no more than draft or settle the Defence Case Statement. Where counsel is retained for the trial, Rule 502(b) of the Code of Conduct deems instructions in a legally aided matter to be at a proper fee and counsel would not be justified in refusing to draft or settle a Defence Case Statement on the sole ground that there is no separate fee payable for this work.

5 Many members of the Bar will nevertheless feel that, in the interests of their lay client and or of good relations with instructing solicitors, they cannot refuse work, even where

they would otherwise be entitled to do so. Those who do so need to recognise the crucial importance of:

(i) Obtaining all prosecution statements and documentary exhibits;

(ii) Getting instructions from the lay client, from a properly signed proof and preferably a conference. Those instructions need to explain the general nature of the defence, to indicate the matters on which issue is taken with the prosecution and to give an explanation of the reason for taking issue. They must also give details of any alibi defence, sufficient to give the information required by Section 5(7) of the 1996 Act;

(iii) Getting statements from other material witnesses;

(ix) Ensuring that the client realises the importance of the Defence Case Statement and the potential adverse consequences of an inaccurate or inadequate statement;

(v) Getting proper informed approval for the draft from the client. This is particularly important, given the risks of professional embarrassment if the client seeks to disown the statement during the course of the trial, perhaps when the trial is not going well or when under severe pressure in cross-examination. Counsel ought to insist on getting written acknowledgement from the lay client that:

(a) he understands the importance of the accuracy and adequacy of the Defence Case Statement for his case;

(b) he has had the opportunity of considering the contents of the statement carefully and approves it.

This may often mean having a conference with the lay client to explain the Defence Case Statement and to get informed approval, although in straightforward cases where counsel has confidence in the instructing solicitor, this could be left to the solicitor. Where the latter course is taken, a short written advice (which can be in a standard form) as to the importance of obtaining the written acknowledgement before service of the statement should accompany the draft Defence Case Statement. A careful record should be kept of work done and advice given.

(vi) If there is inadequate time, counsel should ask the instructing solicitor to apply for an extension of time. This needs to be considered at a very early stage, since the application must be made before the expiry of the time limit.

6 It follows that counsel ought not to accept any instructions to draft or settle a Defence Case Statement unless given the opportunity and adequate time to gain proper familiarity with the case and to comply with the fundamental requirements set out above. In short, there is no halfway house. If instructions are accepted, then the professional obligations on counsel are considerable.

### **Future Changes.**

The following provisions are on the statute books, awaiting implementation.

## **Criminal Procedure and Investigations Act 1996**

### **6A. Contents of defence statement**

5) For the purposes of this Part a defence statement is a written statement

- a) setting out the nature of the accused's defence, including any particular defences on which he intends to rely,
- b) indicating the matters of fact on which he takes issue with the prosecution,
- c) setting out, in the case of each such matter, why he takes issue with the prosecution,
- ca) *setting out particulars of the matters of fact on which he intends to rely for the purposes of his defence*, and
- d) indicating any point of law (including any point as to the admissibility of evidence or an abuse of process) which he wishes to take, and any authority on which he intends to rely for that purpose.

#### **6B. Updated disclosure by accused**

- 1) Where the accused has, before the beginning of the relevant period for this section, given a defence statement under section 5 or 6, he must during that period give to the court and the prosecutor either
  - a) a defence statement under this section (an "updated defence statement"), or
  - b) a statement of the kind mentioned in subsection (4).
- 2) The relevant period for this section is determined under section 12.
- 3) An updated defence statement must comply with the requirements imposed by or under section 6A by reference to the state of affairs at the time when the statement is given.
- 4) Instead of an updated defence statement, the accused may give a written statement stating that he has no changes to make to the defence statement which was given under section 5 or 6.
- 5) Where there are other accused in the proceedings and the court so orders, the accused must also give either an updated defence statement or a statement of the kind

mentioned in subsection (4), within such period as may be specified by the court, to each other accused so specified.

- 6) The court may make an order under subsection (5) either of its own motion or on the application of any party.

### **6C. Notification of intention to call defence witnesses**

- 1) The accused must give to the court and the prosecutor a notice indicating whether he intends to call any persons (other than himself) as witnesses at his trial and, if so
  - a) giving the name, address and date of birth of each such proposed witness, or as many of those details as are known to the accused when the notice is given;
  - b) providing any information in the accused's possession which might be of material assistance in identifying or finding any such proposed witness in whose case any of the details mentioned in paragraph (a) are not known to the accused when the notice is given.
- 2) Details do not have to be given under this section to the extent that they have already been given under section 6A(2).
- 3) The accused must give a notice under this section during the period which, by virtue of section 12, is the relevant period for this section.
- 4) If, following the giving of a notice under this section, the accused
  - a) decides to call a person (other than himself) who is not included in the notice as a proposed witness, or decides not to call a person who is so included, or
  - b) discovers any information which, under subsection (1), he would have had to include in the notice if he had been aware of it when giving the notice,

he must give an appropriately amended notice to the court and the prosecutor.

## **6D. Notification of names of experts instructed by accused**

- 1) If the accused instructs a person with a view to his providing any expert opinion for possible use as evidence at the trial of the accused, he must give to the court and the prosecutor a notice specifying the person's name and address.
- 2) A notice does not have to be given under this section specifying the name and address of a person whose name and address have already been given under section 6C.
- 3) A notice under this section must be given during the period which, by virtue of section 12, is the relevant period for this section.