DISCLOSURE

Report of the follow-up review of the duties of disclosure of unused material undertaken by the CPS

December 2009
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1 INTRODUCTION

1.1 This is the report of Her Majesty’s Crown Prosecution Service Inspectorate’s (HMCPSI) follow-up review of the duties of disclosure of unused material undertaken by the Crown Prosecution Service (CPS).

Background to the review

1.2 In the latter half of 2007 HMCPSI undertook a review of how the CPS discharged its duties in relation to the disclosure of unused material. A thematic review of the duties of disclosure of unused material undertaken by the CPS was published in May 2008 (the 2007-08 review).

1.3 The purpose of that review was to assess the quality and timeliness of CPS performance in respect of disclosure of unused material in Crown Court and magistrates’ courts’ cases; the effectiveness of compliance with the disclosure regime of the Criminal Procedure and Investigations Act 1996 (CPIA) as amended by the Criminal Justice Act 2003 (CJA); and the impact of non-compliance upon the fairness of trials and on the wider costs and resources within the criminal justice system. It assessed performance in eight varied CPS areas.

1.4 The report made 21 recommendations to improve performance. These related to arrangements for reviewing material before and after charge; the quality of disclosure schedules; arrangements for handling sensitive and third party material; and joint management arrangements with police to improve performance. It identified 15 aspects of good practice which covered practical issues such as storage of material as well as procedures for reviewing material and decision-making, case progression issues and learning from experience. Full details of the recommendations and aspects of good practice are set out at annex B.

1.5 HMCPSI had undertaken an earlier thematic review in 1999 and that report, published in March 2000, found the CPIA was not working as Parliament had intended and its operation did not command the confidence of criminal justice practitioners. The 2007-08 review noted an incremental improvement in the way that disclosure was handled by the prosecution.

1.6 CPS Headquarters responded by preparing an action plan addressing each of the recommendations and commenting upon the good practice. It established a joint working party comprising representatives from the CPS’s Business Development Directorate (BDD) and Policy Directorate and the Association of Chief Police Officers (ACPO) to deal with those recommendations which required a joint approach.

1.7 Headquarters also carried out its own reviews of CPS areas whose disclosure performance had been assessed as Poor or Fair in HMCPSI’s overall performance assessments (OPAs) of 2007. BDD provided assistance to bring about improvement.

1.8 This short follow-up review assessed progress in taking forward the recommendations and measured improvements in performance across a sample of CPS areas and divisions.

The Criminal Procedure Rules

1.9 The Criminal Procedure Rules 2005 have been amended from 5 October 2009 and Part 22 amends and draws together provisions relating to the disclosure of unused material; public interest applications; section 8 CPIA applications; applications to use disclosed material; and penalties for unauthorised usage.
2 SUMMARY OF INSPECTION FINDINGS AND RECOMMENDATIONS

Overview

2.1 The prosecution, in addition to providing details of the evidence alleged against the accused, must also disclose to the accused all material gathered during the course of the investigation which the prosecution does not intend to use and which passes the disclosure test. The test for disclosure is that the material “might reasonably be considered capable of undermining the case for the prosecution against the accused, or of assisting the case for the accused, and which has not previously been disclosed”. Disclosure of unused material is an aspect of CPS performance which has led to criticism from other criminal practitioners, including the judiciary, leading to a lack of confidence that the duty of disclosure is being properly and consistently complied with.

2.2 The 2007-08 review indicated that there had been some incremental improvements in disclosure performance since the 2000 report was published, but also noted that some criticisms directed at the structure of the regime and the way in which disclosure was undertaken remained. We found that the trend of improvement is continuing, albeit slowly, but that there are still many recurring issues which need to be resolved.

2.3 Areas have historically demonstrated substantially different levels of performance in respect of disclosure and continue to do so. The performance of an individual area tends to be consistent in itself with good and poor aspects relating to, for example, completion of disclosure record sheets and endorsement of disclosure schedules becoming part of the local culture. These issues need to be addressed.

2.4 In our discussions with chief crown prosecutors (CCPs) and disclosure champions it was clear that many of the problems we found came as little or no surprise. They were clearly aware of the issues and most had taken steps to address them. Part of the problem is that some matters were dealt with through general measures and guidance. However there were signs of an increasing tendency to deal with poor performance on an individual basis, particularly in those areas which had been assessed as Poor and Fair in the 2007 OPAs. Although the casework quality assurance (CQA) scheme has for some years provided a means of doing this it has not dealt with disclosure in sufficient depth, nor has it been applied sufficiently robustly. One area which took part in this review has added extra questions on disclosure to the standard CQA questionnaire to supplement its available performance information. This is something which should be considered by other areas.

Disclosure and pre-charge decisions

2.5 Despite existing guidance encouraging the investigator and duty prosecutor to consider any unused material likely to affect the charging decision, MG3s (the form including the request for and record of decisions) too often show no evidence that this has been done in more routine cases. Some MG3s contain reference to unused material having been considered but these are general rather than specific and more likely to be found in decisions made by CPS Direct (CPSD). The position is different in the more serious and complex cases where early consultation between the police and CPS encourages discussion of unused material and disclosure issues, as well as evidence, as part of case building.
Follow-up report of disclosure of unused material by the CPS

**Initial disclosure**

2.6 Initial disclosure was properly dealt with in 75.4% of cases examined in the review file sample. Taking into account results of file examination from recent area and Central Casework inspections as well as this review (see paragraph 3.11), initial disclosure was handled properly in 65.5% of cases. In both instances this represents an improvement on performance in the 2007-08 review, although there still remains room for improvement in the way that the prosecution carries out its duty to make initial disclosure.

2.7 Part of the persisting problem is the quality of police schedules. Many contain inadequate descriptions of material and prosecutors rarely return them for proper completion. This is largely due to time constraints and because some material inadequately described is accompanied by a copy of it.

2.8 The police provide as routine copies of the crime report and message logs relating to incidents and these are generally accompanied by other documents recorded as events unfold. Our file sample for this review showed that prosecutors were examining material which passed the disclosure test and recording their decision on the schedule.

**Continuing disclosure**

2.9 Performance in respect of continuing disclosure has shown a slight decline since the 2007-08 review. Overall we found that it was handled properly in 68.9% of cases against 71.3% in 2007-08. This was enhanced by the performance of the two Central Casework divisions at 96.2% (although from a small sample of cases).

2.10 The defence provided inadequate defence case statements in four out of 31 cases (12.9%) but they were all accepted by the prosecutor. Once a defence statement is received it is generally sent to the police without any prior consideration by the prosecutor. We have noted in past area inspections and OPAs that disclosure has tended to peter out at this stage with files showing no further activity in this respect. More recently case files show a more complete and structured audit trail of continuing disclosure.

2.11 There are instances where disclosure remains an issue after formal response to the defence statement without any formal indication that all disclosure issues are finalised. Sometimes the defence make a formal application to the court under section 8 CPIA for disclosure of specific items but this is rare.

**Dealing with sensitive material**

2.12 There are still some misunderstandings among investigators and prosecutors about what constitutes sensitive material but there are signs of gradual improvement. Applications to withhold material on grounds of public interest immunity (PII) are rare, although areas do maintain a log for recording any applications.

**Third party material**

2.13 The likely or possible existence of third party material (e.g. records about a victim or defendant held by a bank or social services) is something which is frequently overlooked until after a prosecution has commenced, even in those cases which usually give rise to third party issues. Not every area has concluded a protocol with the local authority dealing with the production of such material, although informal arrangements appear to have been established in most, which often replicate the principal provisions within the nationally developed protocol.
Managing disclosure performance

2.14 Although it has been apparent for some time that disclosure performance raises issues over training needs in both the police and CPS there has been no structured approach to its provision. There was a joint national training initiative five or six years ago when the new provisions of the CJA 2003 were introduced and the new Disclosure Manual was published. Since then despite the influx of new police officers and CPS prosecutors the approach to training remains ad hoc. The CPS revised its disclosure course and e-learning programme in November 2009. Performance monitoring at area level has been limited and generally inadequate in terms of addressing issues. The CPS may wish to extend the monitoring initiated by Headquarters which has been undertaken by the areas assessed as Poor or Fair in the 2007 OPAs to all areas and require them to submit reports on disclosure performance at regular intervals.

2.15 Serious and complex cases continue to present challenges in handling unused material. However the prosecution team generally considers disclosure management at an early stage in these and resources are usually made available to meet the increased demand such cases present. In some instances CPS lawyers spend days in police stations going through large volumes of material. Sometimes this task is given to specially appointed disclosure counsel.

Conclusions

2.16 There is some headway still to be made before the CPS handling of disclosure of unused material achieves a consistent and acceptable level of performance. We consider that there has been a trend of improvement but that progress is slow. In November 2009 some changes to the MG6C and MG6D schedules have been agreed between the CPS and police and amendments made to the guidance in the Disclosure Manual. These should help to strengthen the quality and clarity of decision-making by prosecutors.

2.17 There needs to be detailed monitoring and provision of individual feedback, not only the issuing of general guidance and reminders to lawyers to follow this. There remain some misunderstandings about some aspects of disclosure which are not restricted to CPS prosecutors. The performance of the police is crucial to the effective fulfilment by the CPS of its disclosure responsibilities. Improvements in performance can best be achieved by a continuing joint approach to training and performance monitoring.

CPS response to recommendations

2.18 Inspectors assessed progress in relation to the recommendations as follows: achieved - 2; substantial progress - 4; limited progress - 7; no progress - 1; fully considered and decision taken not to implement - 2; not accepted by CPS at outset - 2; and progress restricted by position of external organisation - 1.
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3 SCOPE OF THE REVIEW AND METHODOLOGY

3.1 The main themes of the 2007-08 review were to:

- assess the quality of CPS decision-making in respect of disclosure including adherence by prosecutors and prosecuting advocates to the law and guidance;
- assess compliance with the Protocol for the Control and Management of Unused Material in the Crown Court; the Disclosure: Experts’ Evidence and Unused Material Guidance Booklet for Experts; and the Protocol for the Control and Management of Heavy Fraud and Other Complex Criminal Cases;
- assess the effectiveness of joint working with the police to ensure all relevant material is correctly captured and recorded;
- assess performance management by managers to ensure compliance and secure improvements;
- assess the effectiveness and adequacy of ongoing training and materials provided to prosecutors;
- consider the cost and resource issues of disclosure handling and its impact on the prosecution process; and
- identify good practice and make recommendations to secure improvements in practice.

The report contained 21 recommendations and 15 aspects of good practice.

Scope of the follow-up review

3.2 This follow-up focused principally on progress made against each of the recommendations of the 2007-08 review and also considered the extent to which the good practice identified in the report has been adopted within areas. It did this by considering the following aspects:

- the extent to which disclosure issues are discussed as part of the charging process including in serious and complex cases;
- the handling of initial disclosure of unused material including the quality of police schedules and prosecutors’ decisions on disclosure;
- how prosecutors discharge the duty of continuing disclosure including the scrutiny of, and responses to, defence case statements and prosecution responses to defence applications for disclosure under section 8 CPIA;
- how prosecutors handle sensitive material including the quality of police schedules, prosecutors’ decisions on disclosure and PII issues;
- how prosecutors deal with third party material including any agreed protocols with local authorities;
- the effectiveness of area managers in monitoring performance on disclosure;
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- the allocation of resources to deal with disclosure in the more serious and complex cases where examination of unused material presents a significant burden; and

- the extent to which areas use IT in the management of disclosure.

Methodology of the follow-up inspection

3.3 Inspectors visited eight areas during the 2007-08 review. Their selection represented metropolitan and rural areas and a mix of Excellent, Good, Fair and Poor assessments in the 2005 OPAs.

3.4 Five areas were selected for the purposes of this follow-up. The selection was based on performance in the 2007 OPAs compared with that in the previous programme. Performance in four had improved or worsened by two levels of assessment and in the fifth had remained at Poor. CPS Staffordshire and South Wales had taken part in the 2007-08 review.

<table>
<thead>
<tr>
<th>Area</th>
<th>2005</th>
<th>2007</th>
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<tbody>
<tr>
<td>Cleveland</td>
<td>Excellent</td>
<td>Fair</td>
</tr>
<tr>
<td>Lincolnshire</td>
<td>Fair</td>
<td>Excellent</td>
</tr>
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<td>Staffordshire</td>
<td>Excellent</td>
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<tr>
<td>West Yorkshire</td>
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<td>Poor</td>
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<tr>
<td>South Wales</td>
<td>Poor</td>
<td>Poor</td>
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3.5 In the 2007-08 review a total of 152 case files were examined, 48 of which (16 magistrates’ courts and 32 Crown Court) were finalised and 104 (55 magistrates and 49 Crown Court) were ‘live’ trials observed at court during the area visits. This allowed inspectors to interview those involved in the case decisions and also, where possible, the defence and prosecution teams as well as the judge. Inspectors’ presence at court at the start of the trial provided an additional perspective and confirmed that many events at court connected with disclosure were not recorded on the file.

3.6 For the follow-up ten concluded trial files were selected from each of the chosen areas (four magistrates’ courts and six Crown Court) and examined against a questionnaire designed to reflect the issues being considered. Some of the more serious and complex cases and a high proportion of serious sexual offences were sought because they were more likely to provide information about how third party material was handled.

3.7 Such a sample size does not provide a truly statistically valid sample and will not necessarily reflect area procedures and the level of performance in respect of disclosure completely. However it does provide a general indicator of CPS performance.

3.8 In two of the areas visited we were able to consider some live files to gain an indication of the effect on performance of any recently introduced local procedures. This provided a total sample of 61 files and the results of our examination are shown at annex A.

3.9 In each area visited we interviewed the disclosure champion and invited the CCP and unit heads to contribute if they wished. Files were read on-site so that we had the opportunity to discuss issues raised in individual cases with the reviewing lawyer if necessary.
3.10 We interviewed the disclosure leads in BDD, Policy Directorate and ACPO about action taken to implement the recommendations of the 2007-08 review.

3.11 The follow-up findings were also informed by the recent area effectiveness inspections (AEIs) of CPS Surrey and Leicestershire and Rutland. Similarly the inspections of both the Special Crime and Counter Terrorism Divisions of CPS Central Casework have provided useful information about how unused material is handled in the more serious and complex cases. We refer to these inspections at various places in the text of he reports as “the recent area and Central Casework inspections”.

The first thematic review

3.12 HMCPSI’s first thematic review of disclosure was published in March 2000. It found that the CPIA was not then working as Parliament had intended; nor did its operation command the confidence of criminal practitioners. The law as set out in the CPIA was subsequently amended by the CJA 2003.
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4 PRE-CHARGE DECISION-MAKING

Unused material and the charging decision

2008 Recommendation 1
Chief crown prosecutors should ensure:
• pre-charge revelation to the prosecutor of unused material which may undermine the prosecution case or assist the defence is received from the police in accordance with the existing Director’s Guidance on Charging, and this is monitored;
• feedback is given to police officers and prosecutors in cases of non-compliance; and
• performance in respect of compliance is considered by the CPS and police at prosecution team performance management meetings (paragraph 6.6).

Current status: Limited progress.

4.1 Paragraph 7.2(1) of the Director’s Guidance on Charging requires that in all cases proceeding to the Crown Court or those likely to be contested the MG3 must be accompanied by an evidential report containing all key evidence, together with any unused material which may undermine the prosecution case or assist the defence. (This is to inform the prosecutor’s review and charging decision and the disclosure regime itself is not engaged at this point). The Disclosure Manual at chapter 2 requires the investigator to inform the prosecutor as early as possible whether any material weakens the case against the accused.

4.2 The 2007-08 review found that unused material was rarely provided at the pre-charge decision stage. Material was provided to the prosecutor at charging in only six out of 13 cases (46.2%) identified in which there was potentially undermining material.

4.3 CPS Headquarters responded to this recommendation by firstly issuing a reminder to areas of the existing guidance and secondly the joint ACPO/CPS working party was asked to consider the issue. The working party’s terms of reference were aimed at raising awareness of both police and duty prosecutors to the need to consider unused material at charging.

4.4 The working party has proposed an amendment to the MG3 to include a prompt for discussion of unused material. This is currently awaiting approval by ACPO and the CPS. The new form should stimulate greater consideration of matters likely to undermine the prosecution case or assist the defence, but both organisations will need to ensure that each carries out its obligations fully in this respect.

4.5 For the moment there has been little improvement. Although there are expectations that the police should identify specific items as unused material on MG3s when they request charging advice, it is rarely done. Crime reports and incident logs are sometimes listed and there are instances when statements submitted as potential evidence are identified by the duty prosecutor as unused material. Specialist units, particularly those dealing with serious sexual offences and child abuse cases, are more likely to identify potentially relevant unused material.

4.6 There were 42 cases in our file sample with unused material which was relevant to the charging decision and details were provided in 21 (50.0%). The duty prosecutor made specific reference to the material in the charging decision in 18 of the 21 (85.7%).
4.7 Charging decisions made by CPSD were more likely to refer to unused material, although this was usually a statement that the duty prosecutor was not aware of any material that was likely to affect the decision. Of the 21 cases referred to above in which the police revealed details of unused material, nine were CPSD charging decisions. The prosecutor had taken the material into account in eight of these.

4.8 Duty prosecutors and investigators do sometimes discuss the existence of unused material in general terms, but it is not recorded on the MG3 and discussions appear to be more superficial than detailed. The file sample showed little indication of duty prosecutors raising non-compliance with investigators or their supervisors at the time the charging decision is being considered. Non-compliance may be raised in prosecution team performance management and other meetings in general terms but the continuing failure by duty prosecutors to discuss disclosure issues with the investigator and take immediate action in the charging centre weakens the CPS stance and non-compliance continues to be a problem.

4.9 The recent area inspection of CPS Leicestershire and Rutland found that the police provide disclosure schedules and copies of material to the duty prosecutor at charging. This enables the CPS to provide the defence with disclosure of unused material in cases likely to be contested summarily at the same time as advance information is provided before the first hearing of the case. This has put the consideration of unused material at charging on a formal basis. However the resource demands and any risks of instigating the formal process before the statutory disclosure regime is engaged need to be considered carefully.

**Serious and complex cases**

*2008 Recommendation 2*  
Crown prosecutors handling complex cases with voluminous unused material should encourage the police to consult them at an early stage about scheduling and submission of the unused material (paragraph 6.6).  
*Current status: Substantial progress.*

*2008 Good practice*  
Any pre-charge liaison by the crown prosecutor with Major Incident Teams should routinely include discussion with the disclosure officer of how unused material schedules will be presented (descriptions, cross-referencing etc) and a timetable agreed for the phasing of the supply of unused material after charge. This should be documented and recorded in any action plan agreed. In addition, any issues over unused material in Major Incident Team cases should routinely be discussed in post-case de-briefings to learn lessons and help with training (paragraph 6.6).

4.10 During the last review inspectors observed a number of complex cases where early consultation would have benefited the scheduling and management of unused material, but where there had apparently been no discussion until schedules were submitted in the normal course of events after charge. The handling of unused material in complex cases can be a major undertaking requiring consideration of large volumes of documents. Early discussion of disclosure, before charge where appropriate, will assist subsequent case management.
4.11 There were four such cases in our file sample for this review. Three of them related to charges of murder or attempted murder and the fourth to a serious sexual assault. One required an urgent charging decision to be made using the threshold test which did not allow for detailed consideration of unused material. In the remaining three there had been discussion of relevant unused material before decision.

4.12 The inspections of CPS Special Crime and Counter Terrorism Divisions revealed consistent practice of early discussions on a more structured basis. Both handle a high proportion of serious and complex cases which have large volumes of evidence and unused material. Prosecutors are involved with investigators at a very early stage, usually before charge, in preparing the case and advising on evidence. This also involves consideration of unused material and allows the prosecution team of police and prosecutors to prepare a strategy for managing disclosure as the case progresses. There are clear benefits to the way in which disclosure is subsequently handled.

4.13 Similar practices have begun to develop in area group complex casework units where the same issues arise, although the staged approach to disclosure tends to be more informal rather than part of a case strategy. A lawyer in one unit uses a series of case notes to record in detail actions and events as the case progresses. These include unused material and supplement the information on the disclosure record sheet (DRS).
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5 THE DUTY OF INITIAL DISCLOSURE

Overview

5.1 Initial disclosure is the provision to the defence of any material previously undisclosed which satisfies the test for disclosure (subject to any PII issues). The duty to disclose arises in the following circumstances:

- entry of a not guilty plea in the magistrates’ court;
- committal to the Crown Court in either way cases;
- service of the prosecution case when the defendant has been sent to the Crown Court; and
- preferment of a voluntary bill of indictment.

5.2 In the course of this review initial disclosure was properly dealt with in 46 out of 61 cases (75.4%). Taking into account the results of file examination in the recent area and Central Casework inspections initial disclosure was handled properly in 154 out of 235 cases (65.5%), being adversely affected by the poor performance of CPS Surrey (27.9%). Even so the overall figure is better than the performance recorded in 2007-08 which found that initial disclosure was dealt with properly in 86 out of 152 cases (56.6%).

5.3 This is a welcome improvement in performance. Nevertheless the cases in which initial disclosure was not properly dealt with had the same long standing weaknesses. These included inadequate descriptions of items by police, most of which were not referred back or questioned by the prosecutors, with consequent uninformed decision-making. Some letters to the defence dealing with disclosure were poorly drafted or misleading in their content.

Recording disclosure decisions and actions - the disclosure audit trail

2008 Good practice

Storing the MG20 forms (which accompany additional prosecution material received by the prosecution after service of the case on the defence) with the unused material schedules, clearly endorsed with the decisions taken e.g. “serve as evidence” or “disclosure officer to add to next phase of unused material schedules” (paragraph 7.13).

5.4 The prosecutor’s obligations in respect of initial disclosure are clearly set out in the Disclosure Manual. Schedules should be checked to ensure they are complete in quality and content. Those that are not should be returned to the police for proper completion. This message has been reinforced on numerous occasions both by HMCPSI and the CPS when commenting upon area failures in this aspect of disclosure performance. However the introduction of Criminal Justice: Simple, Speedy, Summary (CJSSS) and the Streamlined Process – initiatives designed to promote more timely preparation and management in summary cases – has brought an increase in the numbers of cases where there is not always time to return incomplete or inadequate schedules. Prosecutors then have to make decisions on the basis of what information they have. This position is accepted by the CPS as long as lawyers fully endorse the schedule with their decision on disclosure and set out their reasons. This may be a pragmatic approach but it does not meet the requirements of the Disclosure Manual. It can lead to potential uncertainties and inaccuracies in disclosure decisions and should not be encouraged.
5.5 The disclosure test must be applied objectively and the prosecutor’s decision endorsed with reasons on the disclosure schedules. In addition the Disclosure Manual requires that a separate record should be kept on the DRS of all actions, decisions, requests and enquiries relating to unused material. AEIs and the 2005 and 2007 OPAs have commented on the poor quality of file housekeeping in respect of disclosure documents and the incompleteness of the DRS. The last thematic review report noted that there had been some improvements in file housekeeping and that disclosure documents were kept within a separate disclosure folder in the main case file. This improving trend has continued although there are still some inconsistencies that need to be addressed within individual areas.

5.6 Disclosure documents were filed separately in 79.6% of cases in the last review. In this follow-up the figure was 90.0% (54 out of 60 cases).

5.7 Disclosure folders in some areas were better maintained than in others. In the best examples documents and correspondence were contained within the folder in a logical order which aided easy location. In some others - including some of the live cases we looked at - documents, including schedules, were filed out of order and difficult to find.

5.8 There is also evidence of improvement in respect of completion of the DRS. At the time of the last review not all files within the sample contained one and some were incomplete, having only a record of the initial actions. The report observed that the degree of completion “varied between the impressively comprehensive (seven pages) and totally blank”. The report noted that only 75 out of 152 cases (49.3%) provided a clear audit trail of disclosure decisions.

5.9 In this follow-up the DRS was properly completed in 40 out of 61 cases (65.6%). If figures from the recent area and Central Casework inspections are included the DRS was completed in 111 out of 234 cases representing only 47.4%, nevertheless the trend is an improving one as the files seen in this review were more recent cases. There a number of factors which contribute to the lower overall figure of 47.4% which include the performance of CPS Surrey and the practical problems in maintaining complete and intelligible records of disclosure in the more complex cases handled by Central Casework.

The format of the disclosure record sheet

2008 Recommendation 3
CPS Business Development Directorate should assess cost implications and the potential benefits of an amendment to the case management system to include a separate disclosure review tab and an updatable electronic disclosure record sheet (paragraph 7.13).

Current status: Fully considered and decision taken not to implement.

2008 Good practice
Using a bright coloured card disclosure record sheet which is easy to identify in the file (paragraph 7.13).

5.10 Currently disclosure management is incidental to CMS, the CPS electronic case management system, rather than its being an integral part of it. The original report noted that CMS did not fully support disclosure issues and although it allowed for an electronic version of the DRS, this had to be updated after every action. This also meant that a copy would need to be printed off for the paper file each time it was updated.
5.11 CPS Headquarters responded to the recommendation above by establishing a working group representing BDD, Business Information Systems and areas to assess the requirements, costs and implications. The current assessment is that the recommendation is impracticable because of cost implications and other aspects concerned with functionality and security. Clearly any amendment to the specifications of CMS is likely to have an initial cost, nevertheless it is in a process of constant development and a number of additional applications and functions have been incorporated since its original implementation within areas. Any additional functions which support the management of disclosure will bring improvements in performance and greater certainty and confidence in the processes.

5.12 The Disclosure Manual gives an example of a DRS although there is no prescribed format. Many areas use a blank sheet of paper which allows them to add details of disclosure actions and events as they arise in as much detail as necessary (although most are brief). Others use a form of pre-populated DRS which can usefully act as a prompt but also limits the detail of any freetext.

5.13 We visited one area in this review which used a disclosure folder with the DRS printed on the front. It included the principal actions such as initial and continuing disclosure but also others which can regularly occur during the life of a case. The space for recording actions was necessarily restricted, although it could be improved by spreading the details over two sides. Nevertheless the examples we observed showed evidence of detailed recording. We considered this to be a useful compromise between a DRS which acts as a prompt and one which allows a comprehensive record of actions.

5.14 In the meantime the need to maintain an appropriately detailed contemporaneous record of disclosure cannot be over emphasised, whatever means or format is employed. The use of a bright coloured card remains potential good practice as providing both a prompt to completion and ease of identification.

**Routine revelation of certain material to the prosecutor**

*2008 Recommendation 4*

CPS Business Development Directorate seeks to agree with the Association of Chief Police Officers that, in addition to the crime report and log of messages, all unused material created contemporaneously with events should be routinely revealed (physically or copied) to the prosecutor and the Disclosure Manual amended to reflect this. Prosecutors should demonstrate close scrutiny of these items and clearly record their review decision and subsequent disclosure decisions when applying the statutory disclosure test (paragraph 7.23).

*Current status: Substantial progress.*

5.15 The Disclosure Manual requires (paragraph 10.8) that copies of the crime report and log of messages should be routinely copied and forwarded to the CPS when a full file is required. At the time of the last review this was routinely done by most police forces but compliance was variable and failures tended to be area-wide with little action in response by the CPS area.

5.16 However as the 2007-08 review indicates there is often other material relating to the reporting of a crime and preliminary stages of investigation which was not always routinely revealed to the CPS. Such material might either strengthen the prosecution case or assist the defence. These include 999 calls to the police, CCTV recordings of the alleged offence and reports of medical examinations of an accused on arrival in custody.
5.17 The 2007-08 review also found that there was no consistent approach as to how this material was dealt with by the police or CPS. In some instances instructions were given to the police to disclose material without the prosecutor having seen it.

5.18 CPS Headquarters responded to the recommendation by having the joint ACPO/CPS working party identify the sort of available material and consider whether it should be copied to the CPS or whether an adequate description was sufficient. This would result in amendment to the Disclosure Manual. Although decisions have been made in this respect joint approval is still awaited before the issue is taken forward nationally.

5.19 This follow-up and recent area inspections have shown an increased awareness in this respect by the police and CPS. Recordings or transcripts of emergency calls and police notebooks together with other contemporaneous material are frequently forwarded to the CPS with the disclosure schedules. The police provided copies of such material together with the crime report and message logs with the schedule in 55 out of 61 cases (90.2%).

5.20 The endorsements on schedules of unused material in respect of these items were generally no better nor worse than endorsements of decisions in respect of others. However prosecutors are aware of the significance of such contemporaneous records and those we spoke to were careful to scrutinise them for any inconsistencies with the evidence or any other aspect which might affect the disclosure test.

**Endorsement of schedules by prosecutors**

*2008 Good practice*
Prosecutors recording on the schedules their decisions and whether an item had been seen by them in order to determine the decision to disclose (paragraph 7.31).

5.21 Chapter 12 of the Disclosure Manual requires the prosecutor to endorse each item on the MG6C with the decision on disclosure and to sign and date the schedule. The following abbreviations are to be used:

- **D** – where an item is to be disclosed (specifying if a copy is attached);
- **I** – where an item is to be disclosed but inspection is more appropriate;
- **CND** – where items are clearly not disclosable at the initial disclosure stage.

5.22 In addition brief reasons for the decision should be given where:

- disclosability or otherwise is not apparent from the description;
- the material is additional to that identified by the disclosure officer on the MG6E as satisfying the disclosure test;
- reasons might be helpful.

5.23 Our file sample showed that the prosecutor endorsed the schedule with the disclosure decision and reasons, where appropriate, in 59 of the 61 cases. We were also able to conclude that the lawyer had considered potentially undermining material in 36 out of 41 relevant cases (87.8%). In most instances prosecutors endorsed each individual item with their decision. Block marking items by brackets does still occur but is less frequently encountered, even on schedules with large numbers of entries. However the endorsement usually comprises the standard abbreviation
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without further explanation. Sometimes it is accompanied by the words “may undermine or assist” or “does not undermine or assist” as appropriate. In the majority of instances this is sufficient but there are cases where further explanation is required. In some cases this may be found on the DRS, although this clearly does not help the accused.

5.24 On 23 November 2009 the CPS issued guidance and a revised schedule MG6C. If the description of any item is inadequate the presenter should view this and mark it “ND” if not disclosable.

Form of the schedule

2008 Recommendation 5
CPS Business Development Directorate, in conjunction with the Association of Chief Police Officers, considers amending forms MG6C, MG6D and MG6E and the main endorsements used on them, so as to provide greater clarity and transparency in the decision-making process and to indicate whether the lawyer has examined the item (paragraph 7.40).

Current status: Achieved (although a date has yet to be fixed for their use by police).

5.25 The 2007-08 review was critical of the form of schedule which is still in use. It also highlighted ambiguities in the approach to use of the standard abbreviations as well as inappropriate use of the I and D abbreviations to disclose, as a matter of convenience, items which were not in fact disclosable and had not been seen by the reviewing lawyer.

5.26 Additionally some lawyers were devising their own abbreviations to endorse schedules. The abbreviation “NUNA” was intended to indicate that a particular item “neither undermines nor assists”. As the 2007-08 review noted it provided a demonstration that the duty of disclosure had been complied with but it may not be clear to all practitioners what it stands for. We found two examples of its use in this follow-up.

5.27 A further issue highlighted in the 2008 report was the practice of some lawyers endorsing disclosure schedules to the effect that “there is nothing undermining, so we are told”. This appeared to be an attempt to rely on the disclosure officer’s assessment but prosecutors were in fact abrogating their own obligations to examine material and make their own judgment. We did not find any examples of this being used.

5.28 The joint ACPO/CPS working party has considered these issues and proposed some amendments to the MG6C, MG6D and MG6E forms to encourage police officers to provide more detailed descriptions of material and encourage lawyers to be more specific in the reasons for their decisions on how material is dealt with. The proposed amendments use prompts within the form providing a reminder to police officers and prosecutors of their obligations and responsibilities. The revised forms were issued on 23 November 2009 with a date yet to be agreed as to their use by police. Chapter 12 of the Disclosure Manual was revised to provide guidance. Future performance will require careful monitoring to ensure compliance.
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Correspondence with the defence

2008 Good practice
The lawyer including in the initial disclosure letter any defences that have been taken into account by the prosecutor when determining whether an item of unused material may assist the defence (paragraph 7.42).

2008 Good practice
Managers checking the quality of initial disclosure letters as part of casework quality assurance (paragraph 7.42).

5.29 Initial disclosure is effected when the prosecutor forwards a copy of the MG6C under cover of a proforma letter to the defence, however the 2008 report highlighted inconsistencies in this procedure. Many letters consisted only of the proforma paragraphs, some were poorly edited and others were misleading in that they indicated there was nothing to disclose but were accompanied by copies of items on the schedule. Such examples did not give confidence that the disclosure had been properly handled. On the other hand inspectors found examples of letters which indicated that proper consideration had been given to disclosure and some which referred to earlier decisions in the case showing that thought had gone into the drafting.

5.30 We found similar examples of poorly and well drafted letters in this follow-up. In particular it is still common for the proforma letter to indicate that there is nothing to disclose but to enclose with the schedule copies of documents without further explanation.

5.31 Performance relating to disclosure is assessed within the CQA scheme and managers may look at the letters that are sent to the defence, but there is greater focus on ensuring that schedules are properly completed and disclosure provided even if this conflicts with the drafting of the accompanying letter. We deal with this in chapter 10 where we set out the limitations of the scheme and its implementation.

5.32 We think that this situation needs to be addressed. HMCPSI has commented in the past on examples of poor draftsmanship of letters in respect of disclosure and other matters. These incidences can be greatly reduced if the quality of letters is monitored, even if after the event if firm action is taken.

5.33 The real issue is the failure of the lawyer to check the disclosure letter before it is sent. If the letter is checked properly before despatch to ensure that it reflects the lawyer’s instruction the majority of the problems referred to above will be obviated. This needs to be addressed.

5.34 The 2008 report highlights as good practice prosecutors indicating in the initial disclosure letter any defences that had been considered in the disclosure decision. CPS Headquarters did not consider this was necessary as it is for the defence to set out the nature of their case clearly in the defence statement. The Headquarters response comments further that the reviewer will have applied the disclosure test on the basis of any defence put forward by the accused in interview or assumed from the circumstances of the case. This may be so but it is a minimalist approach and it is not always evident that it has been done. Confirmation that it has been done, in our view, remains good practice.
Follow-up report of disclosure of unused material by the CPS

Convictions of prosecution witnesses

2008 Good practice
The disclosure officer (or officer in the case) confirming all witnesses have been checked for previous convictions and informing the prosecutor in writing of the results (paragraph 7.43).

5.35 The view of many defence solicitors is that all previous convictions of every prosecution witness should be disclosed regardless of relevance and irrespective of any disclosure test. We did not seek the views of defence solicitors as part of the follow-up but we are given to understand that this is still very much the case.

5.36 The original report acknowledged the dangers of failing to disclose relevant previous convictions which might have enabled the defence to make a bad character application, but recognised that a ‘blanket’ disclosure of irrelevant and potentially embarrassing convictions could lead to witnesses failing to come forward out of fear of the consequences. In particular the report noted that there was no consistent practice within police forces for checking and revealing witnesses’ convictions.

5.37 The CPS responded to this by rightly pointing out that the police should indicate on the form MG9 whether witnesses had been checked for previous convictions and supply details if appropriate. The form should be returned if the convictions column is blank. The attention of prosecutors and caseworkers was specifically drawn to this issue in the guidance issued to all areas in September 2008 in the wake of the report.

5.38 Our file sample did not reveal any specific problems in respect of the notification and supply of previous convictions information. In some cases this was supplied at charging. Nevertheless prosecutors told us that the police on occasions needed to be reminded in individual cases.

2008 Recommendation 6
CPS Policy Directorate should consider, in conjunction with the Office for Criminal Justice Reform (OCJR) and the judiciary, the merits of the prosecution lodging previous convictions of prosecution witnesses with the judge in Crown Court trials and amending the Crown Court Protocol (paragraph 7.44).
Current status: Fully considered and decision taken by CPS and OCJR not to implement.

5.39 The last review acknowledged defence and some judicial concerns about the provision of previous convictions of prosecution witnesses. Inspectors maintained the view that the CPS should be responsible for considering whether convictions should be disclosed. However it considered that an additional safeguard would provide defence practitioners with greater confidence and recommended that the appropriate organisations should consider the feasibility of lodging previous convictions of prosecution witnesses with the judge in Crown Court trials. This would give the judge the opportunity to intervene if a point was reached where a witness’s convictions became relevant.

5.40 The CPS responded by establishing discussions with the OCJR and the judiciary to discuss this issue. These considered the principle involved in the light of the CPIA and disclosure regime and look at the practical implications in deciding whether or not to take it forward. The result of the discussions is that OCJR have rejected the proposals in line with the CPS concerns that, although the reasoning behind the recommendation has a sound basis, implementation would involve a move away from the basic principles of the CPIA by giving the responsibility to the judge rather than the prosecution.
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**Strengthening initial disclosure**

**2008 Recommendation 7**
CPS Business Development Directorate consults with the Association of Chief Police Officers as to providing (initially on a pilot or experimental basis) unused material in magistrates’ courts’ cases directly to the crown prosecutor for examination instead of the disclosure officer describing them (paragraph 7.46).

*Current status: Not accepted by CPS.*

**2008 Recommendation 8**
Crown prosecutors should examine items of unused material in which the description provided by police is not adequate to provide a sound basis for an informed decision as to the application of the disclosure test (paragraph 7.48).

*Current status: Limited progress.*

**2008 Recommendation 9**
CPS Business Development Directorate should consult with the Association of Chief Police Officers to devise and implement an effective performance management scheme to raise the standard of the descriptions of material on the MG6C and the provision of copies of material if incapable of adequate descriptions (paragraph 7.48).

*Current status: Achievement dependent upon ratification by external organisation.*

5.41 Descriptions of material by the police should be detailed, clear and accurate, containing a summary of the contents so that the prosecutor can make an informed decision on whether it satisfies the disclosure test. In some circumstances, for example where there are a number of items similar in nature, they may be described generically. However even then items should be described individually if they are likely to meet the disclosure test.

5.42 The quality of police descriptions of unused material has been the subject of comment in most recent inspections and OPAs. Although some improvements have been noted there is still much to be done to achieve a consistency of approach in all cases in all police forces. We found some evidence that inadequate schedules with poor descriptions are returned to the police for amendment, but often the need to avoid delay leads at best to the prosecutor making an urgent request for copies of individual items.

5.43 In many instances items which are poorly described by the police are ones where copies are routinely forwarded to CPS with the full file. This should not absolve the disclosure officer from ensuring that each item is properly described in order to indicate to the defence the nature of the material, although most prosecutors would review the material in these circumstances without returning the schedule to the police, as we report in paragraph 5.4.

5.44 In our file sample the police schedules listed unused material with adequate descriptions in 45 out of 61 cases (73.8%). This compares favourably with the findings of the original review – that schedules were properly prepared with adequate descriptions in only 77 of the 152 cases examined (50.7%). Our file sample included a high proportion of serious cases in which schedules were prepared by experienced officers, often from specialist squads. Many other cases involved few items of unused material most of which were supplied with the case papers.
5.45 The prosecutor returned the schedule for proper completion in only five of the 16 cases (31.2%) with inadequate schedules compared with 31 out of 75 (41.3%) in the original review.

5.46 The above recommendations were formulated to address some of the failings in initial disclosure identified during the original review. Recommendation 7 - that consideration be given to providing all unused material in summary trials to CPS for examination - was an overarching recommendation designed to obviate most of the issues relating to descriptions of material, returning schedules for amendment and reviewing items and recording decisions and reasons. It would also provide greater confidence and certainty in the decision-making process.

5.47 Inspectors recognised that the recommendation would mean a redistribution of resource demands on both the police and CPS but that this would be balanced by reduced need to describe items and return schedules and by improvements in overall performance. Inspectors also recognised that implementation of recommendation 7 would entail agreement between the police and CPS as well as changes to the code of practice. The remaining two recommendations were designed to promote a more immediate greater adherence to the code of practice within the existing regime, linked to an effective performance management system.

5.48 The CPS response to the recommendations was to emphasise that current guidance in the Disclosure Manual included how to deal with inadequate police descriptions and contained provision for immediate disclosure of evidence which became unused material following review without waiting for amendment of the schedules. However this message can also be reinforced by reminding areas of their current responsibilities.

5.49 Recommendation 7 was initially rejected on the basis that it would require primary legislative change. This view has since been modified although the CPS does not feel ready to meet the increased demand on its resources, particularly if the implementation of CJSSS means earlier listings of summary trials.

5.50 The recommendation of devising a joint performance management scheme was accepted to the extent that it would form part of the deliberations of the joint ACPO/CPS working party. Although discussions have been completed in this respect any action has yet to be approved at strategic level.
Follow-up report of disclosure of unused material by the CPS
6 THE DUTY OF CONTINUING DISCLOSURE

Overview
6.1 The prosecutor has a duty to keep under review at all times the need to make disclosure of relevant material. This has always been the case, although disclosure used to be seen very much as a two stage process of initial (or primary) disclosure followed by continuing (or secondary) disclosure after a defence statement was received.

6.2 The original review reported that performance in respect of continuing disclosure was better than that for initial disclosure. It was dealt with correctly in 62 out of 87 relevant cases (71.3%).

6.3 In this review continuing disclosure was dealt with properly in 20 out of 37 relevant cases (54.1%). If the results from the recent area and Central Casework inspections are added, this shows that continuing disclosure was dealt with properly in 102 out 148 (68.9%). The difference is largely due to the two Central Casework divisions whose combined performance was 96.2% (25 out of 26 cases).

2008 Recommendation 10
CPS Business Development Directorate provides guidance to crown prosecutors about steps to take to ensure that the details of non-sensitive unused material not initially on the MG6C are provided to the defence at the earliest opportunity in order to avoid delay (paragraph 7.50).
Current status: Limited progress.

2008 Good practice
Lawyers re-endorsing the unused material schedules (as well as the disclosure record sheet) when significant changes occur to the case (paragraph 8.6).

6.4 Sometimes additional material is provided by the police after the full file has been submitted. In those cases where there are many additional items we found that they were listed on a further MG6C and reviewed by the prosecutor in the same way as the initial schedule. There were eight such cases in our file sample.

6.5 Often however individual items are submitted accompanied by an internal memorandum. There were very few cases in our sample where this occurred and, as with the last review, they were often difficult to identify because they were found in the general correspondence folder and dealt with as such rather than under the formal disclosure procedure. However we identified three cases which involved material being disclosed to the defence informally after initial disclosure. In one it occurred after continuing disclosure had been dealt with in response to receipt of the defence case statement. In one of the three cases the item was added to the MG6C by the lawyer.

2008 Recommendation 11
Crown prosecutors object appropriately to any defence applications to the court for disclosure which do not comply with section 8 Criminal Procedure and Investigations Act procedures (paragraph 8.8).
Current status: Limited progress.
6.6 The defence may apply to the court for an order under section 8 CPIA that the prosecution should disclose material which they consider meets the disclosure test. This can only be done if a defence statement has been served. The original report refers to incidents of the defence listing cases for mention when the prosecution fail to respond to requests for additional disclosure. This had resulted in some instances in orders for disclosure being made. We were told by prosecutors that this still occurs.

6.7 Prosecutors also told us that formal applications under section 8 CPIA are still very rare. If particular items are in contention there is usually some compromise found without the necessity for a formal hearing of an application. There was only one case in our file sample in which the defence made a formal application for disclosure of material which the prosecution had initially refused to disclose. The application was granted albeit the prosecution had in the meantime made some limited disclosure.

**Defence statements**

6.8 There were 31 cases in our file sample in which a defence statement was provided to the prosecution. All of these were dealt with in the Crown Court. There is no obligation on the defence to provide a defence statement to the prosecution in magistrates' courts' cases, although they may do so. The defence statement was adequate in 27 of the 31 (87.1%). In none of the four cases where the defence statement was inadequate was it rejected by the prosecutor and raised in court.

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2008 Good practice

Local arrangements under which the judge requires initial disclosure and the provision of a defence case statement to be served before the plea and case management hearing (as should take place under the Criminal Procedure Rules and in accordance with the Crown Court Protocol) (paragraph 8.11).

6.9 In the Crown Court initial disclosure is generally dealt with by the prosecution during committal for trial in either way cases, or when the case papers are served on the defence in indictable only offences which have been sent to the Crown Court. Defence statements should be served on the prosecutor within 14 days of initial disclosure and, generally, in advance of the plea and case management hearing.

6.10 The Crown Court Protocol emphasises that service of the defence statement is a critical stage in the disclosure process and timely service will help in resolving issues in advance of trial. The protocol also recognises that there will be cases where it is not possible to serve a defence statement within the time limit and there is statutory provision for an extension of time.

6.11 None of the areas we visited had specific local arrangements for the timing of service of the defence statement. All relied on the existing regulations and the Crown Court Protocol. Consequently perhaps there are still instances when defence statements are served late and there is little evidence at local area level of specific action to tackle the issue, although this and other case progression issues are regularly discussed.

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2008 Good practice

A covering advice by the prosecutor sent along with the defence statement to the disclosure officer identifying the matters to be considered and emphasising that they should not only consider items which could assist the defence, but also items which could equally rebut the defence (paragraph 8.14).
6.12 Although the last review found that continuing disclosure tended to be handled better than initial disclosure, there were still a number of issues relating to the actual process and strict compliance with procedures. In many cases material which should have been disclosed earlier was often handed over on the morning of trial, or just before. In particular the report noted that, in a substantial number of cases, there was nothing on the file to indicate that the lawyer had re-examined unused material in the light of the defence statement. In a few cases there was evidence of the lawyer having re-appraised the unused material following receipt of the defence statement but this was usually in the larger, more complex cases. In the more routine cases there was no record of the reasons for the decision on continuing disclosure.

6.13 We found that the situation has changed little. CPS Headquarters commented in its response to the 2008 report that paragraphs 15.14 and 15.15 of the Disclosure Manual require the prosecutor, when forwarding the defence statement to the police, to draw attention to key issues raised by the statement and give advice to the disclosure officer about the sort of material to look for. However it is still common for defence statements to be forwarded immediately to the police by the caseworker with no more than the standard letter. This is done, we were told, because it reduces the risk of delay but it can lengthen the disclosure process and it deprives the prosecutor of the chance to consider the case in the light of the defence statement and ensure that appropriate material is not overlooked.

6.14 There were seven cases in our file sample where the prosecutor considered whether further material should be disclosed before receiving a response from the police to the defence statement. All of these were of a serious nature relating to allegations of serious sexual assaults or violence (including murder) and one high value fraud case. In one there was a discussion between the investigator and lawyer which resulted in one item being disclosed before the defence statement was forwarded to the police. In another (which related to serious sexual offences) the police appeared not to respond at all which prompted the lawyer to deal with continuing disclosure without the response.

6.15 We believe that this situation needs to be addressed more positively than by simply reminding prosecutors of the requirements of the Disclosure Manual. This again reflects a minimalist approach rather than the development of higher standards in order to ensure that the practice becomes a routine part of the disclosure process and is not just restricted to the more serious and complex cases.

**Timeliness of continuing disclosure**

2008 Good practice
In cases where there are significant ongoing disclosure issues, any uncertainty and misunderstanding can be avoided by making it clear to the defence in correspondence that all disclosure issues have now been dealt with (paragraph 8.16).

6.16 The defence sometimes seek additional disclosure after the prosecution’s response to the defence statement and sometimes there are a multiplicity of such requests. Where the prosecutor considers the requests unreasonable and that no further material meets the disclosure test they should reply to the defence making the position clear. This avoids the prosecution appearing weak or indecisive and puts the onus on the defence to proceed by way of application under section 8 CPIA rather than by informal mentions at court for non-response. Our file sample did not contain any examples of the prosecution seeking to put an end to such a situation by writing to the defence confirming that all disclosure issues had been dealt with.
Follow-up report of disclosure of unused material by the CPS
7 SENSITIVE MATERIAL

Overview
7.1 Sensitive material has been defined as material which, if disclosed, creates “a real risk of serious prejudice to an important public interest”. All files submitted to the CPS should include a schedule of sensitive material (MG6D) even if there is none so that the police can demonstrate they have considered the possibility of its existence through a nil return. The police provided a schedule of sensitive unused material (including nil returns) in 59 of the 61 cases within our file sample for the follow-up.

7.2 If sensitive material does exist and is recorded on the MG6D the disclosure officer should set out the reasons for regarding the material as sensitive. If the prosecutor accepts the material is in fact sensitive, is relevant to the case and meets the disclosure test, then it must be disclosed unless the court accedes to a prosecution application to withhold on the grounds that disclosure would be against the public interest.

7.3 The 2007-08 review highlighted serious concerns over the way that sensitive material was dealt with by the police and CPS. Inspectors considered that too often the defence were not made aware of unused material that, albeit of a generally sensitive nature, did not meet the real risk test. Disclosure officers were incorrectly classifying material as sensitive; prosecutors were not examining all sensitive material; and truly sensitive material that ought to be considered for PII was not being identified or detailed information provided about it.

7.4 Our file examination indicated significant improvements in the classification of material as truly sensitive by police (71.4% compared to 23.4% in 2007-08) and in the levels of examination of this by prosecutors (61.9% compared to 31.8%). Nevertheless there remains a considerable way to go before sensitive material is dealt with universally well.

The sensitive material schedule

2008 Recommendation 12
CPS Business Development Directorate, in consultation and conjunction with the Association of Chief Police Officers, should take steps to ensure that disclosure officers only seek to withhold items listed on the sensitive material schedule when there is a real risk of serious harm to an important public interest and that such assertions are ratified by a senior officer; and crown prosecutors examine all material on sensitive material schedules, or are fully informed about it by a senior police officer (paragraph 9.13).

Current status: Limited progress.

7.5 The 2007-08 review was concerned to increase awareness in the police and CPS of the principles relating to sensitive unused material to ensure that there was greater certainty in the way that it was dealt with. By way of response to recommendation 12 the joint working party considered the provision of training and guidance for disclosure officers and looked at the role of prosecutors in helping disclosure officers to complete schedules accurately. The working party’s proposals include an amendment to the MG6D which sets out the test to be applied by disclosure officers and reinforces the need to provide the CPS with sufficient information for an informed decision to be made. The working party’s recommendations are awaiting strategic approval. Further training and guidance for disclosure officers will help to improve the quality of schedules and assistance from prosecutors in compiling them is a positive step. However more is required.
7.6 We are told that ACPO have made it clear they do not accept the need for the schedule of sensitive material to be reviewed by a senior officer. Recommendation 12 does not require this, rather it seeks to ensure that those items on the schedule which are sought to be withheld on the grounds that their disclosure would pose a real risk of serious harm to an important public interest are confirmed as such by a senior officer. Equally where the prosecutor cannot for any reason examine the material it should be fully described by a senior officer so that a proper, informed decision can be made. This procedure is already in line with current requirements of the Disclosure Manual.

7.7 There were 35 cases in our file sample which gave rise to consideration of the existence, or possible existence, of sensitive material. Prosecutors dealt with the issues correctly in 21 (60.0%). When the file examination results from the recent area and Central Casework inspections are taken into account performance rises to 72.0% (72 cases out of 100). Again this relatively high level is due largely to the performance of the Special Crime and Counter Terrorism Divisions (80.8%).

7.8 There were 28 cases in our file sample in which the police had recorded the existence of sensitive material on a schedule. In 20 of those (71.4%) the items represented material that satisfied the “real risk” test. As far as we could tell they were prepared by the disclosure officer with no endorsement by a senior officer.

7.9 In the remaining eight cases the prosecutor dealt with the material according to its actual nature which was usually to disclose, sometimes with personal details edited. In none of the cases did we see any indication that schedules were returned to the police in order that the items be added to the list of non-sensitive material on the MG6C. In most cases in the sample (other than the serious or complex ones), the nature and number of the items listed presented little scope for error.

Public interest immunity

2008 Recommendation 13
Chief crown prosecutors ensure that a log is maintained of all public interest immunity applications, together with a record of all parties involved in the decision-making process, and the results of ex parte applications without notice are collated nationally (paragraph 9.19).

Current status: Achieved.

7.10 The original report dealt in some detail with issues relating to PII. This may be claimed by the prosecution in the case of disclosable material where it is believed that the public interest in not disclosing it outweighs the need to do so. If an application is to be made there are three ways of doing so depending on the circumstances of the case and the nature of the material. These are:

• Type 1 – application made after notice to the defence specifying the nature of the material in issue.
• Type 2 – application after notice to the defence but made in their absence and without specifying the nature of the material because doing so would defeat the object of the application.
• Type 3 – application without notice because the fact of an application being made would defeat the object of doing so.
7.11 Type 3 applications are very rare and the report of the inspection of CPS Counter Terrorism Division observed that they had not dealt with any. Type 3 applications should be notified to CPS Headquarters. A log should be maintained on area of the general details of the application and outcome. The last review recommended that this requirement should be extended to all PII applications and this was done with effect from October 2008.

7.12 Each area had a log book in which details of applications could be recorded when they arose. Surprisingly none of the areas had any entries for recent PII applications and staff in the areas visited confirmed that there had not been any to their knowledge.

**Examining sensitive material and recording reasons for decisions**

*2008 Recommendation 14*

Crown prosecutors ensure that in any case with sensitive material a complete record is maintained of the application of the disclosure test and the decisions made in relation to such material, and that the trial advocate is fully informed of those decisions (paragraph 9.26).  
*Current status: Limited progress.*

7.13 The 2007-08 review highlighted the fact that prosecutors tended to rely on the disclosure officer’s assessment in respect of sensitive material and did not often examine individual items; there was evidence that the prosecutor had examined the sensitive material in only 31.8% of cases.

7.14 In October 2008 the CPS issued a reminder to areas of their obligation to maintain proper records and file endorsements and ensure that the DRS was properly completed. The DRS was to be shown to the trial advocate who was also to be informed of any specific sensitive issues. Compliance with this was to be monitored under with the performance management regime established in accordance with recommendation 18 of the 2008 report (see paragraph 10.3).

7.15 We observed in the follow-up review that the prosecutor correctly endorsed the schedule with the decision on sensitivity in 21 out of 28 cases (75.0%). There were 21 cases in which there was material that satisfied the disclosure test and we found evidence that the prosecutor had examined the material in 13 of those (61.9%). The prosecutor did not provide specific instructions on sensitive material within the brief in any case. These results present a more optimistic picture but, as we have said, the files within our sample presented little challenge in this respect. It remains of concern.

**Conclusions**

7.16 The handling of sensitive material is still a matter where much needs to be done to achieve a proper and consistent approach. The provision of training for disclosure officers and prosecutors will go a long way to addressing the misunderstandings and uncertainties relating to sensitive material which currently exist. More urgent action is needed than simply reminding areas of existing guidance. The issue makes the establishment of a specific disclosure performance regime more of an imperative (see paragraph 10.5).
Follow-up report of disclosure of unused material by the CPS
8  THIRD PARTY MATERIAL

Overview

8.1 There are many cases in which a third party such as a local authority, social services department, doctor or forensic service provider will hold material relevant to the prosecution case. This frequently occurs in cases of child abuse and other serious sexual offences. If the material is not to be used as prosecution evidence and may undermine the prosecution case or assist that of the defendant, then it should be obtained and disclosed as unused material.

8.2 The 2008 report found a lack of understanding among the police and prosecutors about third party material and the procedures for obtaining it. Enquiries about its existence are often made late and frequently precipitated by a request from the defence. There have also been instances where early enquiries by the prosecutor at charging are not followed through. The failure to make timely enquiries about third party material often leads to delay in proceedings and has led to prosecutions being dropped when material is produced which makes the prosecution case untenable.

8.3 The CPS reminded prosecutors of existing guidance and there has been some renewed drive to take forward and agree protocols with police, local authorities and local health services. It is likely that joint police and CPS forms will provide prompts to consider issues at the charging stage. Nevertheless progress is slow and problems remain in individual cases.

Third party procedure

2008 Recommendation 15
CPS Business Development Directorate, in conjunction with the Association of Chief Police Officers, considers amending the form MG3 to include a prompt for prosecutors to confirm the possible existence of third party material and that any appropriate action in relation to it has been considered and discussed with the officer (paragraph 10.9). Current status: Achievement dependent upon ratification by external organisation.

8.4 Prosecutors should be alert to the existence or possible existence of third party material in appropriate cases and ensure that enquiries are put in hand at the earliest opportunity. The 2007-08 review found that in only 17 out of 34 relevant cases (50.0%) did the prosecutor make enquiry of the police about the possible existence of third party material. The CPS responded to the above recommendation by reminding prosecutors of the existing guidance. In this review we identified nine cases which gave rise at the time of charging to the existence or likely existence of third party material. It was considered in only three of those (33.3%).

8.5 The other part of the CPS response was to set up the joint ACPO/CPS working party as reported earlier at paragraph 4.3. Amendments to the MG3 which include more specific prompts on disclosure have been agreed subject to formal approval. However we do not consider that this will address the misunderstandings identified in the 2008 report and which still persist. We consider that guidance should be accompanied by training of both the police and CPS prosecutors and caseworkers to promote greater understanding of the issues and achieve a consistent approach to dealing with third party material.
Third party material and public interest immunity applications

2008 Recommendation 16
The Ministry of Justice considers the case for providing courts with the power to award costs out of central funds to third parties and interested individuals drawn into the criminal court process and who have acted reasonably (paragraph 10.12).

Current status: Progress restricted by position of external organisation.

8.6 In some instances the holder of material is prepared to hand it over to the prosecution, but in other cases issues of confidentiality mean that the holder will require a court order as a means of protection before providing the material. In these circumstances the prosecution (or defence) may apply for a witness summons which obliges the third party to attend court to produce the material. Where any other individual has an interest in the material (for example the victim who is the subject of local authority or medical records), the court may require them to be notified of the proceedings. This is to allow them the opportunity to make representations if they wish that the material should not be disclosed.

8.7 It is normal to make a request to the holder for the material before any application to the court, but the last review noted a number of instances where applications were made without the holder being notified. This meant in some cases that the applications were unnecessary.

8.8 The 2008 report also noted some confusion among prosecutors between PII applications and the third party material procedure which sometimes led to local authorities being involved in unnecessary applications. The lateness of some enquiries by the prosecution also led to unnecessary applications because local authorities did not have sufficient time to review material properly in order to make an informed decision. In either case the local authority is put to expense which includes instructing their own legal representative to consider the issues and attend the hearing. The costs in these circumstances have to be borne by the local authority and cannot be reclaimed out of central funds.

8.9 Following a recommendation in the last report that the Ministry of Justice considers making provision for costs to be awarded to third parties in these circumstances, the CPS contacted them and followed up the enquiry in June 2009. As yet no action or proposals have resulted.

8.10 It is apparent that the CPS can do a lot to ensure that applications to the court are made only when strictly necessary. There will however remain instances where the holders of material, or the subject of the material, have legitimate reasons for wanting to withhold it and are entitled to air those arguments in court through a properly instructed legal representative. In such cases they should be entitled to proper recompense for the properly incurred costs. We urge the CPS and Ministry of Justice to pursue this matter.

Protocols

2008 Recommendation 17
Chief crown prosecutors liaise with the police, local authorities and local health services to agree effective third party unused material protocols (where this has not already been achieved) and ensure that all protocols are regularly reviewed and updated (paragraph 10.17).

Current status: Limited progress.
8.11 The proceedings which usually give rise to considerations of third party material held by local authorities' social services departments involve allegations of child abuse and consequently engender a spirit of cooperation between the CPS, police and the authority. This has led to informally established procedures for obtaining material which, in some areas, have been incorporated into a more formal protocol.

8.12 In October 2003 a national model protocol was developed between the CPS, ACPO, Local Government Association of England and Wales and the Association of Directors of Social Services. CPS areas were encouraged to adopt this model in dealing with local authorities, tailored to local circumstances as necessary.

8.13 However at the time of the last review not all areas had established protocols and some local authorities declined to enter into them, preferring the existing informal procedures. Consequently inspectors recommended that CCPs should liaise with the relevant agencies and the police to agree protocols and that these should be updated regularly. Following the report areas were encouraged by CPS Headquarters to agree local protocols where none existed and reminded that existing protocols should be regularly reviewed.

8.14 The position has changed little. None of the areas visited during this follow-up had concluded a protocol with the local authority, although all had been involved in negotiations for some time. Some areas have more than one local authority to deal with making a consistent approach more difficult.

8.15 On 17 June 2009 an email was sent to all CCPs by Headquarters requesting information on the current position within areas so that information could be collated. Further action will follow once the national picture has been established.

8.16 Although none of the areas we visited had concluded formal protocols with the relevant local authorities we were told in each one that the existing informal arrangement worked well in just about all cases without the need for any application to the court. Although that may be so the existing informality and inconsistency of approach needs to be put on a more uniform and structured basis.
Follow-up report of disclosure of unused material by the CPS
9 THE GENERAL APPROACH TRIAL ADVOCATES TAKE TO DISCLOSURE

Activity at court

2008 Good practice
Feedback sessions by higher courts advocates to other CPS staff on all aspects of Crown Court work, including the handling of unused material (paragraph 11.4).

9.1 The methodology of the last review included a detailed consideration of many live trials involving observations at court, examination of court files and interviews with those who took the decisions in cases. This aspect of the methodology revealed there were a number of problems arising at court, such as late non-compliance, which were often not recorded on the file. Other issues identified included a lack of confidence by the trial advocate in the way disclosure had been handled by the reviewer and lack of a cohesive prosecution team approach. In some cases the inadequacy of some descriptions of material led to the realisation on the day of the trial that some of it would have provided valuable supporting evidence for the prosecution case.

9.2 Because these issues are not always recorded on the file, or not recorded in sufficient detail, the opportunity for learning valuable lessons is often lost. The last report commented upon the increasing use of in-house higher courts advocates undertaking preliminary court and plea and case management hearings in the Crown Court. Since then the use of crown advocates has rapidly developed to include more trial advocacy. This provides greater opportunity than before for reporting back on disclosure issues which arise at court.

9.3 Numerous inspection reports have referred to the importance of learning lessons from casework and the various ways in which areas approach this. In the report of the inspection of Counter Terrorism Division we highlighted as good practice the post-trial case conferences held after every trial and involving representatives from the agencies involved in the case. These provided a good means of learning lessons about the conduct of the prosecution including disclosure issues. They are chaired by the reviewing lawyer and a note is prepared of the issues discussed which is then made available to all staff.

9.4 Most other areas have a less formal approach which usually relies on the reviewing lawyer or caseworker identifying issues which are then usually discussed in unit or team meetings. When this approach is used it is important that there is a structure in place which ensures that all relevant information can be fed back to all staff to avoid further similar problems.
Follow-up report of disclosure of unused material by the CPS
10 ENSURING EFFECTIVE DISCLOSURE – THE MANAGEMENT ROLE

2008 Good practice
Focussed and systematic examination of a sample of files in order to benchmark disclosure performance. Thereafter, monitoring to be repeated quarterly and a report prepared for the consideration of the area management team (paragraph 13.11).

2008 Recommendation 18
CPS Business Development Directorate considers establishing uniform performance targets for disclosure against agreed criteria; and chief crown prosecutors ensure their area’s performance is monitored and achieves the agreed target (paragraph 13.11).
Current status: No progress.

10.1 The 2007-08 review observed that unless there was an adequate performance management regime it was not possible to achieve consistently good performance in the handling of unused material. The monitoring of disclosure performance is still incidental to performance management rather than being a focus. The CPS CQA scheme provides some information on disclosure but it is basic in its nature and obtained from a relatively small sample base. In addition CQA is used in some areas more robustly than in others.

10.2 The 2007-08 review found that CQA was being used to a limited extent to improve performance on disclosure on an individual basis but the emphasis needed to change from a formal requirement to report to Headquarters on performance to a genuine attempt to ensure compliance on a difficult aspect of casework. Some areas, including some of those which took part in this follow-up, have extended the CQA monitoring to include additional questions on disclosure but this is by no means universal.

10.3 The 2008 report was published shortly after those from the 2007 round of OPAs. In accepting recommendation 18 the CPS decided to concentrate resources on those areas which were rated Poor or Fair on disclosure. Each was subjected to a review by BDD which included sampling a selection of files and reporting on the issues revealed. An individual action plan was then formulated for implementation by the individual area. This generally included self assessment by sampling a number of case files per quarter and reporting on the results to Headquarters. Follow-ups were conducted by BDD to check on progress. Four of the areas involved were part of this review. The performance regime also applied to CPS Leicestershire and Rutland and Surrey.

10.4 Although it was not part of this review to assess performance in individual areas we did detect overall improvements, with the exception of one area.

10.5 Consideration has been given by Headquarters to extending monitoring to all areas so that each submits at least one report per year specifically on disclosure and based on self assessment of a number of case files. However the general trend of improvement in performance and the resource implications involved have put further consideration of extending the monitoring on hold. The requirements of a universal monitoring exercise need not be as detailed as that applied in the OPA Poor and Fair areas. In our view the current inconsistencies in disclosure performance indicate a more urgent need for a focussed and structured form of monitoring in order to improve performance.
Follow-up report of disclosure of unused material by the CPS

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**2008 Good practice**

Regular case progression meetings between court staff and a senior CPS lawyer or caseworkers to ensure that cases are trial ready (paragraph 13.12).

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10.6 The Criminal Case Management Framework and Criminal Procedure Rules place duties of case management upon various parties within the criminal justice system. The establishment of local criminal justice boards in 2003 saw the beginnings of a more joined up approach to ensuring cases were trial ready and led to the establishment in many areas of case progression officers (CPOs) within the CPS, police and courts.

10.7 CPOs continue to hold regular case progression meetings at which all issues likely to affect trial readiness are discussed. In many instances the focus will be on witness availability and attendance but disclosure is also discussed where this is relevant. The gradual implementation of PROGRESS, a case management programme for recording orders and directions in individual cases, will make this aspect easier but does not remove the need to ensure that disclosure is carried out effectively and in a timely manner.
11 THE COST TO THE CPS OF DISCLOSURE HANDLING

2008 Recommendation 19
CPS Headquarters undertakes the necessary research to determine accurately the complexity profile of trial cases in the Crown Court and magistrates’ courts, and clarifies if large and more serious cases are causing disclosure resource issues for the less serious cases (paragraph 14.34).
Current status: Not accepted by CPS.

11.1 The last review looked in some depth at the way in which disclosure is resourced within the CPS. It concluded, in very basic terms, that the current system of resource allocation meant the less serious cases were subsidising the most serious ones. The effect of this was that no amount of improvement activity would ensure that the CPIA disclosure regime could operate as intended. The findings of the review - that prosecutors should be examining more material in order to make better informed decisions - meant that more time would need to be spent by prosecutors reviewing material in a significant proportion of cases of medium levels of seriousness if the disclosure regime was to work properly.

11.2 In some of the most serious and complex cases sufficient resources were being devoted through the ring fencing of prosecutors and others staff, but the effect of this was to take away resources from less serious cases. The report concluded that greater information about the complexity profile of cases and the effect on the work involved in disclosure handling at local level would allow better targeting of resources and recommended research into the issues.

11.3 The CPS rejected this recommendation but not without serious consideration of its implications. It was decided that the cost of implementation would be disproportionate to its effectiveness in terms of performance improvement. It would also require changes to CMS, as well as the corporate and management information systems which would involve additional significant cost.

2008 Recommendation 20
Chief crown prosecutors should consider in those cases where examination of unused material represents a significant burden on the prosecution, whether the detailed work should be done by a specially instructed external disclosure counsel on a fixed fee basis attributed to the prosecution costs budget, and ensure that the guidance on the management of large scale cases is followed (paragraph 14.35).
Current status: Substantial progress.

11.4 Chapter 29 of the Disclosure Manual contains detailed guidance on handling large scale cases. The guidance includes appointing prosecuting counsel at an early stage to assist with the investigation and ensure that disclosure issues are identified and dealt with. The manual recognises that prosecuting counsel may be best placed to make decisions on disclosure but that circumstances may arise in which it is appropriate to appoint separate disclosure counsel (or team of counsel in appropriate cases) and provides guidance accordingly.

11.5 Area lawyers and heads of area group complex casework units are fully aware of the guidance. Although cases are rare we were told of a number of examples in which disclosure counsel had been appointed. It is more common in the Central Casework divisions, especially Counter Terrorism.
Follow-up report of disclosure of unused material by the CPS
12 PARTICULAR FINDINGS IN SERIOUS AND COMPLEX CASES

2008 Good practice
Continuity and retention of file ownership and decision-making through the early identification and involvement of the prosecution team – investigating officer, disclosure officer, senior officer, reviewing lawyer, caseworker, trial counsel (paragraph 15.9).

12.1 The 2007-08 review pointed out that it was the small number of serious and complex cases which caused the greatest problems in disclosure, ranging from general delay to serious miscarriages of justice. The volume of material generated in some cases makes the task of analysing it a major project in itself (which is sometimes addressed by the appointment of disclosure counsel as discussed in the last chapter).

12.2 Inspectors in the last review examined a sample of serious cases including murder and fraud from each area visited to ascertain how areas approached case management, including disclosure. Such cases not only have many pages of evidence and exhibits but large volumes of unused material, often set out in multiple schedules. Inspectors observed differences of approach in the way that resources were allocated to individual cases.

12.3 The approach used in the Central Casework divisions is to assign one lawyer and caseworker to deal with a case from start (usually the initial stages of the investigation pre-charge) to finish. Day to day handling may be dealt with by the caseworker but the lawyer is always on hand to make major decisions. The police take the same approach and trial counsel is appointed early so that they can be involved in important discussions and conferences. This system provided a high level of compliance with the disclosure regime and fairness to the defence.

12.4 We found that areas tend to handle their more serious and complex cases, including homicides and serious sexual offences, in the same way. They recognise the value in such cases of having the same stable prosecution team to manage them and, importantly, to provide support and give confidence to victims, their families and witnesses.

12.5 In the magistrates’ courts the implementation of the CPS optimum business model approach to working means that cases may be reviewed by more than one lawyer as they progress. However areas have recognised the importance of having individual responsibility where appropriate and tend to assign the more serious and sensitive cases to an individual lawyer after the first hearing.
Follow-up report of disclosure of unused material by the CPS
13 **ACCESSING THE LAW AND GUIDANCE IN RELATION TO DISCLOSURE**

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2008 Recommendation 21

CPS Policy Directorate undertakes the collation of all relevant law and guidance on disclosure and provides itemised electronic links to this with the Disclosure Manual (paragraph 16.4).

*Current status: Substantial progress.*

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13.1 Inspectors involved in the last review found that the relevant law and guidance relating to disclosure was not easily located. They identified 11 key items of legislation and associated guidance regularly referred to by practitioners. However the guidance and legislation had not been collated by CPS either in hard copy or electronically and inspectors considered that this had impacted adversely on the effective management of disclosure by prosecutors.

13.2 Following on from the above recommendation CPS Headquarters has made improvements to its internal intranet to allow easier access and reference to disclosure documents and guidance. There is now a comprehensive page dedicated to disclosure which contains automatic links to the principal disclosure documents and guidance, including the CPIA, Disclosure Manual, Criminal Procedure Rules and Attorney General’s Guidelines as well as more specialist guidance on highly sensitive issues in the more complex cases. The Disclosure Manual itself contains hyperlinks to other documents and guidance referred to in it.

13.3 This represents a substantial improvement on the position as it was at the time of the last review, although the location of the web page is not immediately apparent and it is difficult to find without being first aware of its existence. There are five separate links from the home page via BDD and Operational Legal Support Division. When the page was first set up in January 2009 it was announced by a minute to all areas as well as Headquarters directorates. Despite this awareness of its existence is not widespread within areas which clearly detracts from the page’s usefulness. Those responsible for its maintenance would like it to be given more prominence but there are competing priorities in this respect and not all can be accommodated.

13.4 The legal guidance page on the intranet also has a number of references to disclosure under the headings “Disclosure” and “Unused Material”. These are listed alphabetically in the index to the legal guidance but are easily accessed by hyperlink to the specified document. Other documents, for example the Director’s Guidance on Charging, are listed alphabetically in the index to the guidance. There is no link to the disclosure page.

13.5 Whilst we have said that the current situation has improved substantially the lack of awareness of the disclosure page by some prosecutors is a concern. During the course of the follow-up review there was an enquiry on an internal electronic bulletin board requesting information on disclosure. The enquirer was referred to the disclosure page. Urgent action needs to be taken to make its existence more widely known. We hope that this report will go some way in redressing the position but also hope that those who have responsibility within the CPS for maintenance of the intranet will be able to take action to promote awareness of the disclosure page.
Follow-up report of disclosure of unused material by the CPS
14 TRAINING

14.1 The 2007-08 review made reference to the fact that many police officers interviewed for it were concerned at the lack of practical training and guidance available to ensure they could deal effectively with their duties of disclosure. The report could not make any specific recommendation in respect of police training but expressed the view of inspectors that an assessment of joint police and CPS training needs should be undertaken.

14.2 The CPS action plan in response to the 2008 report contains numerous references to the joint ACPO/CPS working group considering raising awareness and giving guidance to the police and prosecutors on aspects of disclosure as well as providing joint training. The action plan does not specify how it proposes that any training will be delivered, though it will of course have resource implications for the police and CPS.

14.3 There is currently no national joint training programme with the police on disclosure which is an important aspect of joint performance and still impacts on case progression and trial effectiveness on a daily basis.

14.4 In 2004-05 the police and CPS undertook a major joint training programme following the changes to disclosure resulting from the amendments in the CJA 2003. There was later joint training in respect of advanced disclosure which deals largely with sensitive issues such as surveillance methods and informants and, as such, was delivered to those investigators and prosecutors who deal with the more serious and complex crimes.

14.5 Since then there has been no structured approach to joint training either at national level or within areas. We were told in this review that there is limited CPS input locally on disclosure in some police training, usually for new police officers or officers new to CID.

14.6 The working group has already identified some training needs. However its considerations should not be restricted to individual aspects of disclosure. Some, such as sensitive or third party material, may have a higher priority than others but treating these in isolation will not be enough. There is a need for joint training on all aspects of disclosure in order to improve skills and performance.

14.7 The working group recognises a need for training on many aspects of disclosure and this will be more effective if it is comprehensive rather than fragmented. It does not have to be a massive undertaking and it should be possible to put together a nationally devised joint programme of training for local delivery.

14.8 CPS Leadership and Learning has now revised the basic classroom taught Disclosure in Practice course and a revised form of the Prosecution College e-learning course has been prepared and is to go live in the near future.
Follow-up report of disclosure of unused material by the CPS
15 THE ROLE OF THE DISCLOSURE CHAMPION

15.1 The 2007-08 review commented upon the developing role of the area disclosure champion. Initial uncertainties over the role were gradually being eroded as more guidance was provided centrally. Following a successful conference for champions in March 2007 there were proposals to make it a biannual event. Plans to strengthen the support network for disclosure champions included a dedicated bulletin board on the CPS intranet.

15.2 A bulletin board has been established “to enable discussion of topics about and surrounding the disclosure of unused material” but it is rarely used. As with the disclosure page this may be the result of few people being aware of it but it demonstrates the need to be more proactive in raising awareness of disclosure issues, not just for disclosure champions but for all prosecutors and caseworkers.

15.3 The 2007-08 review suggested there should be standard job profile dealing not only with training and mentoring but also playing a key role in disclosure management. Although there is still no uniform job profile, the role of the disclosure champion and the possible development of a job description have been discussed at the biannual meetings to the extent that champions should be aware of the principal requirements of the role. We found that it was well developed in the areas we visited in this review and that the disclosure champions were heavily involved in performance management, although this was largely due to the imposition of the performance management regime by CPS Headquarters following the 2007 OPAs.

15.4 Nevertheless it illustrates the important part that disclosure champions can play at local level in monitoring performance. Their experience will also be invaluable in linking performance with learning lessons from casework, mentoring other lawyers and providing internal and joint training.
Follow-up report of disclosure of unused material by the CPS
ANNEX A: KEY FILE DATA

Figures in brackets take account of the results of the AEIs of CPS Surrey and Leicestershire and Rutland, and the Central Casework Special Crime and Counter Terrorism Division inspections.

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<th>Aspect</th>
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<td>33.3</td>
<td>66.6</td>
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<td>Police provided copies of crime report, message logs and other contemporaneously recorded material</td>
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<td>6</td>
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<td>The prosecutor returned inadequate schedules</td>
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<td>11</td>
<td>45</td>
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<td>The lawyer considered potentially undermining material before initial disclosure</td>
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<td>5</td>
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<td>MG6D adequate showing only appropriate material</td>
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<td>8</td>
<td>33</td>
<td>71.4</td>
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<td>Disclosure record sheet properly completed</td>
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* One file had been stripped of some documents for storage purposes.
ANNEX B: RECOMMENDATIONS AND GOOD PRACTICE FROM THE 2008 REPORT

Recommendations

1. Chief Crown Prosecutors should ensure:
   - pre-charge revelation to the prosecutor of unused material which may undermine the prosecution case or assist the defence is received from the police in accordance with the existing Director’s Guidance on Charging, and this is monitored;
   - feedback is given to police officers and prosecutors in cases of non-compliance; and
   - performance in respect of compliance is considered by the CPS and police at prosecution team performance management meetings (2008 report, paragraph 6.6).

   Status and comment: Limited progress.

2. Crown prosecutors handling complex cases with voluminous unused material should encourage the police to consult them at an early stage about scheduling and submission of the unused material (2008 report, paragraph 6.6).

   Status and comment: Substantial progress.

3. CPS Business Development Directorate should assess cost implications and the potential benefits of an amendment to the case management system to include a separate disclosure review tab and an updatable electronic disclosure record sheet (2008 report, paragraph 7.13).

   Status and comment: Fully considered and decision taken not to implement.

4. CPS Business Development Directorate seeks to agree with the Association of Chief Police Officers that, in addition to the crime report and log of messages, all unused material created contemporaneously with events should be routinely revealed (physically or copied) to the prosecutor and the Disclosure Manual amended to reflect this. Prosecutors should demonstrate close scrutiny of these items and clearly record their review decision and subsequent disclosure decisions when applying the statutory disclosure test (2008 report, paragraph 7.23).

   Status and comment: Substantial progress.

5. CPS Business Development Directorate, in conjunction with the Association of Chief Police Officers, considers amending forms MG6C, MG6D and MG6E and the main endorsements used on them, so as to provide greater clarity and transparency in the decision-making process and to indicate whether the lawyer has examined the item (2008 report, paragraph 7.40).

   Status and comment: Achieved (although a date has yet to be fixed for their use by police). Additional guidance has been provided to prosecutors and amendments made to chapter 12 of the Disclosure Manual.

6. CPS Policy Directorate should consider, in conjunction with the Office for Criminal Justice Reform and the judiciary, the merits of the prosecution lodging previous convictions of prosecution witnesses with the judge in Crown Court trials and amending the Crown Court Protocol (2008 report, paragraph 7.44).

   Status and comment: Fully considered and decision taken by CPS and OCJR not to implement.
7 CPS Business Development Directorate consults with the Association of Chief Police Officers as to providing (initially on a pilot or experimental basis) unused material in magistrates’ courts’ cases directly to the crown prosecutor for examination instead of the disclosure officer describing them (2008 report, paragraph 7.46).
Status and comment: Not accepted by CPS.

8 Crown prosecutors should examine items of unused material in which the description provided by police is not adequate to provide a sound basis for an informed decision as to the application of the disclosure test (2008 report, paragraph 7.48).
Status and comment: Limited progress.

9 CPS Business Development Directorate should consult with the Association of Chief Police Officers to devise and implement an effective performance management scheme to raise the standard of the descriptions of material on the MG6C and the provision of copies of material if incapable of adequate descriptions (2008 report, paragraph 7.48).
Status and comment: Achievement dependent upon ratification by external organisation.

10 CPS Business Development Directorate provides guidance to crown prosecutors about steps to take to ensure that the details of non-sensitive unused material not initially on the MG6C are provided to the defence at the earliest opportunity in order to avoid delay (2008 report, paragraph 7.50).
Status and comment: Limited progress.

11 Crown prosecutors object appropriately to any defence applications to the court for disclosure which do not comply with section 8 Criminal Procedure and Investigations Act procedures (2008 report, paragraph 8.8).
Status and comment: Limited progress.

12 CPS Business Development Directorate, in consultation and conjunction with the Association of Chief Police Officers, should take steps to ensure that disclosure officers only seek to withhold items listed on the sensitive material schedule when there is a real risk of serious harm to an important public interest and that such assertions are ratified by a senior officer; and crown prosecutors examine all material on sensitive material schedules, or are fully informed about it by a senior police officer (2008 report, paragraph 9.13).
Status and comment: Limited progress.

13 Chief crown prosecutors ensure that a log is maintained of all public interest immunity applications, together with a record of all parties involved in the decision-making process, and the results of ex parte applications without notice are collated nationally (2008 report, paragraph 9.19).
Status and comment: Achieved.

14 Crown prosecutors ensure that in any case with sensitive material a complete record is maintained of the application of the disclosure test and the decisions made in relation to such material, and that the trial advocate is fully informed of those decisions (2008 report, paragraph 9.26).
Status and comment: Limited progress.
Follow-up report of disclosure of unused material by the CPS

15 CPS Business Development Directorate, in conjunction with the Association of Chief Police Officers, considers amending the form MG3 to include a prompt for prosecutors to confirm the possible existence of third party material and that any appropriate action in relation to it has been considered and discussed with the officer (2008 report, paragraph 10.9).
Status and comment: Achievement dependent upon ratification by external organisation.

16 The Ministry of Justice considers the case for providing courts with the power to award costs out of central funds to third parties and interested individuals drawn into the criminal court process and who have acted reasonably (2008 report, paragraph 10.12).
Status and comment: Progress restricted by position of external organisation.

17 Chief crown prosecutors liaise with the police, local authorities and local health services to agree effective third party unused material protocols (where this has not already been achieved) and ensure that all protocols are regularly reviewed and updated (2008 report, paragraph 10.17).
Status and comment: Limited progress.

18 CPS Business Development Directorate considers establishing uniform performance targets for disclosure against agreed criteria; and chief crown prosecutors ensure their area’s performance is monitored and achieves the agreed target (2008 report, paragraph 13.11).
Status and comment: No progress.

19 CPS Headquarters undertakes the necessary research to determine accurately the complexity profile of trial cases in the Crown Court and magistrates’ courts, and clarifies if large and more serious cases are causing disclosure resource issues for the less serious cases (2008 report, paragraph 14.34).
Status and comment: Not accepted by CPS.

20 Chief crown prosecutors should consider in those cases where examination of unused material represents a significant burden on the prosecution, whether the detailed work should be done by a specially instructed external disclosure counsel on a fixed fee basis attributed to the prosecution costs budget, and ensure that the guidance on the management of large scale cases is followed (2008 report, paragraph 14.35).
Status and comment: Substantial progress.

21 CPS Policy Directorate undertakes the collation of all relevant law and guidance on disclosure and provides itemised electronic links to this with the Disclosure Manual (2008 report, paragraph 16.4).
Status and comment: Substantial progress.

Good practice
1 Storing the MG20 forms (which accompany additional prosecution material received by the prosecution after service of the case on the defence) with the unused material schedules, clearly endorsed with the decisions taken, e.g. “serve as evidence” or “disclosure officer to add to next phase of unused material schedules” (2008 report, paragraph 7.13).

2 Using a bright coloured card disclosure record sheet which is easy to identify in the file (2008 report, paragraph 7.13).

3 Any pre-charge liaison by the crown prosecutor with Major Incident Teams should routinely include discussion with the disclosure officer of how unused material schedules will be presented (descriptions, cross-referencing etc) and a timetable agreed for the phasing of the supply of
unused material after charge. This should be documented and recorded in any action plan agreed. In addition, any issues over unused material in Major Incident Team cases should routinely be discussed in post-case de-briefings to learn lessons and help with training (2008 report, paragraph 6.6).

4 Prosecutors recording on the schedules their decisions and whether an item had been seen by them in order to determine the decision to disclose (2008 report, paragraph 7.31).

5 The lawyer including in the initial disclosure letter any defences that have been taken into account by the prosecutor when determining whether an item of unused material may assist the defence (2008 report, paragraph 7.42).

6 The disclosure officer (or officer in the case) confirming all witnesses have been checked for previous convictions and informing the prosecutor in writing of the results (2008 report, paragraph 7.43).

7 Lawyers re-endorsing the unused material schedules (as well as the disclosure record sheet) when significant changes occur to the case (2008 report, paragraph 8.6).

8 A covering advice by the prosecutor sent along with the defence statement to the disclosure officer identifying the matters to be considered and emphasising that they should not only consider items which could assist the defence, but also items which could equally rebut the defence (2008 report, paragraph 8.14).

9 In cases where there are significant ongoing disclosure issues, any uncertainty and misunderstanding can be avoided by making it clear to the defence in correspondence that all disclosure issues have now been dealt with (2008 report, paragraph 8.16).

10 Continuity and retention of file ownership and decision-making through the early identification and involvement of the prosecution team – investigating officer, disclosure officer, senior officer, reviewing lawyer, caseworker, trial counsel (2008 report, paragraph 15.9).

11 Local arrangements under which the judge requires initial disclosure and the provision of a defence case statement to be served before the plea and case management hearing (as should take place under the Criminal Procedure Rules and in accordance with the Crown Court Protocol) (2008 report, paragraph 8.11).

12 Regular case progression meetings between court staff and a senior CPS lawyer or caseworkers to ensure that cases are trial ready (2008 report, paragraph 13.12).

13 Managers checking the quality of initial disclosure letters as part of casework quality assurance (2008 report, paragraph 7.42).

14 Feedback sessions by higher courts advocates to other CPS staff on all aspects of Crown Court work, including the handling of unused material (2008 report, paragraph 11.4).

15 Focused and systematic examination of a sample of files in order to benchmark disclosure performance. Thereafter, monitoring to be repeated quarterly and a report prepared for the consideration of the area management team (2008 report, paragraph 13.11).
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