CROWN PROSECUTION SERVICE INSPECTORATE

THE INSPECTORATE'S REPORT

on

THE THEMATIC REVIEW OF THE DISCLOSURE OF UNUSED MATERIAL

THEMATIC REPORT 2/2000 MARCH 2000

CPS

Areas and Branches that assisted this review

AREAS AND BRANCHES

1. CPS Thames Valley (Berkshire Branch)
2. CPS London (Camberwell Branch)
3. CPS Durham
4. CPS Sussex (East Sussex Branch)
5. CPS Leicestershire
6. CPS Lincolnshire
7. CPS South Wales (Mid Glamorgan Branch)
8. CPS Norfolk
9. CPS Devon and Cornwall (Plymouth and Cornwall Branch)
10. CPS Merseyside (South Liverpool Branch)
11. CPS Greater Manchester (Stockport/Sale Branch)
12. CPS West Yorkshire (Wakefield Branch)
13. CPS West Midlands (Wolverhampton Branch)

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INTRODUCTION

1.1 This is the report on the Crown Prosecution Service Inspectorate's thematic review of the disclosure of unused material. We have undertaken an in-depth study of the way in which the Crown Prosecution Service (CPS) deals with its statutory duty, as set out in the Criminal Procedure and Investigations Act 1996 (the CPIA), to disclose prosecution material. The exercise included detailed scrutiny of the files relating to 631 contested cases handled by 13 different CPS Areas. As part of this study we have also considered the disclosure of unused material other than in accordance with the requirements of the CPIA. We have not examined cases which commenced before the CPIA and to which common law rules still apply.

1.2 The CPIA, and CPS compliance with its duty to disclose unused material, has come under considerable public scrutiny. The Director of Public Prosecutions (DPP), in a seminar held soon after he took up his appointment, highlighted its importance. This is reflected in the objectives established for the CPS nationally which include:

" To enable the courts to reach just decisions by fairly, thoroughly and firmly presenting prosecution cases, rigorously testing defence cases and **scrupulously complying with the duties of disclosure**" (our emphasis).

1.3 Our review was also conducted with the knowledge that the British Academy of Forensic Sciences and the Criminal Bar Association had carried out a survey among practising barristers into the provisions of the CPIA and jointly conducted a seminar to discuss the operation of the legislation. These produced a variety of criticisms directed both at the structure of the regime and how disclosure was undertaken in a number of cases.

1.4 The primary purpose of our review was to establish as clear a factual picture as is possible about the manner in which the CPS discharges its important statutory obligations so that weaknesses may be addressed and good practice identified and promulgated throughout the Service.

1.5 We did not set out specifically to confirm or refute the extensive criticisms which have been made, sometimes very publicly, of CPS performance in relation to disclosure; it is better so far as possible to avoid generalisations and to let the facts speak for themselves. Moreover, the structure of the statutory disclosure regime makes it impossible to evaluate CPS performance in isolation from that of other important players – police officers, defence practitioners, prosecuting counsel and judges. It has also been necessary to take into account weaknesses in several aspects of the regime itself where responsibilities are placed on individuals who are ill-equipped to discharge them.

1.6 What is clear is that the CPIA is not at present working as Parliament intended; nor does its present operation command the confidence of criminal practitioners. We find that in a significant proportion of contested cases CPS compliance with CPIA procedures is defective in one or more respects; there is also uncertainty on the part of prosecutors about what is expected of them and in some instances an unrealistic approach to the provision of primary and secondary disclosure. These are important contributory factors to the present lack of confidence and it is therefore easy, as many do, to attribute the problem solely to the CPS and prosecuting authorities generally. However, there are numerous other important factors. These include the difficulties which police officers experience in producing for prosecutors full and reliable schedules of unused

material, which consequently often provide an inadequate basis for informed decisions by prosecutors about disclosure; the frequent lack of ongoing involvement by the police officer designated "disclosure officer" with the trial process, which places him or her at a disadvantage in assessing whether material may undermine the prosecution case or assist the defence; and a similar lack of continuity as between CPS prosecutor and counsel, neither of whom may in any event have seen all the unused material.

1.7 Much of this is attributable to the way in which responsibility is divided between the police service and the CPS. That split also seems to make the administrative arrangements associated with the disclosure regime rather convoluted. We think that this should be one of the main issues for further examination in the research which the Home Office has commissioned as part of its evaluation of the effectiveness of the disclosure legislation.

1.8 As a result of our review and the data and information we have gathered, we are able to provide reliable findings from which the CPS should be able to achieve better compliance with its CPIA obligations and contribute to the restoration of confidence in this aspect of the criminal justice process. We also hope that this report will be of help to those in the CPS who are considering what national guidance should be given to prosecutors to assist them in complying with their duty of disclosure as well as to those with responsibility for evaluating the legislation.

1.9 The purpose and aims of the Inspectorate are set out on the inside back cover of this report.

1.10 Chapter 2 sets out the methodology used in the review.

1.11 Chapter 3 traces briefly the recent history of disclosure.

1.12 The remaining chapters examine our findings in depth, and set out the evidence on which those findings are based. We broke the disclosure regime down into its component parts – the preparation of schedules of relevant material, primary disclosure, secondary disclosure, ongoing review and other specific issues (eg. third party disclosure) – and examined CPS performance in respect of each aspect. We took into account, where appropriate, the impact which the performance of other agencies had on the way the CPS discharged its responsibilities.

1.13 A notable feature of our review was the markedly different picture of the operation of the disclosure regime which emerged from our on-site work, when contrasted with the results of our file examination. We describe this in Chapter 9 under the heading "Informal Disclosure". In many Areas the strict operation of the CPIA regime is tempered by quite extensive informal disclosure, usually quite late in the proceedings, which considerably exceeds the statutory requirements. The drivers for this appear to be recognition of the limitations on the disclosure decisions made by prosecutors because of their heavy dependence on schedules of variable reliability; and secondly, the need for the disclosure process to have a greater degree of transparency if it is to command the confidence of criminal practitioners and avoid prolonged disputes over disclosure which detract from proper focus on the issues in the case. The initiative is often taken either by the Bar or by the judges of the Crown Court whose likely attitude in any given circumstance generally becomes known to local practitioners.

1.14 One view of this is that the system is adjusting itself in the best traditions of the common law. On the other hand, it may be regarded as unsatisfactory for there to be such significant departure from a statutory regime within a relatively short time of its inception. We question too the desirability of the extensive variations in

local practice we found. It can hardly be right for the extent of disclosure to be dependent on geography.

1.15 The annexes at the end of the report contain background information, which is designed to help the reader with matters of detail.

1.16 The review team comprised six CPS inspectors and a police officer seconded from the Association of Chief Police Officers (ACPO) Crime Committee. The Chief Inspector is grateful to the Chairman of the ACPO Crime Committee for his co-operation and assistance in releasing a senior police officer to participate in the review.

1.17 The Chief Inspector and the review team are grateful for the co-operation and support of all those with whom they came into contact during the review - either in the preparation of material for the team's consideration, or in interview. In particular, we were impressed by the openness and frankness with which staff in the CPS were willing to acknowledge the shortcomings in present practices. Gaining acceptance of the need for improvement is one of the first important steps in bringing it about. We hope that our report will assist the DPP in harnessing that positive thinking to achieve that part of the CPS's stated objective of scrupulously complying with the duties of disclosure.

METHODOLOGY

2.1 The purpose of a thematic review is to paint a national picture about how the CPS deals with a given subject throughout England and Wales, based on evidence drawn from a number of Areas and CPS headquarters.

2.2 Thirteen CPS Areas, or Branches within larger Areas, assisted us in our work: Berkshire Branch (CPS Thames Valley); Camberwell Branch (CPS London); CPS Durham; East Sussex Branch (CPS Sussex); CPS Leicestershire; CPS Lincolnshire; Mid Glamorgan Branch (CPS South Wales); CPS Norfolk; Plymouth and Cornwall Branch (CPS Devon and Cornwall); South Liverpool Branch (CPS Merseyside); Stockport/Sale Branch (CPS Greater Manchester); Wakefield Branch (CPS West Yorkshire); and Wolverhampton Branch (CPS West Midlands). These Areas or Branches represent a cross-section of the entire CPS, and provided us with a mix of urban and rural environments from which to draw our evidence. We examined files from all 13 sites and visited six – Camberwell; East Sussex; Mid Glamorgan; Norfolk; South Liverpool and Stockport/Sale.

Scope of the review

2.3 The review examined contested summary and Crown Court cases. We also considered any Area or Branch systems that are in place to assist compliance with the disclosure provisions.

Our approach

2.4 A comprehensive list of the issues that we considered is set out in Annex A of this report. They cover all stages of the disclosure process commencing with the adequacy of the initial scheduling of unused material and ranging through the manner in which it is scrutinised by prosecutors, the quality of prosecutorial decisions, the treatment given to sensitive material and the arrangements for obtaining third party material where appropriate.

2.5 We used the following techniques to carry out our review:

- a consideration of CPS and police guidance on the disclosure of unused material;
- file examination;
- interviews with CPS staff;

- interviews with police officers;
- interviews with criminal practitioners;
- interviews with the local representatives of other criminal justice agencies; and
- consideration of other relevant literature.

Review of CPS/police guidance

2.6 The detailed themes of our review were identified from the guidance given to disclosure officers and prosecutors contained in the Code of Practice issued pursuant to sections 23 and 25 of the CPIA.

2.7 We considered the Joint Operational Instructions for the disclosure of unused material (JOPI) which were issued in March 1997 to assist CPS staff and police officers, and how they were used in practice, together with any local guidance issued at the sites that assisted us in the review.

File examination

2.8 We examined a total of 251 contested magistrates' courts and 380 Crown Court cases. A breakdown of the file sample drawn from each Area or Branch by case category is set out at annex B.

2.9 We examined while on-site any police files that we considered might reveal more information about the existence of unused material than was on the case papers submitted to the prosecutor. We are grateful to the representatives of the local police criminal justice units (CJUs) who assisted us in locating the relevant papers.

2.10 Annex C sets out in detail some of the information that our file examination provided.

Interviews

2.11 We interviewed CPS staff at all levels at the six sites that we visited. They were seen either individually or in small groups. The Chief Crown Prosecutor (CCP) or Branch Crown Prosecutor (BCP), prosecutors and caseworkers provided information on a practical level about how the disclosure of unused material is dealt with by the CPS.

2.12 In order to complete the picture, the review team saw local representatives of other criminal justice agencies. At each site the review team interviewed magistrates, clerks to the justices, the police, and members of the Bar including members of the Criminal Bar Association. The team also interviewed several members of the judiciary and defence solicitors. A list is at annex D.

Police practice

2.13 There is inevitably a strong link between the manner in which a criminal investigation is conducted, the way the police prepare for trial, and fair and scrupulous compliance with the CPIA disclosure regime. This is emphasised by Section 3.4 of the Code of Practice which makes it clear that a fair and thorough investigation of offences requires the pursuit of all reasonable lines of enquiry, whether these point towards or away from the suspect. For this reason, we had hoped to carry out this inspection as a joint exercise with Her Majesty's Inspectorate of Constabulary (HMIC). This would have facilitated a thorough examination of a selected number of police investigations and subsequent preparation for prosecution and trial. Although HMIC was willing in principle to assist, its existing commitments precluded its participation.

2.14 However, in the course of our inspection we had the benefit of the involvement on site of a representative of the ACPO Crime Committee. He provided an invaluable police perspective to the inspection although this was not by any means a joint inspection.

BACKGROUND TO THE REVIEW

The historical development of disclosure

3.1 Unused material consists of material obtained in the course of a criminal investigation which does not form part of the case for the prosecution. Prior to the CPIA, which provides the first statutory requirement to disclose unused material, the prosecutor's duty had developed through guidelines and case law. The Attorney General's Guidelines on disclosure were issued in 1981. They provided at paragraph 2:

"In all cases which are due to be committed for trial, all unused material should normally…..be made available to the defence solicitor if it has some bearing on the offence(s) charged and the surrounding circumstances of the case."

3.2 The Attorney General's guidelines contained no overall definition of unused material, albeit certain categories of statement and document were stipulated as included. One possible explanation is that the guidance was founded on the prevailing practice (at least so far as DPP cases were concerned) of police submission to the prosecuting authority of a comprehensive report which covered all the evidence gathered during an investigation. The prosecutor decided what evidence should be adduced and the remainder became "unused" material. Judicial decisions subsequently expanded the scope of what was to be regarded as "unused material" (eg. Henry J (as he then was) at first instance in R v Saunders (the Guinness case)).

3.3 Despite the duty of disclosure created by the Attorney General's guidelines, there were a number of high profile cases where defendants were acquitted on appeal in the light of evidence which should have been disclosed before trial. These cases gave rise to considerable concern. Of particular note was the Court of Appeal's observation in the case of Ward (1993) 1 WLR 619 that:

"an incident of a defendant's right to a fair trial is a right to timely disclosure by the prosecution of all material matters."

3.4 All those involved in criminal cases were anxious to ensure defendants should have available to them all the material reasonably necessary for them to present and conduct their defences effectively, in order to avoid the type of miscarriage of justice that had occurred in the cases referred to in the preceding paragraph. This created its own difficulties as the practice developed of the defence making requests for very wide-ranging quantities of material with little or no apparent bearing on the issues in the case. Someone in the prosecution team, usually counsel, would then examine every bit of background material, much of it peripheral. In order to ensure that no relevant material was missed, the prosecution would place all material before the trial judge but without any effective filtering. All of this resulted in the prosecution, defence and the judiciary expending great resources in examining material that was of minimal importance to the trial.

3.5 In R v Keane (1994) 1 WLR 746 the Court of Appeal considered the question of what the judge should examine, when considering material the prosecution wished to withhold. The court held that documents are material to a case, and therefore ordinarily fell to be disclosed, if they could be seen on a sensible appraisal by the prosecution:

"(1) to be relevant or possibly relevant to an issue in the case;

(2) to raise or possibly raise a new issue whose existence is not apparent from the

evidence the prosecution proposes to use;

(3) to hold a real (as opposed to fanciful) prospe of providing a lead on evidence which goes to (1) or (2)."

Any material which fulfilled this criteria and which the prosecution did not wish to disclose because of its sensitivity had to be placed before the judge.

3.6 This did not result in a reduction of the time taken by the prosecution in considering unused material. Indeed, it probably increased it, as there was now placed on the prosecution a duty to consider every single item of unused material, in order to consider whether it was relevant within the Keane criteria.

3.7 The Royal Commission on Criminal Justice reported in July 1993. It accepted that decisions on disclosure had created unreasonable burdens for the prosecution, who could be required to disclose material, the potential relevance of which was speculative, and the sheer bulk of which could make disclosure wholly impractical. It proposed a new regime, in order to ensure a reasonable balance between the duties of the prosecution and the rights of the defence. The regime would comprise of two stages: automatic primary disclosure, and secondary disclosure if the defence could establish its relevance to the case. The Royal Commission's report was followed by a consultation paper in 1995 (Cm 2864) which set out the Government's proposals in relation to disclosure and subsequently a statutory regime was embodied in the CPIA.

3.8 The CPIA came into effect on 1 April 1997, and applies to cases where no criminal investigation had begun before that date. The common law rules continue to apply to those cases where the investigation began before 1 April 1997. The purpose of the CPIA regime is to focus disclosure on material which might either weaken the prosecution case or assist the defendant in developing his own case, whilst reducing the time and money expended by both prosecution and defence examining vast quantities of irrelevant material.

3.9 The CPIA provides the fullest definition so far of "prosecution material" which is defined in section 3(2) of the Act as material:

"(a) which is in the prosecutor's possession and came into his possession in connection with the case for the prosecution against the accused; or

(b) which, in pursuance of a code operative unde Part II he has inspected in connection with the case for the prosecution against the accused."

The above must be considered in conjunction with section 2(3) and 2(4) of the Act (definitions of "prosecutor" and "material" respectively).

3.10 Even so, this does not produce certainty. The above definition bites only on material in the possession of or actually inspected by the prosecutor. The uncertainty derives from the mechanisms by which prosecutors learn of the existence of material which may be relevant to an investigation and the extent to which prosecutors gain constructive possession of items of material listed for their attention by the disclosure officer. These mechanisms are so constructed that it is the conduct of the disclosure officer and/or the prosecutor which determines whether or not any particular item becomes "prosecution material". We consider this area of uncertainty further later in our report.

The Code of Practice governing the retention and recording of material by police

3.11 The Code of Practice issued pursuant to Section 23 and 25 of the CPIA confirms that all investigators (that is, any police officer involved in the conduct of a police investigation) have a responsibility for carrying out the duties imposed under the Code of Practice, including, in particular, recording information and retaining records of retained information and other material. The officer in charge of an investigation is the officer responsible for directing a criminal investigation, but also is responsible for ensuring proper procedures are in place for recording information, and for retaining records of information and other material in the investigation. The disclosure officer (whom the Code of Practice states to be a "person" rather than a police officer) is responsible for examining material retained by the police during the investigation, revealing material to the prosecutor during the investigation and any criminal proceedings resulting from it, and certifying that he has done this.

3.12 The Code of Practice defines "material" as being material of any kind, including information and objects, which is obtained in the course of a criminal investigation and which may be relevant to the investigation. Briefly, the police must reveal to the prosecutor by means of a schedule the existence of any material "relevant to the investigation" which is defined in the Code of Practice as that which:

"appears to an investigator, or to the officer in charge of the investigation, or to the disclosure officer, that it has some bearing on any offence under investigation or any person being investigated, or on the surrounding circumstances of the case, unless it is incapable of having any impact on the case."

3.13 It is axiomatic that if careful investigation is not undertaken then both positive and negative evidence will be lost or not followed up. The officer in charge of the investigation has the duty to ensure that material which may be relevant to an investigation is recorded in a durable or retrievable form (whether in writing, video or audio tape, or on computer disk). The Code of Practice gives particular emphasis to parts of larger records or negative information. It provides guidance concerning the retention of material and lists common pieces of material falling into a number of categories. Examples include the following:

- crime reports (including crime report forms, relevant parts of incident report books or police officers' notebooks);
- records which are derived from tapes of telephone messages (for example, 999 calls) containing descriptions of an alleged offence or offender;
- communications between the police and experts such as forensic scientists, reports of works carried out by experts, and schedules of scientific material prepared by the expert for the investigator for the purposes of criminal proceedings.

3.14 Although the definition contained in the Code of Practice which governs the material to be listed on the schedule provided to the prosecutor may be regarded as comprehensive, it is not free from uncertainty. This is particularly so in relation to the growing volume of criminal investigation which is intelligence-led or target-based eg. drug trafficking, terrorism and other forms of organised crime. The police there tend to investigate suspects and organisations rather than specific offences and build up a picture of the criminal activity based on a mixture of intelligence, evidence and other information. When proceedings ensue, it may be very difficult for a disclosure officer to delineate with any real

precision what may properly be attributed to any particular offence or suspect.

3.15 In reality, there is a limit as to how far it is possible to define material which is to be regarded as "relevant to an investigation" and hence considered for disclosure. We do not suggest that a fresh definition should be adopted – merely that the difficulty has to be faced.

Statutory duties of disclosure upon prosecutors

3.16 The CPIA requires the prosecutor to disclose unused material to the defence in all cases where there is:

- a plea of not guilty in the magistrates' court;
- committal or transfer of a case for trial at the Crown Court; or
- the preferment of a voluntary bill of indictment.

3.17 At this stage, the prosecutor has to apply the primary disclosure test, and must disclose all material in his or her possession or which the prosecutor has inspected and considers might undermine the prosecution case. Following receipt of primary disclosure, the defendant must, in Crown Court cases, and may, in magistrates' court cases, serve a defence statement on the prosecution. Where a defence statement is provided, the prosecutor must apply the secondary disclosure test, and must disclose any material not yet disclosed which might assist the defence case as disclosed by the defence statement.

3.18 Following the introduction of the CPIA, there was debate about the precise extent to which it abolished the common law rules in relation to disclosure. In the case of R v the Director of Public Prosecutions ex parte Lee (1999) 2 All E.R. 737, the defence complained about the lack of disclosure of unused material prior to committal, which is before the provisions of the CPIA apply. The Court of Appeal stated that:

"even before committal a responsible prosecutor should be asking himself what if any immediate disclosure justice and fairness requires him to make in the particular circumstances of the case."

3.19 The court acknowledged that in most cases disclosure can wait until after committal without jeopardising the defendant's right to a fair trial, but gave examples of the sort of material that might fall to be disclosed earlier.

3.20 The law on disclosure has to be considered in the light of Article 6 of the European Convention on Human Rights, which provides that:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

"Everyone charged with a criminal offence has the ..... rights .... to have adequate time and facilities for the preparation of his defence."

3.21 This means that, in considering disclosure, prosecutors have to ensure that all their decisions not only comply with the CPIA and common law, but that they are compatible with the right of the defendant to a fair and public trial.

Duties within the CPIA disclosure regime upon police and prosecutors

3.22 The Code of Practice governs the action the police must take in recording and retaining material obtained in the course of a criminal investigation, and regulates its supply to the prosecutor for a decision on disclosure.

3.23 The police must also draw attention to and provide copies of certain categories of material – those which experience shows are most likely to undermine a prosecution case or assist the defence.

3.24 There is thus a division of responsibility. The disclosure officer provides an initial filter of unused material. The CPIA places the duty of disclosure on the prosecutor in relation to that which he possesses or has inspected.

3.25 The prosecutor is defined in section 2 (3) of the CPIA as:

> "any person acting as prosecutor, whether an individual or a body."

This means that duties under the CPIA are placed on both CPS prosecutors and any advocate instructed to prosecute on behalf of the CPS.

CPS/Police Training and Joint Operational Instructions

3.26 The CPS and police devised, and undertook, a joint training programme on the provisions of the CPIA. A guide to the disclosure of unused material was compiled.

3.27 Joint operational instructions, the JOPI referred to in paragraph 2.7, were also produced. The JOPI expands upon the CPIA and the Code of Practice, and gives further guidance to prosecutors and disclosure officers on their roles and responsibilities. In particular, it details the forms which should be used by disclosure officers, and how they should be completed. We refer to the document where relevant at various parts of the report. We also, where necessary, express our opinion on the appropriateness of the instructions contained within it.

3.28 We comment on the JOPI, and set out our suggestions and recommendations which touch upon it in Chapter 11. We would make it clear that we strongly commend both the principle of having joint guidance for police and CPS in relation to the shared responsibilities and duties of disclosure, and the overall content of the JOPI itself. For the most part it has stood the test of practical implementation. It has been of tremendous value to police and prosecutors in undertaking their respective roles, and has underpinned the CPIA and the Code of Practice. If the guidance within the JOPI was strictly followed in all cases then the disclosure regime would be on a much sounder footing.

3.29 Most of our adverse comments and findings are based upon non-compliance with the JOPI, but in significant areas we did find that there might be uncertainty as to the status of the JOPI or about its content. It is a restricted document and so has not been circulated or distributed publicly. Some of our comments may therefore be difficult to follow for readers of this report who are not police or CPS staff members.

3.30 There are ambiguities about the status of the JOPI and in its provisions. Its very title states they are "instructions", but it is explained as being only guidance, albeit highly directive, and not formal requirements. The JOPI provides guidance on practical issues, combined with standard forms from the Manual of Guidance for the Preparation, Processing and Submission of Files (which is another guide to operational issues agreed between the police and CPS). However, in some respects it only seeks to provide principles to enable both police and CPS to understand their responsibilities under the CPIA and the Code of Practice, and to perform their duties successfully.

3.31 Some of our concerns relate to the fact that the JOPI itself has not been updated since it was issued on 24 March 1997 (before the introduction of the legislation). Instead, some further guidance or recommended practice has been

included in Casework Bulletins, in the weekly guide to CPS business circulated to all staff, or in updated training material. There is no comprehensive reference point for this new material.

3.32 We understand that it has always been intended to review the workings of the JOPI and the disclosure regime generally within the CPS. We hope that our report will inform that review and help the Director of Policy, or the disclosure working group, to formulate changes that will help and support police and prosecutors in their work.

Recent developments

3.33 Since the introduction of the CPIA, there have been growing concerns about how the prosecution is complying with its duties of disclosure. There have been reports in the press of cases where material which ought to have been disclosed under the CPIA was not disclosed. Criminal practitioners have also expressed concerns, in legal publications, about the workings of the CPIA. These concerns led to the survey carried out by the British Academy of Forensic Sciences and the Criminal Bar Association between January and April 1999, which we referred to in paragraph 1.3. We understand that a summary of the findings was produced in October 1999, incorporating a parallel survey conducted by the Law Society. We were able to see the answers given by practitioners in response to a request for examples of particular difficulties experienced. However, we did not see any report or collation of all the responses.

3.34 In the light of the CPS objective of scrupulously complying with the duties of disclosure and the reorganisation of the CPS into 42 Areas, on 18 May 1999 the DPP held the seminar on disclosure referred to in paragraph 1.2. It was attended by the newly appointed CCPs, other members of the CPS, members of other prosecuting authorities and criminal law practitioners.

3.35 As part of the Government's responsibility to evaluate new legislation, the Home Office has set up an inter-departmental working group to evaluate the operation of the law on disclosure. Research has been commissioned and will be undertaken in 2000.

3.36 The CPS has also formed a disclosure working group, whose terms of reference are:

- to act as a conduit for information and issues of concern between Areas and between the Areas and CPS HQ;
- to identify good practice;
- to make recommendations on guidance to assist CCPs; and
- to facilitate inter-agency involvement in problem solving.

Members of the group have been drawn from ten of the CPS Areas, from Casework Directorate and from Policy Directorate. The group also has a representative of ACPO as a member.

3.37 The Attorney General has announced his intention to publish guidelines on the disclosure of information in criminal proceedings.

Concerns expressed to us about the disclosure regime in practice

3.38 Criminal practitioners outside the prosecution who we interviewed expressed almost universal lack of faith that the system is working satisfactorily. There were doubts about the consistent quality of investigations and the capturing, recording, or following up of relevant matters. There were doubts about the quality of consultation and communication between the officer in charge of the investigation and others

involved in the particular investigation or in closely related matters, and between the officer in charge and the disclosure officer. There were doubts about the priority given to the task by the nominated disclosure officer, and about the suitability of some disclosure officers.

3.39 These concerns have led to a lack of trust in the comprehensiveness and accuracy of the schedules of non-sensitive and sensitive material provided by the disclosure officer to the prosecutor. There was also concern about the skill and ability of the disclosure officer, and sometimes in his determination or intention, to draw the attention of the prosecutor to material which may fall within the tests for primary or secondary disclosure. All these concerns centred upon the quality of the investigation, and the skill, ability and training of the investigating officers and disclosure officers to perform their duties under the CPIA and the Code of Practice.

3.40 We have set out the problems which arise in the police phase of the criminal process. Our inspection focussed on the handling of disclosure by the CPS. Here we again found almost universal lack of faith by other practitioners within the criminal justice system as to the skill and ability of the prosecutor, or more frequently the resources of the CPS, to undertake its duties fully and reliably.

3.41 We have set out these concerns in this section of the report to bring them into the open at the outset of this report, and so that our findings and recommendations can be appreciated in the light of these perceptions of others in the criminal justice system.

PRIMARY DISCLOSURE

The duty to make primary disclosure

4.1 Section 3(1)(a) of the CPIA states:

" The prosecutor must disclose to the accused any prosecution material which has not previously been disclosed to the accused and which in the prosecutor's opinion might undermine the case for the prosecution against the accused".

4.2 The CPIA goes on to say that the prosecutor must confirm in writing to the accused if he considers that there is no material which might undermine the prosecution case that has not previously been disclosed.

4.3 In this chapter we consider how prosecutors discharge this duty, the timeliness of their actions, and how certain core unused material is dealt with. We also examine in more detail certain aspects of the relationship between the duties placed on the police and those of the prosecutor.

The role of the disclosure officer

4.4 The Code of Practice at paragraph 2.1 defines the disclosure officer as being:

"the person responsible for examining material retained by the police during the investigation, revealing material to the prosecutor during the investigation and any criminal proceedings resulting from it, and certifying that he has done this; and disclosing material to the accused at the request of the prosecutor."

4.5 The Code of Practice requires the disclosure officer to list on a schedule all unused material that may be relevant to the investigation. He must ensure that the schedule captures everything

falling within the Code definition of "material relevant to the investigation". As noted in Chapter 3, this can give rise to uncertainty even with a quite comprehensive definition; it must also be described sufficiently for the prosecutor to make an informed decision about whether it ought to be disclosed. The disclosure officer should draw to the prosecutor's attention material which might undermine the prosecution case. If a defence statement is served the disclosure officer must at that stage also draw the prosecutor's attention to any material that might assist the defence.

4.6 The disclosure officer has a crucial role in facilitating proper compliance with the requirements of the CPIA. Reference in the JOPI to the disclosure officer being responsible for handling the administrative side of disclosure does not convey properly the importance of the role. Nevertheless, the importance of the role is indicated by the extensive summary of the obligations set out in the JOPI, which gives a flavour of the critical role played by the disclosure officer, and we were told that this was emphasised throughout the joint training of CPS staff and police.

4.7 We found that police practices vary as to who is appointed the disclosure officer. Generally, it is the police officer in the case. At some sites the role is carried out by a police officer in the CJU. The officer in the case may perform initially some of the tasks of the disclosure officer before the file of papers is passed to the CJU. At one site we were told that the role of the disclosure officer is to be performed by a civilian within the CJU. In major investigations a dedicated disclosure officer may be appointed to deal with unused material.

4.8 Some interviewees expressed concern that there is no requirement for the disclosure officer to be independent of the investigation of the offence. They questioned whether the officer in the case can demonstrate sufficient detachment from the case to satisfy the requirement that all material which might undermine/assist is drawn to the attention of the prosecutor with a view to disclosure. Other interviewees said that the disclosure officer needed to have an in-depth knowledge of the investigation to be able to assess the relevance of material in the context of the case. Virtually all interviewees considered that there should be better supervision and training of those who perform the functions of disclosure officer.

4.9 Generally, we believe that the appointment of an individual with knowledge of the case as disclosure officer will best serve the interests of justice. The appointment of the disclosure officer is an operational police matter. Nevertheless, we consider that in some cases, to demonstrate the openness and integrity of the disclosure provisions, it would be better if the person appointed was someone other than the officer in the case. For instance, in cases where the officer in the case is also the victim, or is the subject of a formal complaint arising out of the proceedings, the integrity of the procedures would be more clearly established by the appointment of someone other than him.

4.10 Whoever is appointed as the disclosure officer must appreciate what needs to be considered in the context of the primary and secondary disclosure tests. That person also needs to be in a position to reveal to the prosecutor relevant material that may not have been generated by the investigation of the offence and to facilitate access to that material when appropriate. Such material may be held by other police officers not connected with the investigation or by other agencies. (There are provisions for this to be done by a senior investigating officer where the material is highly sensitive.)

4.11 We were told on many occasions, both by CPS staff and external interviewees, that the listing of unused material was regarded as a mechanical task. We refer further to our concerns about this at paragraphs 4.36 to 4.38.

The provision of the schedule of non-sensitive unused material by the police

4.12 The instructions in the JOPI require the disclosure officer to list non-sensitive unused material on a schedule referred to as the MG6C schedule.

4.13 The police are good at providing the MG6C schedule. Prosecutors are good at requesting it when they do not.

4.14 The police provided the MG6C schedule without prompting in 604 of the 628 cases where it was possible to ascertain whether or not an MG6C schedule was submitted. The prosecutor prompted the police to provide the missing schedule in 19 out of 24 cases. The police ultimately provided the schedule in 17 of the 24 cases. Overall, an MG6C schedule was provided in 621 of the 628 cases.

4.15 Nineteen of the 24 instances where the schedule was missing were cases involving not guilty pleas in the magistrates' court. One of the 19 cases concerned minor traffic matters; the rest involved allegations of assault, dishonesty and public order. Whilst overall the police are good at providing the MG6C schedule, we were concerned to find that 7.6% of summary trial files were inadequate. CPS staff at one site confirmed that the provision of schedules in summary trial cases is poor.

4.16 At another site, we were told that the police are poor at providing the appropriate schedules in minor traffic process cases. These cases are not always prepared for trial by the CJU but may be dealt with by another police unit, whose staff are not experienced in the requirements of the CPIA.

4.17 We accept that it is extremely rare for minor traffic cases to generate any unused material that might undermine the prosecution case. This does not, however, negate the requirement for a disclosure officer to be appointed and all relevant schedules compiled and forwarded to the prosecutor. The prosecution must comply with the requirements of the CPIA in all summary cases in which a not guilty plea is entered.

4.18 We recommend that prosecutors always request unused material schedules where they are missing before proceeding to trial.

The timing of the provision of the schedule of non-sensitive unused material by the police

4.19 We found that the unused material schedules are usually provided with the summary trial or committal file. There is evidence, particularly in summary cases, that late delivery of the file and schedules impacts adversely on how prosecutors fulfil their responsibilities under the CPIA.

4.20 The JOPI provides definitive guidance to police and prosecutors that the responsibility for creating the schedules and keeping them accurate and up-to-date is placed on the disclosure officer. Consequently they may not be amended by the prosecutor (JOPI: paragraphs 2.86 to 2.89). This may seem somewhat cumbersome in relation to the majority of relatively straightforward cases.

4.21 At more than one site, prosecutors told us that, because of the late delivery of the case papers, they amend schedules rather than return them to the police for correction. They add items to the schedule, for example, witness statements that they decide will not form part of the prosecution case, and blank out items that they consider should not be included.

4.22 We were also told that in some summary trial cases the late delivery of the schedule does not allow enough time for it to be returned to the disclosure officer for correction.

4.23 We recognise that the late delivery of a schedule, which requires amendment, creates a dilemma for prosecutors. The JOPI is not complied with if they correct the schedule, but if it is returned to the police compliance with the statutory duty to supply the schedule to the defence may not take place before the trial date. An application to adjourn the trial may have to be made which, if not successful, may lead to the case being dismissed.

4.24 In Crown Court cases late delivery of the committal file and schedules can result in primary disclosure not taking place immediately after the committal. This affects the timely progress of the case and the effectiveness of the plea and directions hearing (PDH). We discuss the timing of disclosure to the defence further at paragraphs 4.121 to 4.127.

4.25 To comply with the Code of Practice the responsibility for the schedule, which is created by the disclosure officer, must remain with him. This is interpreted in the JOPI as meaning that the prosecutor should not make amendments to the schedule. This places a responsibility on the police to ensure that all the relevant schedules are provided to the prosecutor in sufficient time to enable primary disclosure to be dealt with before the trial date.

4.26 An illustration of what can happen if the provision of primary disclosure is delayed (for whatever reason) was found at one site: we were told that summary trials were being adjourned because defendants were not being given enough time to consider whether, in the light of the primary disclosure, they wish to serve a defence statement. In reality we found defence statements are extremely rare in summary trial cases and so this may sometimes be a device to delay the trial. Nevertheless, this must be taken into account when ensuring that the prosecution undertakes primary disclosure and supplies the schedule of unused material to the defence in good time before the date fixed for trial.

4.27 We understand that the issue about amending the schedule was considered when the JOPI was prepared. This aspect of its guidance generates delay in a significant number of cases, and we think it should be revisited.

4.28 We suggest that paragraphs 2.87 to 2.89 of the JOPI should be reviewed and a procedure incorporated which facilitates swifter amendment of MG6C schedules with a view to service on the defence.

4.29 When an item listed on the MG6C is used as prosecution evidence then the prosecutor can endorse such a decision on the schedule. It is the addition of items, or the deletion of items which either do not exist or ought to be on the schedule of sensitive material, which must at present be dealt with by the disclosure officer. For the present, if changes are necessary, and the disclosure officer cannot carry them out, then the prosecutor should set them out in a letter or document and deliver it to the defence. This procedure has been recommended to prosecutors and was included in refresher training.

The quality of the schedule of non-sensitive unused material

4.30 A copy of the schedule was on the file in 621 cases in our file sample. It was defective in 239 of the 621 cases.

The following table gives a breakdown of the reasons why the schedule was defective:

Nature of defect	Number
Material Omitted	74
Insufficient details of items listed	139
Referred to item being used as evidence	8
Item should have been on MG6D	5
Other	13
Total	**239**

4.31 In too many cases obvious items are omitted from the schedule. Prosecutors are poor at returning schedules for correction. A reference to unused material (which it was clear existed) was omitted from the list in 74 of the 239 cases where the schedule was incorrect. There may well have been other cases where material was omitted without this being obvious from the papers submitted to the CPS.

4.32 The prosecutor asked the police to correct the schedule in 24 of the 74 cases and the police corrected 14 of these. The prosecutor corrected the schedule in nine of the 74 cases, and in one further case the police corrected it without prompting. As a result 50 cases (7.9% of the total sample) proceeded with items clearly missing from the schedule.

4.33 We were told of cases where items that had been omitted from the schedule played a significant part in the outcome of the proceedings, for example:

- evidence of the first description of an offender that contradicted fundamentally the description contained in a witness's statement; and
- a photograph of the defendant that showed clearly injuries he asserted he had sustained at the hands of the victim.

4.34 Examples of items which we could determine on the face of the papers were missing, included:

- statements from witnesses who did not want to give evidence;
- police officers' notebooks; and
- crime reports.

We appreciate that to require the disclosure officer to amend the schedule may appear inconsistent with our suggestion at paragraph 4.28 that a simplified and swifter procedure be sought. Nevertheless, in the meantime we consider that the existing procedure should be complied with, particularly in relation to significant omissions. We therefore make the following recommendation.

4.35 We recommend that prosecutors examine the MG6C schedule carefully, in the light of the evidence in the case, and if omissions are apparent that they send the schedule back to the disclosure officer for rectification.

4.36 We have referred at paragraph 4.11 to the compilation of the MG6C schedule being regarded as a mechanical task. Some police forces use pre-printed schedules that require the disclosure officer to delete non-applicable items. We recognise that it may be expedient to use this approach, but we have a number of concerns. First, the use of such a format lends support to the view that the consideration of unused material is a mechanical task that involves no more than stating whether a document exists; it does not concentrate the mind of the disclosure officer on its content. Secondly, these pre-printed forms tend to contain a long list of documents that are identified only by a form number and, as stated in the JOPI, this reference may be meaningless to anyone outside the local police service. Thirdly, the inexperienced disclosure officer may consider the pre-printed list to be

exhaustive and fail to list other items that are clearly relevant. Fourthly, we were told of cases where the disclosure officer failed to delete from the schedule items that did not exist in the particular case. The defence may be misled into believing that the documents do exist, and even when the correct position is revealed they are likely to remain suspicious of the integrity of the disclosure decisions.

4.37 A contrary view was put to us by a member of the Bar, who thought that a pre-printed list prompted disclosure officers to deal with all commonly generated material and helped to prevent obvious omissions.

4.38 The accurate completion of the MG6C schedule is fundamental to the proper application of the disclosure provisions. The integrity of the system must be supported by the methods used to comply with its requirements. If pre-printed schedules are to be used, we consider that local quality checks must be instituted. Any significant adverse findings should lead to their use being stopped.

4.39 We recommend that the CPS examines with ACPO means of reducing the proportion of defective MG6C schedules submitted to the CPS. This should include the setting of targets using our findings as an initial benchmark.

4.40 At one site, the police make use of a wall chart and desktop guidance, issued after recent consultation with the CPS locally. These detail the sort of items that fall within the definition of unused material, which schedule they should be put on and instructions about what detail to provide. We noted that at this site CPS staff have fewer concerns about the quality of the MG6C schedules than we found elsewhere. The Metropolitan Police in conjunction with the CPS produced a similar type of chart before the CPIA was introduced. We commend this approach and would like to see this taken forward at a national level between the CPS and ACPO, and adopted by the police and CPS within every Area.

4.41 We recommend that the Director of Policy, in conjunction with ACPO, devises a chart, for wall or desktop use, which provides clear guidance about unused material, its inclusion on schedules, and descriptions to be provided, to assist disclosure officers and prosecutors in achieving national consistency.

The description of material listed on the non-sensitive unused material schedule

4.42 The JOPI states at paragraph 2.56 that, **"The description should contain sufficient information to enable the CPS to make an informed decision as to whether or not it ought to be considered by the prosecutor for disclosure**". The importance of this requirement is emphasised in the JOPI by the use of bold lettering.

4.43 The JOPI also provides that inappropriate use of generic listing is likely to lead to requests from the CPS and the defence to see the items. Inadequate descriptions in a schedule copied to the defence may result in the defence making application to the court to be allowed access to the material itself, and result in orders to disclose material which may well on examination neither undermine the prosecution case nor assist the defence.

4.44 In too many cases, disclosure officers did not provide any description of the material listed, nor did prosecutors request that schedules be amended to enable them to make an informed decision. In most Areas we found little evidence of liaison about disclosure issues at senior management level in the past that would have been necessary to secure improvements. However, we were told of new initiatives in a

number of the Areas we visited which included joint discussions or training with police.

4.45 One hundred and thirty nine of the 239 incorrect schedules in our file sample contained insufficient detail (ie. 22% of the total file sample). The prosecutor asked the police to provide further detail in only four. In all four cases, further detail was provided. We consider that a schedule contains insufficient detail if the prosecutor cannot determine from the description on the face of the schedule whether the document should be considered for disclosure at either the primary or secondary stage.

4.46 At one site, we are pleased to note that, following consultation between the police and the CPS, schedules are far more detailed than was previously the case. At another site representatives of the CJU told us that they were working towards putting more detail on the schedules.

4.47 At one site the description of a witness statement included reference to what it related to, such as "arrest" or "taking of a photograph showing injuries", whereas at another site there was no such detail.

4.48 At all of the sites that we visited CPS staff expressed concern about the lack of detailed information on the schedule. We share this concern, but note both from our file examination and on-site interviews that it is rare for prosecutors to request more detail. If prosecutors are not provided with detailed schedules, and do not inspect items listed on the schedule, then they have to rely entirely on the disclosure officer to identify material which might undermine the prosecution case.

4.49 A case in our file sample highlights our concern. The defendant was charged with an offence of assault against a police officer. The MG6C schedule listed correctly as unused material the existence of a closed circuit television (CCTV) recording of the defendant while in the police station. The disclosure officer did not provide any detail of what was on the recording, nor was it identified as material which might undermine the prosecution case. The prosecutor did not request sight of the video at the primary disclosure stage. The defence were provided ultimately with a copy of the recording, which was played at the trial. The trial Judge commented adversely on what was shown on the recording, saying that it went to the credit of the police officer. The defendant was acquitted. We could not find any evidence on the file to show that the prosecutor had, at any stage, viewed the recording. Whilst we do not say that it was wrong for the case to have proceeded, the video recording should have been considered as part of the overall review of the sufficiency of evidence. In any event, it is clear that the prosecutor should have viewed this material at the primary disclosure stage in order to make an informed decision about whether it might undermine the prosecution case. It was certainly capable of having an adverse effect upon the prosecution case and so should have been disclosed to the defence.

4.50 The degree of detail necessary for prosecutors to make "informed decisions" is at the heart of the Code of Practice. We found that the working of the whole system of disclosure is based largely on decisions being made by prosecutors on the basis of the contents of the MG6C schedule alone, rather than on personal examination of the documents listed. Much of the concern expressed to us centred on whether the decisions of prosecutors were in any sense "informed decisions". It is highly probable that laxity of the kind described in the preceding paragraphs (7.9% of cases in our sample proceeding with material omitted from schedules and 22% of schedules containing insufficient detail) has been a major factor in the cases

identified by the Criminal Bar Association in its survey where there has been failure to make proper disclosure.

4.51 We recommend that the Director of Policy seeks to agree with ACPO standards for the preparation of schedules so that material is described in sufficient detail to enable the prosecutor to make an informed decision about primary disclosure.

4.52 We recognise that for prosecutors to inspect every item listed on the MG6C schedule would have very substantial resource implications and would go against part of the purpose of the CPIA. If, however, prosecutors are to achieve the CPS national objective to comply scrupulously with the duties of disclosure, they must satisfy themselves in every case that all the documents listed on the MG6C schedule are described sufficiently. If documents are described adequately the JOPI envisages that there will be no need for the prosecutor to inspect them to determine whether or not they should be disclosed. If they are not described adequately, prosecutors cannot comply with their duty of disclosure unless they inspect those documents. Prosecutors told us that they do not have time to do so. This is the prosecutor's dilemma.

4.53 We have come to the view that details of the contents of certain types of document cannot be adequately described on the MG6C schedule so as to provide sufficient information to the prosecutor to make an informed decision about whether or not they should be disclosed. As a consequence this means the prosecutor should always inspect them. An example might be a tranche of correspondence or documents relating to the business affairs of a victim in a fraud case.

The crime report and log of messages

4.54 The crime report and log of messages are the police documents that in many cases contain the first details or information about the offence under investigation; sometimes they originate from individuals who subsequently become witnesses. The crime report is a compilation of the various steps in the case, starting off with the initial complaint. The log of messages is a composite log of messages passing between police officers, usually contained on a computer system. Confusingly, there is no common police terminology for these forms. In some areas, the crime report is known as the crime complaint. The Metropolitan Police refer to the log of messages as the computer aided despatch. In other areas a similar compilation may be called, for example: the command and control log, FWIN, IRIS or serial. In this report we refer to these documents as the crime report and log of messages.

4.55 In some cases, the content of these documents will be relevant to the prosecutor's consideration of whether there is a realistic prospect of conviction in accordance with the Code for Crown Prosecutors. They may contain information about the offender (the first description must be provided in any event pursuant to the Code of Practice), which the prosecutor will wish to consider if identification is likely to be in dispute. They will often contain the first account of the circumstances of the offence. The content of these documents may be at variance with that contained in subsequent witness statements. The differences may affect the sufficiency of the evidence and consideration of them will therefore be an integral part of the prosecutor's assessment of the evidence.

4.56 These are also the documents that defence practitioners consider are most likely to contain material that might undermine the prosecution case or assist the defence. We found, unsurprisingly, that these are the two classes of document most frequently requested by the defence.

4.57 The MG6C schedule was often silent about what these documents contained. The disclosure officer would merely list them, without providing any detail. We could not find any assistance in the JOPI as to how items such as the crime report or log of messages could be described in sufficient detail so as to enable a prosecutor to make an informed decision as to whether or not the items meet either of the tests for disclosure.

4.58 We were, therefore, interested to find out how often the police provide copies of these documents to the prosecutor, and what action the prosecutor takes when they are not provided with the file. We also considered the prosecutor's response to defence requests for disclosure.

4.59 The crime report was listed on the MG6C in 476 of the 587 cases where the nature of the offence would have resulted in the document being created. The log of messages was listed in 386 of the 550 cases where such a document or record would have been expected to be created.

4.60 The police provided a copy of the crime report in 183 of the 587 cases. In 33 of the 183 cases, the prosecutor had specifically asked the police for a copy. The log of messages was provided in 159 of the 550 cases, the prosecutor having asked for it in 39 of the 159 cases.

4.61 At one site, there is a local agreement with the police that these documents are automatically provided with the file. At other sites, the police only provide copies of the documents following a request by the prosecutor. At the site where the police automatically provide these documents, the prosecutor will supply a copy to the defence on request.

4.62 A copy of the crime report was supplied to the defence in 91 of the 183 cases where the police provided the prosecutor with a copy. In 25 cases where the crime report was supplied to the defence there was material which might have undermined the prosecution case or assisted the defence, although this material was not necessarily included in the crime report itself.

4.63 Therefore, in at least 66 cases the crime report was supplied to the defence even though the statute did not require it. In line with this discretionary disclosure we considered that the crime report should have been sent to the defence in an additional 13 cases.

4.64 The copy of the crime report was supplied at the primary disclosure stage in 45 cases and at the secondary disclosure stage in 34 cases. It was rare for the prosecutor to supply a copy of the document before the provisions of the CPIA applied, and we came across only two cases. In ten cases, we could not ascertain when the document was supplied to the defence.

4.65 A copy of the log of messages was supplied to the defence in 82 of the 159 cases where the police provided the prosecutor with a copy. In 23 cases where the log of messages was supplied to the defence there was material which might have undermined the prosecution case or assisted the defence, although this material was not necessarily included in the log of messages itself.

4.66 Therefore, in 59 cases the log of messages was supplied to the defence notwithstanding the absence of any statutory requirement to do so. In line with this discretionary disclosure we considered that the log of messages should have been sent to the defence in 13 cases (some of these were those referred to in paragraph 4.63).

4.67 The log of messages was supplied to the defence at the primary disclosure stage in 35 cases and at the secondary disclosure stage in 32. There was no case in our sample where it was disclosed before the primary stage. In 15 cases, we could not ascertain when the document was supplied to the defence.

4.68 In most cases, the crime report and log of messages do not contain material that clearly might undermine the prosecution case or assist the defence. The CPIA does not require them to be provided automatically to the defence upon request, in contrast to the defendant's entitlement to a copy of his custody record under the Police and Criminal Evidence 1984. There would, however, be substantial resource implications for the prosecution if copies of these documents were to be provided in every case, or upon request regardless of whether any material which might undermine/assist was revealed. These documents often contain some material, for example witnesses' addresses, which need to be edited out. Automatic supply could involve a substantial amount of extra work by either the police or the CPS.

4.69 Interviewees outside the CPS were almost universal in their view that prosecutors should consider these documents. They were divided on what they thought the defence should receive. Some are of the view that this class of document should be supplied in every case. Others, consider that the CPIA should be strictly applied and copies provided only if and when either of the two disclosure tests is satisfied.

4.70 A third view was expressed to us that falls between the two extremes. This was that in every case, at the primary disclosure stage, the prosecutor should consider the crime report and log of messages, and copies of the documents should be supplied to the defence if the prosecutor, having regard to the nature of the case, considers that they contain information about which the defence should be made aware.

4.71 CPS staff were divided on what they consider to be the best approach. Some prosecutors confirmed that they welcomed automatic sight of these documents. They told us that they often give important pointers to the evidence and aid consideration of other unused material.

4.72 We see merit in the suggestion that the prosecutor should consider these documents in every case where the CPIA applies. They can only make an informed decision about whether they must be disclosed if they have considered the detail in the documents. It is rare for this material to be described sufficiently on the MG6C so as to enable the prosecutor to make that decision without sight of the documents. In fact we go so far as to consider that the content of this type of document can very rarely be described both concisely and adequately on the MG6C schedule. At best, a specific assurance can be provided by the disclosure officer that nothing in the documents conflicts with the evidence in the case.

4.73 In our view, it is only if prosecutors examine the documents that they can make an informed decision about whether they should be disclosed to the defence.

4.74 We recommend that the Director of Policy should consider with ACPO an amendment to the JOPI and the Manual of Guidance which would have the effect that in all cases a copy of the crime report and log of messages is provided with the MG6C.

4.75 We consider that the view, informed by experience, can be held that the contents of crime reports and logs of messages will almost inevitably be material which might be expected to assist the accused's defence. It will therefore satisfy the test for secondary disclosure if applied fairly and generously, following a reasonable defence statement. This would be preferable to the variable practice we referred to in paragraphs 4.63 and 4.66.

The quality of the prosecutor's endorsement on the schedule of non-sensitive unused material

4.76 The quality of the prosecutor's endorsement is the best evidence of the quality of the attention given by the prosecutor to the question of disclosure. The JOPI states that in all cases the schedule should be signed and dated by the prosecutor. No further endorsement is required on the MG6C if the prosecutor considers that there is no material to disclose, or to be inspected by the defence. If the prosecutor considers that there is material to be disclosed or inspected he must endorse this fact on the schedule.

4.77 We found that prosecutors do not always sign and date the schedule to show when they considered its content. In 103 out of 615 cases, in which it was possible to ascertain whether the MG6C schedule was endorsed, there was no endorsement at all by the prosecutor on the schedule. This is a matter of considerable concern.

4.78 In a further 124 cases the schedule was not endorsed correctly. In some cases in our file sample there was no date on the schedule to indicate when the prosecutor had considered primary disclosure. In others the prosecutor failed to endorse the schedule to indicate that certain items which the police had marked as unused had become evidence. In 16 cases the schedule was either not provided by the police or we could not find a copy on the file.

4.79 We noted that some prosecutors go beyond the limited procedures set out in the JOPI. We saw examples of schedules where prosecutors had endorsed their opinion on the face of the document that there was no material which might undermine the prosecution case. At one site, prosecutors have been told to endorse the schedule itself in all appropriate cases.

4.80 We commend this approach, which shows that the prosecutor's decision at the primary stage has been more than a mechanical task. Nevertheless, the practice recommended in the JOPI is that this should be endorsed on the file. We firmly believe that the prosecutor should also record the reasons for his decision on the file because this adds intrinsically to the quality of the decision by focusing the mind of the prosecutor on all aspects of the material and the test.

4.81 In the light of our comments, the CPS will wish to consider whether the JOPI should be amended to make it clear that a record should be made of all decisions in relation to disclosure, including (in appropriate cases) the prosecutor's opinion that there is no material which might undermine the prosecution case. We consider that as a matter of good practice a full endorsement should be made, together with a record of the reasons for the decision on the file. We commend the practice we have seen in some Areas where a separate disclosure log is kept on a disclosure folder and this is used to record decisions.

4.82 We recommend that prosecutors endorse their opinion whether any material revealed might undermine the prosecution case, and record the reasons for it on the file, or upon a disclosure record sheet within the file.

The provision of the disclosure officer's report and certificate at the primary disclosure stage

4.83 The Code of Practice requires the disclosure officer to draw the attention of the prosecutor to any material an investigator has retained which may fall within the test for primary prosecution disclosure. The JOPI provides that the disclosure officer should identify the material on a form

known as the MG6E. The material should be identified by reference to its entry on the MG6C, or the MG6D schedule if the material is sensitive (see Chapter 6), or otherwise if not listed on a schedule.

4.84 By Paragraph 9.1 of the Code of Practice the disclosure officer is required to certify to the prosecutor that to the best of his knowledge and belief, all material which has been retained and made available to him has been revealed to the prosecutor. The Code of Practice does not prescribe how the disclosure officer should convey the certificate to the prosecutor. The JOPI provides that the certificate should be contained within the MG6E report. A further MG6E report is completed in a similar way at the secondary disclosure stage. We discuss this further at paragraphs 5.39 to 5.42.

4.85 As the MG6E report contains the certificate referred to in the preceding paragraph, it is required in every case to which the CPIA applies whether or not the disclosure officer considers that there is material which might undermine the prosecution case.

4.86 In spite of the instructions we found that an MG6E form is not provided in every case, and prosecutors do not always request the police to provide one.

4.87 The police correctly submitted the report, without prompting, in 574 of the 623 cases in our file sample in which it was possible to ascertain whether or not a report was submitted. In 16 of the 49 cases where the report was not provided at the appropriate time the prosecutor requested one. The police ultimately provided the report in 11 of the 16 cases. In one case the police subsequently submitted a report without prompting. In 37 of the 623 cases (5.9%) we did not find any evidence that a report had been submitted.

The quality of the disclosure officer's combined report and certificate

4.88 In over a third of the cases in our file sample the MG6E form was not filled in correctly (241 of the 586 cases). The following table illustrates the defects we found.

Nature of defect	Number
Referred to evidence	10
Not enough detail	2
Material omitted	27
Certificate not signed	5
Report did not indicate whether submitted at primary or secondary stage	157
Other	40
Total	**241**

4.89 In well over a half of the cases the disclosure officer had not endorsed the report to indicate whether it was being supplied at the primary disclosure stage, or the secondary disclosure stage. We have considered the guidance given in the JOPI, and the instructions on the face of the report. We consider that there is a lack of clarity about what is required of the disclosure officer, about the deletions and insertions to be made, when he considers that there is no material which may undermine the prosecution case.

4.90 We are concerned to note that in 27 cases (4.3% of the total sample) material which might undermine the prosecution case, and should therefore have been included on the report, was omitted. We discuss this in detail at paragraphs 4.100 to 4.101.

4.91 In ten cases, the disclosure officer listed material that was to be used as evidence in the case. CPS staff confirmed that in some cases, where the defendant denies the offence, the record of interview is listed on the report. This displays a substantial misunderstanding of the system on the part of those disclosure officers.

4.92 We dealt with the certificate required by the Code of Practice in paragraph 4.84. It is of a limited nature and does not relate to whether material might be caught by the test, only that it has been revealed to the prosecutor. The JOPI and the combined report form MG6E do not require the disclosure officer to confirm positively that he has considered whether the unused material might undermine the prosecution case. This is in contrast to the requirement at the secondary stage to "mention" on the MG6E report that there is no material which might assist the defence.

4.93 We found that disclosure officers adopt varying practices in cases where they consider that there is no material which might undermine the prosecution case. Some leave the MG6E report blank; others endorse it with the word "none" or "nil"; others make a fuller endorsement, indicating that in their opinion there is no material which might undermine the prosecution case.

4.94 At one site, disclosure officers are required to endorse on the MG6E report that they have considered all the unused material and, in appropriate cases, to confirm that in their opinion there is no material which might undermine the prosecution case. We consider this to be good practice.

4.95 Prosecutors are essentially forming opinions on the basis of schedules of documents and the implication that disclosure officers have followed the Code of Practice.

4.96 We suggest that the Director of Policy should pursue with ACPO whether the JOPI should be amended, to make it a requirement for disclosure officers to endorse on the report:

- **that they have considered all the material listed on the MG6C and MG6D (and other material if retained and not listed); and**
- **that, in their opinion, there is no material which might undermine the prosecution case (where this is the position).**

4.97 We discuss at paragraph 5.46 the existing obligation of the disclosure officer to endorse the report at the secondary stage.

The quality of decision-making at the primary disclosure stage

(i) identification of material which might undermine the prosecution case on the disclosure officer's report

4.98 Correct identification of material which might undermine the prosecution case at the primary disclosure stage is essential if the requirement to comply scrupulously with the disclosure provisions is to be achieved.

4.99 In 48 cases (7.6%) in our file sample the disclosure officer revealed correctly on the MG6E report material that might undermine the prosecution case. The following table illustrates the nature of the material identified by the disclosure officer.

Nature of material	Number
Witness's character	14
Conflicting statement	14
Identification	8
Other	6
Forensic	3
Medical	3
Total	**48**

4.100 On our view of the issues, we considered that there were a further 27 cases in which potentially undermining material was omitted from the

MG6E report. This represented 4.3% of the cases in our file sample. In six of the 27 cases the disclosure officer had identified some, but not all, of the undermining material. In the other 21 cases the MG6E report was silent as to the existence of material which might undermine the prosecution case.

4.101 The prosecutor raised the issue with the police, or asked them to correct the report in five of the 27 cases. In some of these 27 cases the material which might undermine the prosecution case was revealed to the prosecutor but not until after the primary disclosure stage had passed. In particular we found this to be the case where the material consisted of the previous convictions of witnesses.

4.102 At one site, we were told that prosecutors call up documents for examination if they are not sure whether they might undermine the prosecution case. But overall we found that it is rare for prosecutors to examine material that the disclosure officer has not identified as material which might undermine the prosecution case. We have referred at paragraphs 4.44 to 4.51 to our concerns about the lack of detail on the MG6C schedule. In the absence of detail or the calling up of documents for examination, we are concerned that prosecutors generally accept without question that there is no material which might undermine the prosecution case other than what is revealed on the MG6E report. At one site, prosecutors told us that they rely entirely on the disclosure officer's assessment.

4.103 At more than one site, CPS staff told us that they are concerned about whether disclosure officers are identifying correctly material which might undermine the prosecution case. In particular, they are not satisfied that "negative" material is being identified. By this we mean material that either indicates that someone else was responsible for the offence, or does not support the prosecution case against the defendant. For example, fingerprint evidence that reveals that another person has had contact with a package of controlled drugs, or that examination has failed to prove the defendant's fingerprints are on the package. We discuss this further in Chapter 7. Some prosecutors told us that they are also concerned that the police do not follow up lines of enquiry that might reveal material which might undermine the prosecution case. This is particularly important in circumstances where the effect might be to provide support for an innocent explanation (eg. one put forward by a suspect when interviewed).

4.104 Prosecutors must make an informed decision if they are to determine correctly whether material might undermine the prosecution case. It is not sufficient simply to rely on what the disclosure officer has entered on the MG6E. We note that the JOPI provides that the prosecutor should actively consider whether it is necessary to see the item described on the schedule, so as to be able to make a decision on whether the material requires disclosure to the accused. An informed decision can only be made if prosecutors examine all the material that they have any cause to suspect might undermine the prosecution case. We consider that to comply scrupulously with the disclosure provisions demands nothing less than this level of inspection, and furthermore we consider it to be a necessary part of the duty of continuing review under the Code for Crown Prosecutors in any event.

4.105 **We recommend that prosecutors should be more proactive in scrutinising the MG6C to identify that which might undermine the prosecution case, with a view to ascertaining whether any further material may exist which is not recorded on the MG6E but which ought to be.**

(ii) disclosure of material which might undermine the prosecution case

4.106 The prosecutor applied the primary disclosure test in 582 of the 631 cases in our file sample.

4.107 The prosecutor actually disclosed material which might undermine the prosecution case in 42 of the 48 cases where it was revealed by the disclosure officer on the MG6E report (see paragraph 4.99).

4.108 There were three cases where in the opinion of the disclosure officer (with which we agreed) material should have been disclosed, but this had not been done. These constitute 0.5% of the sample. Whilst small, this is of great concern and we analyse it further below.

4.109 In a further three cases we were unable to tell from the file whether the material had been disclosed to the defence.

4.110 Some external interviewees expressed dissatisfaction with the amount of material disclosed at the primary stage. Our findings show that material which might undermine the prosecution case was actually disclosed in 42 of the cases (6.7%) in our sample. The percentage should have been 7.1% to take account of the three cases mentioned above where we considered that there should have been disclosure. Material may have been disclosed in a further three cases, which would increase the percentage to 7.6%. There is not, so far as we are aware, any previous data or information which would indicate whether this accords with, or is above or below the norm, as to what might reasonably be expected. We have no means of knowing in how many cases disclosable material was not seen by the prosecutor.

(iii) the prosecutor's decision

4.111 We applied a strict test when determining whether the prosecutor's decision at the primary stage was wrong, that is, that it was clearly wrong. (Some may consider this too generous to the CPS but the Inspectorate has not so far identified an alternative test which does not have the disadvantage of being unduly subjective.) Furthermore, in answering the question we considered only that material and information that was apparent on the face of the file when the duty to make primary disclosure arose. We excluded from our consideration material which might undermine the prosecution case that was revealed by the police after the initial primary disclosure stage. We also excluded those cases where poor file management made it impossible for us to determine with any certainty whether primary disclosure had been dealt with.

4.112 We have not taken into account 39 of the 631 cases (6.2%) in our file sample where there was no evidence that formal primary disclosure had been undertaken.

4.113 Nor did we take into account the four cases in which the prosecutor's letter to the defence, indicating that there was no material which might undermine the prosecution case, was sent before the MG6E report was received from the police. This gives the impression that the prosecutor regards the duty to comply with the requirements of the CPIA as nothing more than a mechanical task that does not require an informed decision to be made.

4.114 The decision at the primary disclosure stage was in our opinion clearly wrong in three of the 631 cases in our file sample (see paragraph 4.108). In these cases, no primary disclosure took place. In a further three cases the file indicated clearly that there was some material that might undermine the prosecution case. Prosecutors should have considered that material before informing the defence of their decision at the primary disclosure stage. This represents a very small

percentage (1%) of the total case sample but it must be considered against the CPS objective to comply scrupulously with the duties of disclosure.

4.115 We have also referred at paragraph 4.100 to 27 cases where there was no evidence of the prosecutor considering material that should clearly have been included on the MG6E because it might undermine the prosecution case. If these are added to the numbers of non-disclosure of material which might undermine the prosecution case then 33 cases were the subject of non-disclosure, that is 5.2%.

4.116 These figures must also be viewed against the background of our general concerns about the lack of detail provided to the prosecutor about the items listed on the MG6C schedule. Consideration of nothing more than a list of documents, some of which are meaningless without further explanation, did not assure us of the integrity of the system.

4.117 In addition to our own findings, we were told of a number of specific cases in which the prosecutor appeared either to have made a wrong decision, or to have applied an unreasonably strict interpretation of the test. For instance, in one case a witness at the scene (who was an acquaintance/friend of the defendant) gave a mixture of evidence. Some parts of his evidence could be thought to support the defendant's claim of self defence, and other parts of which supported the prosecution case that the defendant and victim had clearly disengaged before the defendant undertook a prolonged violent attack upon the victim. The prosecutor's decision at primary disclosure was that the statement was not material which undermined the prosecution case, although he did not include the evidence in the prosecution case. (In the event the witness gave evidence for the prosecution.) At the primary disclosure stage the prosecutor must have been trying to tread a very fine line between that which did not undermine the case for the prosecution, but did not support it sufficiently to be used.

4.118 Police have a duty under the Code of Practice to retain material which may be relevant to the investigation. Material may be relevant if it appears that it has some bearing on any offence under investigation or any person being investigated, or the surrounding circumstances of the case unless it is incapable of having any impact on the case. The duty of the prosecutor is then to apply the test under the CPIA. Our interpretation of all the files seen and evidence gathered is that prosecutors are tending to apply the test under the CPIA too strictly. They appear to be determining whether the material undermines the case for the prosecution. They should be following the guidance provided in their training and in the JOPI. The test for primary disclosure is satisfied by material which **might** (our emphasis) undermine the prosecution case. The guidance in the JOPI provides that generally any material that has an adverse effect on the strength of the prosecution case ought to be disclosed at the primary stage. This will include anything that goes toward an essential element of the offence charged and which points away from the defendant having committed the offence with the requisite intent. Paragraph 7.3 of the Code of Practice provides examples, and the JOPI provides that anything that is inconsistent with an essential part of the prosecution case, or could weaken it in a significant way, will amount to undermining material requiring disclosure to the defence.

4.119 Our overall finding is that whilst the quality of decision-making is better than some anecdotal evidence might suggest, there is clearly no room for complacency. Urgent and positive action must be taken to eradicate these cases of failure to or wrong decision not to disclose material, and

to reverse the tendency of prosecutors to apply the tests too strictly or narrowly.

4.120 **We recommend that the DPP should consider issuing further guidance about the application of the statutory tests to be considered and applied by prosecutors in relation to disclosure, whether he does so may depend on the content of the proposed Attorney General's guidelines.**

The timing of primary disclosure

4.121 Section 1 of the CPIA sets out the triggers for primary disclosure. The two principal ones are when the defendant pleads not guilty in the magistrates' court or is committed to the Crown Court for trial. Section 17 of the CPIA restricts the use that the defendant can make of unused material, other than for the purpose of the criminal proceedings for which it is disclosed, provided that it is served after the statutory requirements are triggered.

4.122 At more than one site, concern was expressed by prosecutors and defence solicitors about the timeliness of disclosure in summary cases. We were told that, in some cases, the late provision of the unused material schedules by the police results in primary disclosure being provided on the day of trial. At one site, this has led to an increase in adjourned trials because the defence want time to consider whether to serve a defence statement.

4.123 We recognise that magistrates' courts want to list contested cases as quickly as possible. At some sites, the period of time between when a not guilty plea is entered and the date of trial is less than four weeks. This can make it difficult for the prosecutor to comply with all the requirements of the CPIA before the date of the contested hearing.

4.124 If prosecutors are to comply scrupulously with the disclosure provisions in summary trial cases it is likely that there will be an increase in applications to adjourn contested hearings. We examined one file, whilst on-site, in which the prosecutor had discontinued summary proceedings on evidential grounds, because the police had not provided the schedules before the trial date. We have concerns about this approach, and in the event it appeared that the schedules were supplied on what would have been the day of trial. It is right for prosecutors to stress the importance of compliance with the disclosure provisions. However, we consider that the correct approach is to apply to adjourn the proceedings, if either the schedules are not provided by the police, or if the prosecutor is unable to consider and deal with disclosure properly on the day at court.

4.125 In Crown Court cases, interviewees told us that, generally, primary disclosure is dealt with before the PDH. Our file examination confirmed this. We did, however, see some cases where primary disclosure was not undertaken in sufficient time for a defence statement to be served by the date of the PDH. We also examined a few cases where it was done after the PDH. This leads to a delay in setting the agenda for the trial and reduces the effectiveness of the PDH.

4.126 CCPs will wish to satisfy themselves that primary disclosure is made timeously, to allow the defence to prepare and serve a defence statement and for the consideration of this before the PDH. We discuss further the timing of secondary disclosure at paragraphs 5.67 to 5.71.

4.127 **We suggest that CCPs ensure that primary disclosure is made timeously, to allow the defence to prepare and serve a defence statement, and for the consideration of this before the PDH.**

4.128 In the course of our file examination, we found that in some cases it was not possible to ascertain when primary disclosure had been dealt with. The standard form letters that are sent out by the CPS to the defence were often undated or missing from the file. Some CPS offices have devised checklists that the prosecutor or caseworker should endorse with what type of unused material letter is sent, and when it is sent. These may be contained within a summary trial preparation form, or endorsed on an unused material folder, or stapled to a file jacket. Whilst we commend any system which provides a means of easily accessing necessary information at court, we found that the checklists were too frequently only partially completed, if at all.

4.129 We also found that in some cases the letter dealing with primary disclosure was dated at the time the committal papers were prepared, which was not usually the time at which it would have been served. CPS guidance provides for the service of the primary disclosure letter immediately after committal. The date on the letter may not therefore assist in determining when primary disclosure is made. It can lead to uncertainty about when the time limit for serving the defence statement expires. At one site, we were told that in some cases, prosecutors had to accept that they could not say when primary disclosure was made.

4.130 In previous Branch inspection reports and thematic reviews we have expressed concern about the quality of file endorsements. We have similar concerns about the dating of unused material correspondence.

4.131 **We recommend that in all cases, letters are correctly dated when sent, and files contain a record of the date on which primary disclosure is made.**

Previous convictions of witnesses and disciplinary matters recorded against police officers

4.132 The CPS issued on 8 September 1999 instructions to staff about the law on the disclosure of the previous convictions of prosecution witnesses. These instructions reflected advice from First Senior Treasury Counsel as to the effect of the decision of the Court of Appeal in Guney [1998] 2 Cr App R 242 and the relationship between the common law (Guney was tried in 1996) and the CPIA. The instructions were set out in a casework bulletin and state that the previous convictions of all prosecution witnesses, save for minor road traffic matters, must be disclosed to the defence at the same time that primary disclosure is dealt with. Prosecutors do not need to make an assessment whether they are considered to be undermining or assisting under the provisions of the CPIA. The common law, as declared in Guney, regards previous convictions as inherently likely to have that effect. Any convictions known to the prosecution will therefore be disclosed, even if spent under the provisions of the Rehabilitation of Offenders Act 1974.

4.133 Our file sample was provided before the issue of the casework bulletin. We therefore examined files against the criteria set out in the JOPI and applicable at the material time rather than the September 1999 bulletin. We consider that our findings, particularly where they relate to the revealing of previous convictions to the prosecutor, may still be relevant, even if a practice of blanket disclosure has now been adopted. We comment further about this practice at paragraphs 4.147 to 4.150.

(i) Criminal record office checks: CPSI findings

4.134 Paragraph 7.3 of the Code of Practice requires the disclosure officer to provide the prosecutor

with any material casting doubt upon the reliability of a witness. The guidance in Annex B of the JOPI states clearly that previous convictions are unused material that may fall within one or both tests for prosecution disclosure. However, the JOPI only requires the police to carry out a Criminal Records Office (CRO) check if a witness falls into one of five categories. Those categories are:

- key witnesses irrespective of whether their evidence is likely to be disputed;
- witnesses whose accounts are or are likely to be disputed;
- witnesses who might be classified as accomplices;
- witnesses whose accounts are challenged in the defence statement; and
- at the prosecutor's request.

4.135 We found that CRO checks were not always carried out. In some cases, the prosecutor had to request the police to carry out checks on witnesses that fell into the first four categories. We found evidence on the face of the file that the appropriate checks were made in only 228 of the 469 relevant cases. In 62 of those 228 cases the prosecutor had to request the police to carry out a CRO check. CPS managers will be concerned by these findings, especially in the light of the revised guidance.

4.136 In 110 of the 228 cases the CRO check revealed that one or more relevant witnesses had previous convictions.

4.137 In 241 of the 469 relevant cases, we did not find evidence that any checks had been made on the antecedent history of relevant witnesses. The list of witnesses, referred to as the MG9 form, has a column that should be endorsed with whether a CRO check has been carried out against each witness listed. The MG9 does not, however, require the maker of the entry to specify whether a check revealed any previous convictions, nor does it allow space for the result of any record of previous convictions to be included. Our file examination revealed, and CPS prosecutors and caseworkers confirmed, that often the MG9 is silent as to whether the appropriate checks have been carried out.

4.138 The MG6 form has a pre-printed question that asks whether any of the prosecution witnesses have previous convictions. In addition, the JOPI requires the disclosure officer to list on form MG6 details of witnesses who have any previous convictions or cautions, and to provide the prosecutor with forms detailing them.

4.139 The use of two different forms, one to reveal whether a check has been carried out and the other to give details of any convictions/cautions revealed, does not appear to be a satisfactory way of ensuring that the necessary information is conveyed to the CPS.

4.140 The CPS will wish to consider in conjunction with the police what amendments should be made to the instructions in the JOPI in the light of the casework bulletin and our findings. In particular, there is now an apparent conflict between Annex B to the JOPI and the instructions contained in the casework bulletin. The forms should also be amended.

4.141 At more than one site, we were told that the police only carry out the appropriate CRO checks if requested by the prosecutor. In some cases, the request is made after the issue is raised by the defence in correspondence. Ensuring that the appropriate checks are made is now of even greater importance with the change in CPS guidance.

4.142 **We recommend that CCPs should consult with the police to ensure that a timely CRO check is made on the antecedent history of all prosecution witnesses.**

(ii) Previous convictions: CPSI findings

4.143 In 43 of the 110 cases where previous convictions were revealed we considered, applying the then accepted approach, that they might be undermining. They were disclosed in 30 of the 43 cases. In the remaining 13 cases, we did not find any evidence on the file that they had been disclosed. In view of our comments about the quality of endorsements, we cannot discount the possibility that they were disclosed either before the hearing or at the Crown Court on a counsel to counsel basis. At two sites, we were told that the latter practice is adopted in some cases.

4.144 In a further 33 cases non-undermining previous convictions were supplied to the defence.

4.145 In accordance with the revised practice the previous convictions would now fall to be disclosed in all 110 cases.

4.146 The officer in charge of the case or a member of the CJU may carry out the check on the witness's antecedent history. We found that it was more likely to be a member of the CJU, who by the time the check was made would have charge of the case papers. In the light of the instructions in the casework bulletin, there will be no need for either the disclosure officer or the prosecutor to consider whether the material revealed might undermine/assist, as the information will be disclosed automatically.

(iii) The disclosure of previous convictions and other information about character

4.147 Our consideration of these issues identified an area of particular difficulty where guidance or instructions to CPS staff is desirable. The advice from First Senior Treasury Counsel referred to above (paragraph 4.132) also considered the possible effect of the judgment in Guney as regards cautions and, in relation to certain categories of witness, professional disciplinary findings. There is no consensus as to the extent of the prosecutor's obligation in this regard and there would be practical problems associated with compliance with a wide obligation. Although we appreciate the complexity of the issues, that makes it even more important that there should be guidance for CPS staff.

4.148 It is clearly necessary that the law and practice on disclosure should strike the right balance. In view of the number of instances we identified where convictions which ought to have been disclosed had not been (see paragraph 4.143 above), we can see the attraction and advantages of a straightforward and fail-safe procedure which ensures disclosure even if the provisions of the CPIA are not considered to require it. Its effectiveness, however, is still dependent on the police having in fact made the necessary checks. But we are also concerned that the potential disadvantages of universal disclosure should not be overlooked. A high proportion of the population, especially males, has previous convictions often incurred at a relatively young age. Disclosing past convictions merely because that person happens to have become a victim of or witness to a crime may be unfair if that disclosure does not appear likely either to bring out a weakness in the prosecution case or assist the defence. If the view of the law in relation to disclosure of convictions extends to cautions then an individual who accepted a caution many years ago in the belief that the matter was then concluded might feel misled when it is disclosed to the accused.

4.149 We do not underestimate the importance of the criminal courts having available all the information necessary to ensure just outcomes. However, this point raises both civil liberties and human rights issues and also the risk that victims and witnesses might be deterred from giving evidence. The common law and CPIA provide some protection from misuse of disclosed information, but this is unlikely to be

effective where an individual who has become a witness simply finds misdemeanours long ago "spent" under the Rehabilitation of Offenders Act 1974 becoming common knowledge amongst neighbours and colleagues. This may be the consequence of disclosure even if the information has not been mentioned in any proceedings. We think these issues merit further consideration, especially in view of the increasing proportion of the population with previous convictions and/or cautions and the growing sophistication of criminal record databases. We are mindful too that rules of professional conduct mean that solicitors and counsel cannot accept such sensitive information on the basis that they will not pass it to their lay client.

4.150 **We recommend that the Director of Policy:**

- **supplements the instruction and guidance given in the September 1999 Casework Bulletin with suitable instructions or guidance relating to the disclosure of cautions and disciplinary findings; and**
- **monitors the practical effect of the disclosure of previous convictions of witnesses. This should be done in conjunction with the inter-departmental working group set up by the Home Office to evaluate the operation of the legislation on disclosure.**

(iv) Disciplinary findings against police officers

4.151 The JOPI sets out the procedure for revealing to the prosecutor the existence of disciplinary findings of guilt or criminal convictions of police officer witnesses. If previous convictions are revealed they should now be disclosed in accordance with the revised instructions. They should be recorded on a form MG6B. If relevant disciplinary findings are revealed the form should contain sufficient detail about the nature of the finding, or allegation, to enable the prosecutor to make an informed decision about the relevance of the information to the proceedings in question.

4.152 At more than one site, interviewees told us that they are concerned that relevant matters were not being revealed appropriately. Our file examination confirmed that many files are silent about whether police officers have disciplinary matters recorded against them. The JOPI requires that where there are no findings of guilt against a police officer, there should be a positive statement to that effect on the MG6. We are satisfied that this is not being done in all cases.

4.153 We also have concerns about the detail provided on the MG6B. In one case in our sample, involving allegations under the Public Order Act 1986 and the Police Act 1997, the initial file revealed to the prosecutor that a police officer had a disciplinary finding. No detail was provided. The system sets out that detail should be provided with the summary trial file, but none was so provided. We examined the police papers and found that the disciplinary finding was for violent conduct. In view of the nature of the allegations, the prosecutor should clearly have considered this information when deciding whether there was any undermining material.

4.154 In another case, a police officer had supplied an MG6B that revealed two disciplinary findings for " falsehood". No detail was provided and none was requested. The prosecutor had merely endorsed " not undermining" on the envelope that contained the MG6B.

4.155 **We recommend that the Director of Policy should seek to agree with ACPO more effective arrangements for ensuring that:**

- **an MG6B is submitted in all appropriate cases;**

- **the MG6B contains sufficient detail about the finding or allegation against the police officer; and**
- **the MG6 contains an appropriate statement that there are no disciplinary findings or convictions against all the police officers who are witnesses in the case (if that be the situation).**

Monitoring

4.156 At some of the sites, we were told that disclosure problems are raised with the police at Joint Performance Management (JPM) meetings and that the quality of the disclosure schedules is considered as part of the assessment of the file. At another site, the police expressed concern that there is no mechanism for assessing the extent of police compliance with the disclosure requirements.

4.157 As part of JPM, prosecutors record their assessment of the overall quality of files on form TQ1. This form is supplied to the police, who use it to analyse the quality and timeliness of files. There is, however, no part of the form that addresses specifically the quality and timeliness of the disclosure schedules supplied with the file. It is therefore difficult for the police and the CPS to provide reliable data on the level of compliance by the police with the disclosure provisions. Amending the form might assist in providing such data, thereby helping to inform CPS and police managers at a local and national level. However, the form TQ1 is usually returned at an early stage, whereas the adequacy or otherwise of the information in a file may only become apparent as the case progresses.

4.158 **We recommend that the Trials Issues Group develops arrangements for monitoring the quality and timeliness of disclosure schedules.**

Instructions to counsel

4.159 Instructions to counsel do not always adequately address the prosecutor's decision about the disclosure of unused material. They were inadequate in 129 out of 380 relevant cases in our file sample. Whilst in many cases, there was clearly no undermining material, we rarely found any reasons noted as to why the decision not to disclose was reached. Similarly, we found that where material had been disclosed, counsel's instructions did not refer adequately to the reasoning behind the prosecutor's decision. We also found that in some cases the standard brief to counsel contains conflicting information about whether the duty to make primary disclosure has been complied with.

4.160 We refer elsewhere in this report to our other concerns about the quality of counsel's instructions. The brief to counsel is usually delivered shortly after committal and so would not usually deal with the defence statement or secondary disclosure. These issues would have to be dealt with in supplementary instructions. Nevertheless, we have included our composite recommendation in this part.

4.161 **We recommend that instructions to counsel should address fully:**

- **any decision the prosecutor has made at the primary stage about the disclosure of material which might undermine the prosecution case;**
- **any decision the prosecutor has made about sensitive material;**
- **the prosecutor's comment upon the defence statement; and**
- **if appropriate, any decision the prosecutor has made at the secondary stage about the disclosure of material which might assist the defence.**

4.162 It is rare for counsel to be requested formally to advise on the unused material revealed by the police. In 22 of the 380 relevant cases in our file sample counsel was specifically asked to advise on the unused material. The request was appropriate in 17 of the 22 cases. Counsel advised appropriately in 14 of the 22 cases. In a further 13 cases counsel provided advice unprompted on the unused material.

4.163 We discuss further at paragraph 5.72 to 5.77 the involvement of counsel at the secondary disclosure stage.

Conclusions re primary disclosure

4.164 We have included our findings and views within the individual sections dealing with the various aspects of primary disclosure. We provide an overview of our conclusions in Chapter 13.

SECONDARY DISCLOSURE

The duty to make secondary disclosure

5.1 Where a defence statement has been served, section 7(2) of the CPIA states that the prosecutor must:

"disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might reasonably be expected to assist the accused's defence as disclosed by the defence statement given under Section 5 or 6".

5.2 The CPIA goes on to say that the prosecutor must confirm in writing to the accused if he considers that there is no material which might assist the defence case that has not previously been disclosed.

5.3 If no defence statement is served the prosecution is not under a duty to make secondary disclosure.

5.4 In this chapter we consider how the prosecution discharges this duty and the timeliness of their actions.

Service of the defence statement

5.5 Section 5 of the CPIA states the defendant must serve a defence statement in all cases where there are proceedings in the Crown Court, and where primary disclosure has been made. He may do so voluntarily in cases being tried in the magistrates' courts.

5.6 A defence statement was provided in 344 of the 625 cases in our file sample in which it was possible to ascertain whether or not a defence statement was provided. They are usually served in Crown Court cases: a defence statement was provided in 333 of the 380 Crown Court cases. It is rare, however, for a defence statement to be served in contested magistrates' courts cases. One was provided in only 11 of the 251 summary trial cases in our file sample.

5.7 There is a clear difference of approach to the provision of defence statements, depending on which court the case is to be heard in. Nevertheless, there is a significant shortfall in the service of defence statements in the Crown Court of 12.4%. Most, however, related to one site, where we were told that a defence statement is not served in a significant number of Crown Court cases.

5.8 One interviewee said that they make little difference to the case, although they are served if the defendant wishes to give particulars of an alibi. This may be because the requirement to give particulars of an alibi in Crown Court cases is well established (Criminal Justice Act 1967). Failure to do so in a defence statement can lead to comment being made about the failure, or adverse inferences being drawn, during the course of the trial.

5.9 A defence solicitor explained the lack of defence statements in summary cases as being partly because it is very difficult to obtain instructions from defendants in such cases and partly because, in his view, there is rarely any benefit in serving one. Another defence solicitor said that a reasonable request for disclosure following receipt of the primary disclosure letter and MG6C usually obtained the desired material.

5.10 Prosecutors are not under any duty to request defence statements, and do not do so. The issue is, however, usually raised at the PDH.

5.11 As the secondary disclosure provisions apply only in cases where a defence statement has been provided, most defendants who are being tried summarily do not have the benefit of those provisions. We can only assume that this is because the defence prefer not to disclose any aspect of their case, rather than obtain the possible benefit of receiving material that might assist their case.

5.12 We appreciate that the provision of a defence statement in magistrates' courts cases is on a voluntary basis. Although the penalties which can be imposed for offences tried in the magistrates' courts are lower than those it is possible to impose at the Crown Court, this does not mean that summary cases are any less important to the defendant, or that miscarriages of justice cannot occur. It is difficult, therefore, to understand why defence solicitors appear to consider it to be less important to take advantage of the secondary disclosure provisions in summary trials.

5.13 The view that providing a defence statement makes little difference to a case may have developed because so little material is disclosed at the secondary stage. We comment upon the amount of material that is disclosed at this stage in paragraphs 5.55 to 5.58.

The timing of the service of the defence statement

5.14 Regulations made in pursuance of the CPIA require the defence statement to be provided within 14 days of the service of primary disclosure. The defence can apply to the Crown Court to have this period extended. The defence statement was provided in time in 176 out of 320 cases where we could ascertain the date of service. At one site, defence statements are usually served before the PDH. In contrast, at another site, orders are made almost invariably at the PDH for service. Timing is variable at the other sites, with many defence statements being served on the day of the PDH.

5.15 The construction of the CPIA scheme and its time limits are intended to facilitate completion of the disclosure process before the PDH hearing so that the judge may then consider and, if necessary, rule upon unresolved issues. Timeliness by all parties is essential if that is to be achieved. We have already commented upon how the timing of primary disclosure can effect the ability of the defence to serve a statement before the PDH (see paragraph 4.125 to 4.127). Likewise, the timing of service of the defence statement can effect the ability of the prosecutor to make secondary disclosure by the PDH. We deal with the timing of secondary disclosure more fully in paragraphs 5.67 to 5.71.

5.16 Prosecutors will not usually decline to undertake secondary disclosure where the defence statement has been served late. However, we were told at one site that prosecutors used to refuse to provide secondary disclosure in these circumstances, but that the position has now changed. We saw only one case in our file sample where this had occurred. The CPIA does not make provision for non-disclosure if a defence statement is late, but does enable the making of appropriate comment (by or with the leave of the

court), or the drawing of adverse inferences by the court or jury.

5.17 Prosecutors should not therefore withhold secondary disclosure in cases where the defence statement is served out of time. They may, however, consider the possibility of seeking to make appropriate comment or to draw adverse inferences. We are pleased, therefore, to note that prosecutors no longer withhold secondary disclosure in these circumstances.

Quality of the defence statement

5.18 Section 5(6) of the CPIA stipulates that the defence statement should set out the nature of the defence in general terms, indicate the matters on which the defendant takes issue with the prosecution and the reason why he takes issue.

5.19 Defence statements were sometimes very brief. Some contained little more than a denial of the offence and a request for disclosure of the documents listed on the MG6C schedule not accompanied by any reasons. The quality of the defence statement can influence the quality of secondary disclosure, as lack of detail can make it difficult for a prosecutor to make an informed decision about whether any material might assist the defence case. We considered that 85 out of 344 defence statements in our sample contained insufficient detail to enable the prosecutor to make such an informed decision.

5.20 The prosecutor only requested further detail in 12 of the 85 cases. There is some guidance in the JOPI as to what action a prosecutor should take if the defence statement is ambiguous or widely worded. The prosecutor should consider explaining to the defence that there will be difficulty in identifying material that might meet the test for secondary disclosure if the defence statement is deficient. We found that some prosecutors did invite the defence to provide more detail.

5.21 The statutory requirements as to the content of a defence statement are quite specific. Judges may seek to ensure that it is adequately particularised through their overall management of the case and the issue might be aired at the PDH. The only specific sanction, however, is a lesser degree of, or no, secondary disclosure.

5.22 We recognise the difficulty in practice for defence solicitors to obtain clear instructions from the accused swiftly in response to the service of the committal papers and primary disclosure. This is even more difficult in more serious cases when the advice of counsel, and in some cases Leading Counsel, is appropriate. The defence can of course apply to the court for an extension of time and we would expect the prosecutor to be understanding in not opposing such applications provided the amount of further time sought is reasonable.

5.23 Some prosecutors told us that they reject defence statements the content of which they consider does not comply with the provisions of the CPIA, and refuse to provide secondary disclosure. We saw little evidence of this in our file sample. Although the CPIA sets out what a defence statement should contain, it does not set out what a prosecutor can do if a statement does not contain the necessary information. The JOPI points out that the responsibility for the completeness of the statement lies with the defence. It comments that in some cases an incomplete statement may amount to a failure to comply with the CPIA and attract an adverse inference under section 11 of the Act.

5.24 We commend the practice of seeking further detail from the defence, but we do not endorse the practice of rejecting the defence statement and refusing to provide secondary disclosure. We consider that the prosecutor should inform the defence of the extent of the secondary disclosure considered and undertaken, thus enabling the

defence to provide further detail, and apply to the court, as they see fit. We consider further guidance is called for about how and when the prosecutor might seek the court's ruling on the compliance of the defence statement with the CPIA and the drawing of an adverse inference.

5.25 We suggest that the Director of Policy draws up and issues more detailed guidance on how prosecutors should respond to inadequate defence statements.

Provision of the defence statement to the police

5.26 This is another point at which responsibility is split. The prosecutor is responsible for consideration of material in his or her possession or which the prosecutor has inspected; it is the disclosure officer who has responsibility for applying the criteria within the statutory test to the balance of the material listed on the disclosure schedule in order to draw to the prosecutor's attention any material which might assist the defence case. The CPS is efficient in providing a copy of the defence statement to the police. They clearly did so in 317 out of 332 cases in our file sample. In a further 12 cases we could not determine from the file whether a copy was sent.

5.27 Within the CPS, defence statements should be brought to the attention of the prosecutor as soon as possible after receipt. The JOPI envisages that the prosecutor will draw the attention of the disclosure officer to any key issues raised by the defence statement, and provide advice as to the sort of material to look for, particularly in relation to legal issues.

5.28 In most cases, the task is undertaken by caseworkers. Defence statements are regularly shown to the prosecutor before being sent to the police at only two of the sites that we visited, although elsewhere prosecutors may be shown the defence statement subsequently. We acknowledge that this is done in order to reduce the time taken to respond to the defence statement and that there is often little that needs to be said to the police. However, it is important that a desire to provide timely disclosure does not affect adversely the quality of decision-making.

5.29 Prosecutors give guidance to the disclosure officer on the defence statement infrequently. This may be one reason why the disclosure officer identifies so little material that may assist the defence case (see paragraphs 5.49 to 5.52).

5.30 It is important that the prosecutor provides the disclosure officer with as much assistance as possible, so that he can fulfil his duties under the CPIA. Unlike the prosecutor, the disclosure officer may not be aware of issues raised by the defence during the progress of the case (eg. at bail hearings or during committal proceedings). In any event, the prosecutor should be more skilled in recognising likely issues, and should alert the officer to these.

5.31 We recommend that prosecutors should give guidance to the disclosure officer on any key issues raised by the defence.

The extent of secondary disclosure

5.32 We encountered different schools of thought whether the secondary test is applied solely upon the information in the defence statement; or whether the prosecutor should consider the totality of the evidence in the case and apply the test to the issues raised by the defendant in his interview.

5.33 The CPIA refers to the obligation being to disclose material that might assist the defence case "as disclosed by the defence statement". It can be argued that this means that matters raised prior to the defence statement, and which are not rehearsed in it or adopted by it, need not be

considered in relation to secondary disclosure. Indeed, we saw an example in the file sample of a prosecutor refusing to consider information he was aware of, but which was not contained in the defence statement.

5.34 This strict interpretation of the CPIA is not appealing. Informed legal and academic practitioners argue that the overriding duty of prosecutors to be fair envisages that they take into account aspects of the defence case already clearly set out in the evidence, whereas this interpretation substantially reduces the impact of the CPIA upon the defence. We consider this issue further in Chapter 9.

Use of the defence statement by the prosecutor

5.35 The CPIA is silent as to whether or not the prosecution can use defence statements in evidence against the defendant. If the prosecution were to use them it might inhibit the defence from providing them, and thereby frustrate the purpose of the CPIA.

5.36 CPS national guidelines state that, with only one exception, the prosecution must not seek to rely on a defence statement as part of the prosecution case. It is only if the defendant gives particulars of an alibi in his defence statement that the prosecution can seek to rely on it as part of the prosecution case. This is in keeping with the law which was in force before the introduction of the CPIA, and does not conflict with the spirit behind the legislation.

5.37 Prosecutors at one site told us that they thought that defence statements should be used more in cross-examination. We assume that the contents of defence statements would be used in cross-examination if contradicted by the defendant's evidence, but we were not told of many instances. The file sample did not reveal any information about this. We are pleased to note that it does not appear that they are used inappropriately, but there are circumstances in which it would be unhelpful to leave the issue purely to the Judge to comment upon to the jury, without putting any conflicts to the defendant to explain.

5.38 We suggest that the Director of Policy issues further guidance about the circumstances in which a defence statement may be used properly by the prosecution in the course of the trial.

The provision of the disclosure officer's report and certificate at the secondary disclosure stage

5.39 The Code of Practice requires the disclosure officer, after considering the defence statement, to identify to the prosecutor any material which might assist the defence case. It also requires him to certify in all appropriate cases that all material, which has been retained and made available to him, has been revealed to the prosecutor. The JOPI directs that this should be done by the submission of a second MG6E report.

5.40 The police are not as good at providing an MG6E report at the secondary stage, as they are at the primary stage; furthermore prosecutors rarely request missing ones. The police provided a response to the defence statement on an MG6E without prompting in 159 out of the 317 relevant cases in our file sample. We could not ascertain whether the appropriate report had been provided in a further 13 cases. The prosecutor requested the police to provide the missing report in only 11 out of the 147 cases where one was not provided. The police ultimately provided the report in four of the 11. In one of the 147 cases the police subsequently supplied the report without prompting by the prosecutor.

5.41 The police responded by way of ordinary memorandum or by telephone in many of the other cases. In some cases in our file sample, the response in memorandum form was more

informative than that contained on many MG6E reports. It is, however, important that there is a clear assurance that the disclosure officer has applied the secondary disclosure test properly. Correct use of the authorised report helps provide such an assurance. Furthermore, the MG6E form contains the certificate referred to in paragraph 5.39 above which is required in every case after the accused has given a defence statement.

5.42 We recommend that CCPs should remind police forces that the Code of Practice requires a certificate in every case where a defence statement is served; and that they should remind police that prosecutors cannot properly complete secondary disclosure without one.

The quality of the disclosure officer's combined report and certificate

5.43 The second MG6E form was not filled in correctly in 46 out of the 164 cases where one was supplied. The following table illustrates the defects we found.

Nature of defect	Number
Referred to evidence	1
Not enough detail	0
Material omitted	7
Certificate not signed	0
Report did not indicate whether submitted at primary or secondary stage	31
Other	7
Total	**46**

5.44 In over half of the incorrectly completed MG6Es, the disclosure officer had not indicated at which stage the report was being supplied. We made the same finding in relation to reports supplied at primary disclosure stage (paragraph 4.89), and pointed out that there is a lack of clarity in the JOPI. This may at first blush seem a pedantic point. But without careful adherence to and recording of the procedures at each stage, the risk of errors and oversights becomes significant.

5.45 It is usually possible to ascertain whether the report was supplied at the primary or secondary stage by looking at the date on the report, and the correspondence. However, these facts should be clear on the face of the report, in order to assure the prosecutor that the disclosure officer is complying properly with his duties under the CPIA and applying the correct test.

5.46 The JOPI requires the disclosure officer at the secondary stage to "mention" on the schedule that there is no assisting material. There is no guidance on how this should be done. We discuss the varying practices adopted by disclosure officers when submitting the MG6E at the primary stage in paragraph 4.93. Disclosure officers adopt similar practices when submitting second MG6Es in cases where they consider that there is no material that might assist the defence.

5.47 We refer in paragraph 4.94 to the requirement at one site for the disclosure officer to make a fuller endorsement. At the same site, the disclosure officer is required to endorse on the second MG6E report that he has considered all the material and, in appropriate cases, confirm that in his opinion there is no material that might assist the defence.

5.48 This endorsement provides a clear assurance that the disclosure officer has complied with his obligation under the Code of Practice at the time of secondary disclosure. We consider this to be good practice.

The quality of decision-making at the secondary disclosure stage

(i) identification of material which might assist the defence on the disclosure officer's report

5.49 All interviewees told us that material which might assist the defence case is identified infrequently. Our file examination confirmed this. We found that the disclosure officer identified material that was considered to assist the defence in only 25 cases in our file sample out of 344 cases in which a defence statement was provided.

5.50 The following table illustrates the nature of the material which might assist identified by the disclosure officer.

Nature of material	Number
Witness's character	4
Identification	2
Conflicting statement	5
Other	11
Forensic	1
Medical	2
Total	**25**

5.51 Many interviewees expressed lack of confidence in the ability of the disclosure officer to make considered, detailed decisions and, secondly, in the ability of the prosecutor to make a correct decision, when they do not examine material. They are concerned that prosecutors rely on poor quality schedules and on the opinion of the disclosure officer. The prosecutor must make an informed decision about whether or not material might assist the defence case, in order to ensure that all appropriate material is disclosed.

5.52 The weakness in the system is that the prosecutor again relies on the original MG6C schedule, with the frequent lack of detail we commented upon in paragraphs 4.42 to 4.51. Furthermore, we found that prosecutors very rarely examine material that the disclosure officer has not identified as material that might assist the defence case. Relying only on what the disclosure officer has entered on the MG6E may not support an informed decision. We were surprised that prosecutors do not examine material more often, as many expressed concerns about whether disclosure officers are able to differentiate between the two tests, and one prosecutor queried whether the material was being considered afresh after receipt of the defence statement as required by the Code of Practice.

5.53 We recommend that prosecutors should be more proactive in scrutinising the MG6C to identify any material which, in the light of the defence statement, might assist the defence, with a view to ascertaining whether any further material may exist which is not recorded on the MG6E but which ought to be disclosed.

5.54 At one site, we were told that prosecutors ask for copies of all items requested in the defence statement. At another site, prosecutors told us that requests by the defence for disclosure of certain items can be a good signpost to disclosure, as the request can produce documents that have been inadequately described on the schedules. This cannot be the case if the request by the defence for documents is little more than a "shopping list", not accompanied by proper reasons for the request. Examining material that the defence have asked to be disclosed, in a reasoned request, in order to determine whether or not it might assist the defence case, should help prosecutors to make informed decisions and is to be regarded as a

minimum. It will also provide greater assurance to the defence and others in the criminal justice system. We commend this practice, but at the same time emphasise that a much more proactive approach by prosecutors is needed and we are not endorsing purely reactive examination by prosecutors.

(ii) disclosure of material which might assist the defence

5.55 We were told by most solicitors and counsel that it is rare for any material to be supplied at the secondary disclosure stage. Indeed, we have already referred in paragraphs 5.8 and 5.9 to the defence perception that serving a defence statement makes little difference to the case. This is something of a "chicken and egg" situation. We propose a way forward at paragraph 13.28 that will show clearly that a good quality defence statement will lead to greater disclosure by the prosecution, in the light of our comments at paragraphs 4.75 and 9.15.

5.56 We found that the prosecutor disclosed material that might assist the defence in 23 of the 25 cases where the disclosure officer had identified material that he thought might assist the defence, but in no others. In the other two cases we were not able to determine from the file whether the material was disclosed. This means that material was disclosed at the secondary stage in 23 out of 344 cases (6.7%) where a defence statement was provided. We did not come across any case where the prosecutor identified any further assisting material not listed on the second MG6E by the disclosure officer. This is a significant finding and emphasises the extent to which the disclosure regime at present relies on the police.

5.57 Prosecutors have different approaches to the question of disclosure. Some err on the side of caution, and they told us, provided the request is reasoned, that they will disclose material that they personally do not consider to be assisting. Some material may be provided informally either at court or without a clear record on the file as part of the disclosure regime under the CPIA. Some apply the secondary disclosure test strictly, and will not disclose any material that they do not consider might assist the defence.

5.58 External interviewees expressed dissatisfaction with the strict approach adopted by some prosecutors. This dissatisfaction may be one explanation for the more liberal approach to disclosure which has been adopted in the Crown Court which we discuss in Chapter 9.

(iii) the prosecutor's decision

5.59 We considered the question of whether the decision in relation to secondary disclosure was clearly wrong in every case in which a defence statement was provided, applying the same strict test described at paragraph 4.111 which we used when considering decision-making in relation to primary disclosure. We considered only the material and information that we were satisfied the prosecutor was aware of at the time of making the decision. We excluded from our consideration those cases where assisting material was revealed to the prosecutor after the initial secondary stage. We also had to exclude cases where poor file management made it difficult to determine whether secondary disclosure was in fact made.

5.60 We were pleased not to find any cases where the decision in relation to secondary disclosure was clearly wrong. We also found that the prosecutor had disclosed to the defence all assisting material identified by the disclosure officer (see paragraph 5.56). But it would be wrong to take significant comfort from this finding which is more of a reflection of the particular role which, under the CPIA regime, the prosecutor is required to play at this stage. In totality, material was actually disclosed, or

recorded as being disclosed, to the defence by way of secondary disclosure in only 23 out of 344 cases. This figure does not include all of the crime reports, logs of messages and previous convictions that were supplied to the defence (see paragraphs 4.64, 4.67 and 4.144).

5.61 There were also some cases where we could not satisfy ourselves that formal secondary disclosure had been undertaken. In many instances, the CPS had sent the defence statement to the police, who had not responded. There were a high number of such instances in one Branch with a consequent need for management action.

5.62 There was nothing in any of the above cases to establish that a failure to consider and deal with secondary disclosure had led to relevant material not being disclosed. It does not, however, provide an assurance that prosecutors are complying with the CPIA, or achieving the CPS objective of scrupulous compliance with the duties of disclosure.

5.63 In one case in our file sample, the letter to the defence, indicating that there was no material to assist the defence case, was sent before the police had provided a response to the defence statement. (We referred in paragraph 4.113 to four cases where prosecutors made a decision on primary disclosure before an MG6E report was received.) Whilst acknowledging that this is one case out of many, this reinforces our impression that many prosecutors, as well as police officers, regard the duty of disclosure as a mechanical task.

5.64 Our findings show that the quality of decision-making is better than anecdotal evidence might suggest, but there is clearly no room for complacency. First, the comments we made, questioning whether the prosecutor could make an informed decision about a number of documents without inspecting them, are just as valid at this stage, if not more so, where the test is whether material might assist. Again, the JOPI provides that it may be necessary to ask for copies of items listed on the schedules or to inspect material, or to meet the disclosure officer and jointly assess the material. Secondly, our strict test (ie. was the prosecutor's decision clearly wrong) has probably replicated the test our evidence indicates prosecutors are applying. Our consideration of the evidence overall suggests that prosecutors are applying the secondary disclosure test too restrictively. Prosecutors only appear to be disclosing anything which clearly assists the defence case, rather than anything which might reasonably be expected to assist the accused's defence as disclosed by the defence statement, as explained in the guidance in the JOPI and their training. They should disclose anything which **might** (our emphasis) assist the defence to cross-examine prosecution witnesses, enable the defence to call evidence or advance a line of enquiry or argument, or explain or mitigate the defendant's actions. The JOPI expressly provides that the test at the secondary stage should be generously interpreted, so as to avoid potential injustice. We would also add that the smooth operation of the disclosure regime is made significantly more difficult in many cases by the lack of, or inadequate, defence statements.

5.65 As experienced prosecutors standing back from the adversarial process and putting themselves in the position of the defence we would expect a more forthcoming approach to actual disclosure of material of the type which experience shows often provides some scope to the defence. This is the attitude on the part of the prosecution we would commend after a clear defence statement dealing with the issues in the case has been received.

5.66 We take into account that by this stage only a substantially reduced number of cases are

involved, that is cases where the defence have clearly signalled their intent to deny the prosecution case through their defence statement. This, linked to the test of relevance of material, controls the amount to be disclosed. A sensible and realistic interpretation and application of the secondary test should ensure a consistent and also a fair and open disclosure of material to the defence throughout the country, provided that the documentation submitted by police has caused the minds of prosecutors to focus on all that material which properly falls to be considered. It will both comply with the CPIA and provide much more material to the defence.

The timing of secondary disclosure

5.67 The CPIA does not specify a time within which secondary disclosure should be made after receipt of the defence statement. The JOPI directs that it should be made as soon as reasonably practicable, and in any event before the commencement of the trial.

5.68 Ideally, the aim should be to provide secondary disclosure in Crown Court cases by the PDH, in order to ensure that the hearing is effective with the judge having the opportunity to consider unresolved issues. Prompt secondary disclosure is, however, dependent on primary disclosure and service of the defence statement both being timely. In Crown Court cases where the defendant is not in custody, PDHs are usually held 28 days after committal or transfer. If primary disclosure is made immediately after committal or transfer, and the defence statement is served within 14 days thereafter, the prosecution should have time to consult the police and make disclosure by the PDH.

5.69 We were disappointed to find that secondary disclosure was made on average 34.5 days after receipt of the defence statement. This means that disclosure issues are often not being dealt with before the PDH, thereby reducing the effectiveness of that hearing. Nevertheless, we should state that secondary disclosure was undertaken well before any trial date, on average 76.8 days before the start of the trial.

5.70 Some of the delay is due to the time taken to send defence statements to the police. We found that few were considered by prosecutors (see paragraph 5.28), but at the same time they were sent to the police on average seven days after receipt from the defence. They must be sent without delay (and the JOPI so provides) if secondary disclosure is to be made by the PDH.

5.71 We recommend that CCPs take steps to ensure that defence statements are sent to disclosure officers expeditiously.

Instructions to counsel

5.72 The defence statement was sent to counsel in 268 out of the 333 Crown Court cases where a defence statement was submitted. It was not sent in 29 cases, and we could not ascertain whether it was sent in 36.

5.73 Counsel was requested to advise on the defence statement in ten cases. In a further five cases counsel provided advice on the defence statement unprompted.

5.74 Generally, documentation relating to secondary disclosure is sent to counsel informally, without either instructions or comment on what decision has been made, and why. This makes it difficult for counsel to conduct the case properly, and, in particular, to deal with any argument at court about secondary disclosure. We have already made a recommendation at paragraph 4.161 about the content of counsel's instructions. We set it out in full again below.

5.75 We recommend that instructions to counsel should address fully:

- **any decision the prosecutor has made at the primary stage about the disclosure of material which might undermine the prosecution case;**
- **any decision the prosecutor has made about sensitive material;**
- **the prosecutor's comment upon the defence statement; and**
- **if appropriate, any decision the prosecutor has made at the secondary stage about the disclosure of material which might assist the defence.**

5.76 In addition, CCPs will wish to ensure counsel is properly equipped to advise fully and effectively on disclosure issues and to handle them at court. For this purpose counsel must be in possession of all relevant documentation and be fully instructed.

5.77 We suggest that CCPs ensure that all documentation relating to disclosure is sent to counsel formally, with covering instructions.

Orders by the Crown Court

5.78 Where a defence statement has been given, section 8(2) of the CPIA states that if the accused has reasonable cause to believe that there is prosecution material which might be reasonably expected to assist the defence case, and the material has not been disclosed:

"the accused may apply to the court for an order requiring the prosecutor to disclose such material to the accused."

5.79 It might be thought at first blush that the incidence of successful defence applications under section 8(2) of the CPIA would be a good indicator of the quality of prosecution decision-making. But there are in fact very few such formal applications by the defence for an order for disclosure. There were only nine such applications out of 344 cases where a defence statement was served. The defence was successful in six cases. We would have expected many more such applications in the light of discontent expressed in surveys and to us by defence practitioners.

5.80 There is a perception within the CPS that orders to disclose material which does not fall within the criteria set down by the CPIA are being made frequently by Judges. Our file examination did not bear this out, as we found evidence of only 16 such court orders, which were generally made at the PDH.

5.81 It may be that prosecutors are misconstruing directions for the prosecution to undertake secondary disclosure, which are inevitable in view of the high proportion of cases in which this is not achieved by the PDH (see paragraph 5.69), as relating to content. Having said that, prosecutors may have an unrealistic perception of what argument could be put forward by prosecution counsel about disclosure in view of the poor quality of the instructions and the lack of detail in the schedules they have.

5.82 External interviewees told us, however, that the defence make informal applications at court for disclosure. Whilst not making orders to disclose, judges are adjourning cases for the issue to be resolved, indicating at the same time their view that disclosure should be made if there is no reason not to do so. We deal in more detail with disclosure of material that is not considered to fall within the tests laid down in the CPIA in Chapter 9.

Endorsements

5.83 The JOPI provides that a record should be made of all decisions, enquiries or requests relating to

the disclosure of material to the defence, withholding material from the defence, the inspection of material, and the transcribing or recording of information into a suitable form. We found that prosecutors are frequently not following this guidance. This may be because it only appears in the JOPI in the section before that dealing with primary disclosure, or because decisions not to disclose items on the MG6C are considered too routine to merit detailed endorsement. The JOPI does not specifically prescribe whether the prosecutor should endorse his decision, and the reasons for it, in relation to secondary disclosure on the schedules or on the file or elsewhere. We consider the need for such recording should be obvious to prosecutors. In the event, for the most part, the only indication that disclosure had been considered was the fact that a standard form secondary disclosure letter had been sent to the defence. There was usually no endorsement dealing with the reasons for the decision, and it was unclear who had actually made the decision. This latter point is a matter of concern in itself.

5.84 This lack of endorsement means that someone else dealing with the file cannot know whether secondary disclosure has been dealt with by the prosecutor in the case. It is important that prosecutors make endorsements of their decision-making, in order to assist others who have to undertake work on the case, and in order to provide an assurance that disclosure has been considered and an informed decision has been made.

5.85 Despite the unsatisfactory position overall, we found that some prosecutors do make a full endorsement of both their primary disclosure decision (on the MG6C schedule) and also their decisions in relation to secondary disclosure. We commend this approach, with the same caveat we expressed at paragraph 4.80 in relation to whether the schedule itself, the file, or a specific disclosure record sheet or log should be used.

5.86 We found a variety of practices. At one site, caseworkers attach a worksheet to the file when passing defence statements to the prosecutor, and prosecutors endorse their decisions on that sheet. We still did not see much indication of the reasons for their decisions. Elsewhere, some prosecutors note their considerations on the file, but others appeared to do this only where the decision is to disclose material. Overall, we found relatively few instances of such endorsements. We again state our belief that properly recording decisions, and the reasons for them, will intrinsically raise the quality of decision-making.

5.87 We recommend that in relation to secondary disclosure prosecutors endorse their opinion whether any material revealed might assist the defence, and record the reasons for it on the file, or upon a disclosure record sheet within the file.

Conclusions re secondary disclosure

5.88 As with primary disclosure, we consider that there is scope for considerable improvement in the standards to which the prosecution carries out its duties in practice. Prosecutors should inspect more material, effect reasoned consideration in the light of the evidence and the defence statement, respond appropriately to any defence statement, consider matters from the point of view of the defence, and apply the statutory test more realistically. Going beyond what is perceived as absolutely necessary can enhance confidence; rigidity may damage confidence. It needs only one or two clear cases of material being wrongly withheld to undermine confidence.

5.89 These actions will provide greater assurance that the prosecution is complying with its duties, and

should result in the defence having access to a much greater amount of material under the provisions of the CPIA. This will contrast with the current inconsistent situation in which there is wide informal disclosure (see Chapter 9 below) in some cases and unduly restrictive non-disclosure in others.

5.90 We provide an overview of our conclusions in Chapter 13.

SENSITIVE MATERIAL

6.1 Paragraph 2.1 of the Code of Practice defines sensitive material as:

"material which the disclosure officer believes…. it is not in the public interest to disclose".

6.2 Paragraph 6.12 of the Code of Practice gives examples of material which could be sensitive, depending on the circumstances. These include:

- material relating to national security;
- material given in confidence; and
- material relating to the identity or activities of informants, or under-cover police officers, or other persons supplying information to the police who may be in danger if their identities are revealed.

6.3 Such material should generally be listed on a schedule of sensitive material (referred to as the MG6D). The disclosure officer must reveal its existence to the prosecutor, indicating why he considers that it should not be disclosed.

6.4 The prosecutor has to consider whether or not sensitive material falls within either of the two tests set out in the CPIA. If it does, it must be disclosed to the defence, unless sections 3(6) or 7(5) apply. These sections provide that material which would otherwise be disclosable under the CPIA must not be disclosed:

"to the extent that the court, on an application by the prosecutor, concludes it is not in the public interest to disclose it and orders accordingly."

6.5 The procedure for making such applications is governed by rules of court. But the question of seeking an order for non-disclosure cannot arise unless the material in question passes the threshold test for either primary or secondary disclosure.

6.6 In this chapter we consider how the prosecution discharges its duty of disclosure in relation to sensitive material.

The provision of the sensitive material schedule

6.7 The JOPI requires the disclosure officer to list sensitive material on the MG6D schedule. The police are good at providing the MG6D schedule promptly in appropriate cases. It was apparent that there was sensitive unused material in 145 cases in our file sample, and the police provided an MG6D schedule without prompting in 144 of those cases. In the other one, the prosecutor did not prompt the police to provide the missing schedule, and one was not ultimately submitted.

6.8 Where there is no sensitive unused material, the JOPI directs that the police should confirm the fact that there is none on the form MG6. The police only confirmed that there was no sensitive unused material in 308 out of 451 relevant cases. In 36 cases we could not ascertain whether the police had confirmed the existence or otherwise of sensitive unused material. Prosecutors at one site told us that they would follow this up if this occurred in a case involving allegations of drugs offences. Caseworkers at another site told us that they would follow this up in all cases, whereas at a third site we were told that it is not followed up.

6.9 Although we acknowledge that the police do apparently provide the appropriate schedule in almost all cases, prosecutors need a definitive statement one way or the other whether such material exists. It is important, therefore, that the disclosure officer should comply with the JOPI in all cases, and confirm, where appropriate, that there is no sensitive unused material.

6.10 We recommend that CCPs remind the police of the requirement that the disclosure officer provides an MG6D in all cases where there is sensitive material, or, where there is none, confirms that fact on the MG6.

The content of the sensitive material schedule

6.11 The disclosure officer correctly completed the MG6D schedule in 116 of the 144 relevant cases. It was defective in 31 of the 144 cases (21.5%). The following table gives a breakdown of the reasons why the schedule was defective.

Nature of defect	Number of cases
Material omitted	7
Insufficient detail of items listed	14
Item should have been on MG6C or was not unused material	7
Total	**28**

6.12 Examples of material omitted from the MG6D, and not included in an accompanying MG6 report, included material relating to informants. In seven cases, the material listed on the MG6D should have been on a different schedule, or was not even unused material. For example:

- a defendant's previous convictions; and
- a police station closed circuit television video recording (CCTV) (because it showed other defendants not connected with the case).

6.13 We recommend that the CPS examines with ACPO means of reducing the proportion of defective MG6D schedules submitted to the CPS. This should include the setting of targets using our findings as an initial benchmark.

6.14 One counsel told us that the description of items on the MG6D needed to be more detailed without compromising their sensitivity. We found 14 cases where the MG6D was not completed correctly, because insufficient detail was provided. Later we make a recommendation in paragraph 6.55 that prosecutors should inspect all sensitive material. Nevertheless, the items on the schedule still need to be described properly, and the disclosure officer needs to endorse reasons why they ought not to be disclosed.

6.15 Prosecutors do not often ask the disclosure officer to amend incorrect schedules. They did so in only six out of the 31 incorrectly completed MG6Ds. It was corrected in five cases. At one site, prosecutors told us that they only ask for MG6D schedules to be amended if they are proposing to disclose the relevant item.

6.16 It is essential that all schedules are completed correctly. If they are not, the disclosure officer will not have complied with his duty under the CPIA, and it will be difficult to ascertain whether or not the prosecutor has fully discharged his duty.

6.17 We identified a difficulty in relation to some forms of unused material, such as crime reports which contain personal details relating to witnesses (eg. addresses or personal telephone numbers) which need to be protected. We have recommended at paragraph 4.74 that such documents ought always to be supplied to the prosecutor and considered with a view to disclosure. We consider here how they should be listed on the schedules. The instructions in the JOPI are that copies of such documents can be

edited, and the documents should be listed on the MG6C schedule. In practice, disclosure officers deal with such documents in four different ways:

(i) the edited document may be listed on the MG6C and the unedited version on the MG6D;

(ii) the document may be listed only on the MG6C;

(iii) it may be listed only on the MG6D; and

(iv) if the only reason a document is sensitive is because of personal details of witnesses, then the document may be listed only on the MG6C, with the comment "edited". If the prosecutor discloses that document to the defence he will edit the copy document, to exclude the personal details. If, however, the document is sensitive for other reasons, it is listed on the MG6C, with the comment "edited", and in addition is listed on the MG6D. The police are responsible in these circumstances for editing the copy document if it is to be disclosed to the defence. We found that this practice had been agreed between CPS and the police at one site we visited.

6.18 The first practice may be thought to be technically correct, but it proliferates forms for the sake of them and provides a misleading impression of the level of sensitive material, both in a file and in the Area. In so doing, it can reduce the attention given to truly sensitive material.

6.19 We commend the simplified practice described at (iv) above which clarifies on which schedule such documents should be listed. Consideration should be given to including more detailed instructions in the JOPI. For reasons of security, we think it prudent for police to edit or obscure (a practice known as "redacting") the sensitive details so that the copy or copies in circulation outside the secure conditions of police files can never lead to an inadvertent passing on of sensitive information.

6.20 If there is insufficient space on the MG6D for the disclosure officer to explain why he considers that items should not be disclosed, he should use form MG6 to comment further. The disclosure officer used form MG6 to provide additional comment in 37 cases.

The quality of the prosecutor's endorsement on the sensitive material schedule

6.21 The JOPI requires the prosecutor to record his decision in relation to sensitive material on the MG6D schedule. Prosecutors told us that they take sensitive material very seriously. We found that they frequently examine it themselves. In striking contrast, the schedule was endorsed correctly by the prosecutor in only 59 out of the 144 relevant cases. In many cases, there was no endorsement at all, not even the signature of the reviewing prosecutor.

6.22 This means that we were unable to satisfy ourselves that in all cases sensitive material is being considered, or that the appropriate person is dealing with it. It is particularly important that a record is kept of prosecutors' views on sensitive material, so that anyone else who has to undertake work on the case is aware of what decisions have been made, and the reasons for them.

6.23 We consider it implicit that the prosecutor should record his decision at the primary and secondary stage on the MG6D, with each decision being dated. We suggest that this is clarified beyond doubt in the JOPI, and that consideration is given to amending the MG6D to provide separate sections for the prosecutor to complete at each stage. There remains the additional need to record reasons for the decisions. Unlike the position with non-sensitive material, where it is

possible to conclude that secondary disclosure has been considered because of the existence of the relevant letters, it is usually difficult, if not impossible, to ascertain whether it has been considered in relation to sensitive material.

6.24 We recommend that prosecutors endorse the MG6D with their opinion whether any material revealed might undermine the prosecution case or assist the defence, and record the reasons for it on the file, or upon a disclosure record sheet within the file.

Public Interest Immunity applications

6.25 Public interest immunity (PII) applications are applications seeking a court direction in relation to material which is considered to attract public interest immunity but which would otherwise fall to be disclosed under the CPIA. Rules of court govern the procedures for making such applications.

6.26 Notice of an application should ordinarily be served on the accused and shall specify the nature of the material to which the application relates. The prosecution and the defence will be present at the hearing (Type I).

6.27 In certain circumstances, the prosecutor need not specify the nature of the material in respect of which protection is sought, if to do so would create the mischief which the application seeks to avoid. In these circumstances the defence will not be present when the application is made (Type II).

6.28 Very exceptionally, if the prosecutor considers that to disclose even the fact that an application is being made could create the mischief which the application seeks to avoid, the prosecutor may seek to proceed without giving the accused notice, and again the defence will not be present (Type III).

6.29 The Rules of Court give continued effect to the dicta of the Court of Appeal in R v Davis, Johnson and Rowe, 97 Cr.App.R 110. The court laid down the procedure, which is adopted by the Rules of Court, to be followed in cases where the prosecution seeks to withhold material from the defence. The court emphasised that open justice requires maximum disclosure, and that the defence should have the opportunity to make representations on the basis of the fullest information, whenever possible. This means that:

"if the judge takes the view that the defence should have had notice of the application, or of the nature of the material, or that the application should be made inter partes, he should so direct".

6.30 CPS national guidelines are that types II and III applications should be made only where it is really necessary to protect confidentiality; and type III applications should only be made exceptionally. Furthermore, type III applications should only be made with the express approval of either the CCP or a prosecutor to whom he has delegated the authority to do so.

6.31 External interviewees told us that generally prosecutors exercise good judgement in making PII applications, and that they are conducted well. They are conducted for the most part by experienced counsel, although at one site CPS prosecutors make the applications.

6.32 The responsibility for determining whether a claim for public interest immunity should be asserted in relation to any particular material, usually lies with the organisation that generates the material. Most of the material which features in criminal proceedings and needs to be protected by such a claim is generated by the police, and so there needs to be consultation between a senior prosecutor and a senior police officer before an application is made to the court. Some claims are so well-established that they may be asserted by counsel but it may need to be supported by evidence – sometimes in affidavit

form. Prosecuting counsel also need to be consulted in Crown Court cases. In practice, counsel usually makes the application, and a conference is in our view almost always required. We were not assured that this always takes place.

6.33 The JOPI provides that a senior prosecutor should consult with a senior police officer before a decision is taken to make an application to the Court to withhold sensitive material to establish the proper basis for the application. We had to rely on what we were told, but it appears that these duties are delegated in each organisation frequently. In some sites, we obtained little assurance that the BCP was aware of the decisions being taken as the delegation was total. We do not think that this is satisfactory.

6.34 The JOPI additionally requires the prosecutor to draft the submission to the court, and the prosecutor and the senior police officer to sign it. Prosecutors at two sites told us that they draft the reasons for making PII applications. The police do so at the remaining four, and the CPS do not retain copies.

6.35 We examined applications that had been made by prosecutors at one site. They were all extremely well drafted; they had been signed by the prosecutor, but not by the police. We did not see examples of applications that had been drafted by the police, and we are left with concerns as to whether they are being fully considered by prosecutors, least of all by the right level of experienced prosecutor. We suspect that a number are dealt with almost exclusively by the police officer and prosecuting counsel.

6.36 It is important that the prosecutor agrees and signs the submission, as he (or counsel on his behalf) will appear in court to make the application. It is equally important that the police officer also signs the submission in those cases where the police have generated the material.

6.37 Under the common law rules within Keane (1994) 1 WLR 746 the prosecutor had to apply to the court and put before the judge all documents it wished to withhold which were "material" to the case, whether or not they might undermine/assist (see paragraph 3.5).

6.38 We found that it is often still the practice to make an application, even if in reality the material neither might undermine the prosecution case nor might assist the defence case; more often than not sensitive material would, if used, assist the prosecution. The reason given by prosecutors was that they are anxious to keep the trial judge informed of the position, so as not to mislead the court. This reflects lack of clarity in the approach to the relationship between disclosure and public interest immunity.
No claim is necessary or should be made in relation to material which does not cross the statutory threshold for disclosure, although we do not wish to discourage applications where the issue is borderline. Where material which would attract a claim of public interest immunity because its disclosure would be likely to cause real harm to the public interest falls within the statutory criteria requiring disclosure, it is open to the Crown to make that disclosure if satisfied that the interests of justice in the particular case outweigh the harm which that disclosure might occasion. Material should be placed before a judge for PII purposes only when the Crown seeks approval for the withholding of otherwise disclosable material or where the balance between the interests of justice in the particular case and the public interest in non-disclosure of the material is so finely balanced that it ought to be judicially determined.

6.39 We consider that the practice of placing material before the trial judge for what are effectively "trial management" purposes needs to be approached with great caution. The prosecutor does have special responsibility which includes

not misleading the court and fairness to the defendant. But prosecutors must never lose sight of the fact that the placing of material before a judge which has not been made available to both parties is an exceptional course – especially if done "secretly" as a Type III application. As the late Lord Chief Justice, Lord Taylor said in R v Keane (1994) 1 WLR at page 750:

"We wish to stress that ex parte applications are contrary to the general principle of open justice in criminal trials. They were sanctioned in Reg. v Davis [1993] 1 WLR 613 solely to enable the court to discharge its function in testing a claim that public interest immunity or sensitivity justifies non-disclosure of material in the possession of the Crown. Accordingly, the ex parte procedure should not be adopted, save on the application of the Crown and only for that specific purpose."

6.40 These competing considerations must always be carefully weighed before material is placed before a trial judge in order to alert the judge to relevant issues, and ensure that there is continuing review of the position by the judge and so ensure a fair trial.

6.41 There were eight cases in our file sample where the prosecutor made a PII application. Seven were all type II applications, and we considered that this was the correct type. The applications were all successful.

6.42 The eighth case involved a type III application in our file sample. It appeared to have been handled and considered properly, and we were pleased to note that the BCP had been fully involved in the decision-making. However, it had not been logged either on the Branch or at CPS Headquarters.

6.43 In order to monitor the numbers and appropriateness of type III applications, CPS national guidelines state that they have to be recorded. Details of any such applications have to be sent to Headquarters. A quarterly return is submitted to the Law Officers. There are, on average, less than 20 type III applications made by the CPS each year. We were told that there had been none in the previous 12 months at any of the sites that we visited. We examined the log kept at one site: there were none recorded. We were told that the other sites either had no logs, or had empty folders, because there had been no applications.

6.44 There is no requirement for the other types of application to be recorded. Only one of the sites we visited keeps a log of type I and II applications. We found it difficult, therefore, to ascertain if type I and II applications are dealt with correctly, or how frequent they are in practice. We appreciate the need for high levels of security about these matters, but consider that it is essential for the CCP/BCP to be aware of them, and consider that some form of secure list needs to be maintained.

6.45 We retain lurking doubts that in some cases a CPS prosecutor is never informed of the picture, and that it is left to prosecuting counsel and the officer in the case to deal with at court.

6.46 It is our overall view that there needs to be considerable tightening up of the procedures within the CPS for handling public interest immunity applications.

6.47 We recommend that the DPP should issue guidelines requiring that the conduct of cases involving applications for public interest immunity be supervised by prosecutors of suitable seniority who have received appropriate training. No application of Type III (ie. without notice to the accused) should be made save on the authority of the relevant CCP (or Director of Casework where appropriate).

6.48 We recommend that each CPS Area and the Casework Directorate should maintain a log of all PII applications that should record:

- **the type of application;**
- **the nature, in general terms, of the sensitive material; and**
- **the result of the application.**

6.49 These logs should not themselves contain sensitive information, but clearly will need to be kept securely. We deal further with the issue of security in paragraph 6.59.

Inspection of sensitive material

6.50 The JOPI does not require prosecutors to inspect sensitive material when considering the question of disclosure, although it is expected that they either see the material, or part of it, or are fully informed of its contents. This is consistent with the approach to non-sensitive material and is logical insofar as there is no reason why material should be more likely to undermine the prosecution case or assist the defence just because it emanates from a sensitive source. But there is an important distinction because it will not feature on any schedule which the defence will see. This places a greater onus on the prosecutor which is reflected in the fact that, although practices vary, most inspect at least a proportion of the material listed on schedule MG6D. Some prosecutors told us that they normally do inspect sensitive material; some, that they inspect only material that might need to be the subject of an application to the court; others that they always inspect certain categories of material. We were impressed that in one of the cases we saw when we were on site the prosecutor had inspected hundreds of items of sensitive material, in order to ensure that she reached the correct decision in relation to each one.

6.51 Prosecutors require full descriptions of items on the relevant schedules in order to make informed decisions. Certainly, in the absence of proper descriptions, they need to examine the material themselves.

6.52 The CPS and police guidelines expect a senior CPS prosecutor to be made aware of background sensitive material. This is being routinely delegated and some BCPs told us that they are only informed of these cases if it is considered that such material should be disclosed (a rare occurrence). Our examination of the files (and other information) did not assure us that prosecutors were always told of the sensitive information in detail. This does not mean to say that they always need to know highly sensitive information: they do not necessarily need to know the name of an informant if the bona fides and non-involvement of the informant can be assured.

6.53 When considering sensitive material, the prosecutor has a number of different issues to consider. He has to decide whether the material is indeed sensitive (ie. a claim for PII could in law be sustained), whether it might undermine the prosecution case or might assist the defence and, if so, whether it is necessary to make an application to the court. Provided that the description of the item is full, we consider that it is sometimes possible for prosecutors to make the initial decision about whether or not an item is sensitive without inspecting it.

6.54 Only a minority of cases involve sensitive material, and, where they do, the amount of material is usually not substantial, but the issues can be complex. It is, therefore, essential that prosecutors are in possession of as much information as possible before they reach a decision about whether sensitive material is disclosable under the CPIA. Prosecutors can only achieve this by inspecting all material that they

consider might be sensitive. We did not recommend that prosecutors should inspect every non-sensitive item of unused material, recognising that this would create an unsustainable burden on resources. The same consideration does not apply to material that the prosecutor has identified as sensitive. We believe that the proper review of the case under the Code for Crown Prosecutors, as well as the compliance with the duties of disclosure, are best undertaken and assured by full awareness and knowledge of sensitive information and material.

6.55 We recommend that prosecutors should inspect all sensitive material, or be fully informed about it by a senior police officer.

Disclosure

6.56 There were only four cases in our sample which involved sensitive material and came within the statutory disclosure regime. This was unsurprising; in most cases sensitive material would, if used, actually assist the prosecutor rather than the defence. Where the material is prima facie disclosable the prosecutor must consider with the police (or other relevant authority) whether the public interest in non-disclosure is such that, in their view, it outweighs the value of any assistance which the material might be to the defence. If the prosecutor considers that to be the case, a public interest immunity application (as to which see below) should be made so that the trial judge may consider the point and undertake a balancing exercise. If the prosecutor believes that the interests of justice in the particular case do require disclosure, that disclosure must either be made or the case discontinued.

6.57 The prosecutor dealt properly with three cases in our file sample where it was considered that sensitive material might undermine the prosecution case. The material was disclosed in one case. A successful PII application was made in the second case. In a third, the case was dropped ultimately at the Crown Court, because the material was too sensitive to disclose and the prosecutor and the police did not consider it appropriate to make a PII application.

6.58 In a fourth case, the prosecutor considered that sensitive material might assist the defence. There were no clear endorsements on the file as to the final decision, and we were unable to ascertain whether the material was disclosed, or if there was a PII application. We refer to the lack of endorsements about decision-making in relation to sensitive material in paragraphs 6.21 to 6.24. This case highlights the difficulties we commented upon.

Security

6.59 Sensitive material itself is not usually kept in CPS offices, but is retained by the police. The JOPI states that copies of any such material that are in the possession of the CPS should be kept securely, so as to ensure their confidentiality. All the sites that we visited have systems (some more refined than others) requiring that sensitive material be stored away from the file. Our observations showed variable degrees of compliance.

Instructions to counsel

6.60 Instructions to counsel in relation to sensitive material are not always adequate. The PII issues were not covered in the instructions in one of the eight cases where there was a PII application (see paragraph 6.41). We were also told at one site that counsel receives no instructions on sensitive material. We were given no good or adequate reason for this, although we would accept fully the need for security and for instructions and information to be given separately or in conference where appropriate. The recommendation we made at paragraph 4.161 applies even more strongly to sensitive material, although it may have to be dealt with in a secure manner.

6.61 Prosecutors frequently attend conferences with counsel when issues surrounding sensitive material are to be discussed. It is important that prosecutors attend all such conferences, in order to ensure that the issues are fully discussed, and so that they are involved in all decisions relating to sensitive material. It is essential that appropriate records are kept of the essence of the conference and the decisions and actions agreed, and that these records are kept securely.

THE DUTY OF CONTINUING REVIEW

7.1 Section 9 of the CPIA states that there is a continuing duty on the prosecutor to keep under review the question whether at any given time there is material which might undermine the prosecution case or, once the secondary stage is reached, might assist the defence. These duties extend to prosecuting counsel once instructed.

7.2 The continuing duty to review applies to all unused material, whether generated before or after the primary and secondary disclosure stages.

7.3 In practice, we found that further material generated or discovered after the disclosure officer has prepared the MG6C is more likely to be referred to the CPS by way of memorandum. Unless specifically requested by the prosecutor, it is rare for the disclosure officer to submit an amended MG6C. Although little material is likely to be generated after the disclosure officer has completed the MG6C, it is still important that any further material is referred to the CPS on the appropriate schedules.

7.4 At more than one site, prosecutors expressed concern that they are not always informed of unused material that comes into existence after the initial primary disclosure stage has passed. We referred at paragraph 4.103 to examples of the type of material referred to by prosecutors and which we found during the course of our file examination.

7.5 We recommend that CCPs discuss with the police ways of ensuring that relevant unused material, in particular negative fingerprint and forensic evidence, created after primary disclosure, is submitted on the appropriate schedule.

7.6 Interviewees were also concerned about the question of keeping disclosure under continuing review during the course of the trial. There may be no member of the prosecution team in court who has personal knowledge of the contents of all the unused material. This is especially so in Crown Court proceedings. In major or particularly sensitive cases, prosecuting counsel is generally instructed to consider all the material and so can perform the duty in an informed manner. In other cases, there is less clarity. The disclosure officer may play little or no part in the later stage of proceedings. The prosecutor who took the decisions on primary and secondary disclosure will not ordinarily be present.

7.7 We have concerns about whether under present arrangements the prosecuting counsel can properly discharge the duty of continuing review since he will ordinarily have read little or none of the material. Our recommendation at paragraph 5.72 is intended to ensure a more detailed and reliable pooling of information within the prosecution team in every case. Even so, there is likely to be a significant number of cases in which counsel can only discharge the duty of continuing review by asking for and personally considering the unused material.

7.8 We cannot emphasise too strongly the duty which attaches to counsel once instructed to prosecute. The CPS/Bar Standard requires that counsel

consider promptly (within seven days of receipt) instructions delivered by the CPS. It is at this stage that counsel should take an overview and consider whether all necessary steps have been taken, especially in relation to disclosure obligations. The responsibility for the conduct of the case from this point onwards is shared between counsel and the CPS.

7.9 We suggest that counsel should in every case specifically consider whether he or she can satisfactorily discharge the duty of continuing review on the basis of the material supplied by the CPS, or whether it is necessary to inspect further material.

THIRD PARTY MATERIAL

8.1 The Code of Practice states at paragraph 3.5:

" If the officer in charge of an investigation believes that other persons may be in possession of material that may be relevant to the investigation… he should ask the disclosure officer to inform them of the existence of the investigation and to invite them to retain the material in case they receive a request for its disclosure. The disclosure officer should inform the prosecutor that they may have such material."

8.2 If material is inspected or obtained from the third party it becomes unused information or material within the terms of the Code of Practice.

8.3 A recurring theme in the course of our review was the difficulty practitioners experience when dealing with two types of third party unused material, namely CCTV and medical records.

Closed circuit television and video recorded evidence

8.4 The requirement to list a CCTV recording on the appropriate schedule will arise if it is inspected by the investigator or obtained from the third party. There appears to be no requirement under the Code of Practice to list the item on a schedule if the investigator is merely aware of the existence of the material, although the JOPI provides that its existence should be noted on the form MG6.

8.5 At all the sites, concern was expressed about how this type of material is dealt with. In particular, interviewees expressed concern about whether the existence of this type of material was being noted correctly. In some cases, the existence of the CCTV recording came to light after the material had been erased by the third party. We were told of examples of CCTV material that had not been dealt with correctly and when the content of the tape was revealed at a late stage it was undermining of the prosecution case. These experiences had eroded confidence in the disclosure officer and the system itself.

8.6 We were told, at one site that the police instructions are now to obtain a copy of the CCTV if it covers the vicinty of the incident. This ensures that the tape is treated like all other unused material in the possession of the prosecution.

8.7 At another site, the police have agreements with the local football club and shopping centre that all relevant CCTV footage will be retained by the third party.

8.8 We recognise the difficulties police, or the third parties, may face in marshalling and retaining this potential evidence/unused material. Nevertheless, we perceive that its purpose is to both deter and detect crime. In those circumstances, it must warrant proper handling when crimes are the subject of prosecution in the courts.

8.9 We discuss at paragraph 8.29 to 8.31 the benefit that can be gained from entering into protocols with the appropriate bodies about how third party material should be dealt with. CCPs will wish to consider whether this type of material is suitable to be included in any protocols that are entered into by the CPS.

8.10 We suggest that CCPs consider whether CCTV material is suitable to be included in any protocols that are entered into by the CPS.

Medical records

8.11 In considering the disclosure of medical records, we draw a distinction between what may be called the historical medical record of the victim and notes which were made during the investigation and relate to the allegation against the defendant.

8.12 In the case of historical records the disclosure officer will, generally, have no knowledge of their content, or in some cases their existence. We do not consider that these records can be treated any differently from other historical third party material, for example Social Services records. The circumstances of the individual case will determine the extent to which the investigating officer should seek to examine them.

8.13 If, however, a witness statement is based on medical notes different considerations apply. A police officer who is present when the statement is made might inspect the notes. In these cases the content of the notes should be referred to on the appropriate schedule and be disclosed to the defence if required by the CPIA. If, as is often the case, a police officer is not present when the statement is made, neither the content of the notes, nor their existence, will be referred to on a schedule. But, unlike historical records, all parties to the proceedings know that the notes exist, through experience or because they are referred to in the statement itself.

8.14 We were told that it is the usual practice for the defence to request sight of the notes and the police to obtain them. At one site, we were told that the defence do not accept any doctor's statement served on them under the provisions of section 9, Criminal Justice Act 1967 until they have sight of the notes on which the statement is based. At another site, we were told that the notes are often inconsistent with the statement and delay occurs in the trial process while issues are resolved.

8.15 An analogy can be drawn between medical notes which form the basis of a statement and the crime report and log of messages. Often the notes contain the witness's account of the incident and how the victim's injuries were sustained. This account may differ from the one which the witness gives in a later statement. The notes may also contain matters of detail that go to the heart of the allegation and affect the prosecutor's consideration of whether the evidential sufficiency criteria is satisfied. A complicating factor is that the makers of such notes, frequently forensic medical examiners (police surgeons) or hospital doctors, may have concerns about their confidentiality, and may not willingly release them.

8.16 We recognise both the concern of medical practitioners, and also the wisdom of obtaining the consent of the person examined to the release of the notes. Nevertheless, the recurring waste of effort and cause of delay to criminal trials is significant.

8.17 At one site, the police are negotiating with the local hospital to agree the release of medical notes if they have been used to form the basis of a witness statement. We see substantial merit in this approach, although we recognise that there are resource implications for the police if the hospital requires payment for the release of the notes.

8.18 At another site, a local Crown Court practice has been agreed which requires the notes to be listed on the MG6D schedule in unedited form and the MG6C schedule in edited form. The notes should then be disclosed to the defence as a matter of course.

8.19 The CPS will wish to consider with the police whether a framework agreement for the revealing of medical notes to the prosecution can be negotiated nationally for adoption at a local level. We consider that such agreements would better inform the decision-making process, assist in setting the agenda for the trial, and facilitate the disclosure of the notes at the appropriate time.

8.20 We are aware that the Trials Issues Group is considering with the National Health Service such a draft protocol for the provision of witness statements from hospital accident and emergency staff for use in criminal proceedings. This deals primarily with the content of witness statements, and the obtaining of the victims' consent to the release of their medical notes. However, the draft we have seen does not address the issue of the disclosure of those notes.

8.21 We suggest that the Trials Issues Group should consider amending the draft protocol to include arrangements for the revealing of medical notes to the prosecution.

Revealing the existence of third party material

8.22 In some cases the prosecutor may not be aware of the existence of material until the defence raises the issue. It is essential for the prosecutor to be made aware of the existence of all relevant unused material that has come to the notice of the disclosure officer, whether or not there is a requirement under the Code of Practice for it to be listed on the appropriate schedule.

8.23 The JOPI requires the disclosure officer to endorse on the form MG6 if he considers third party material might be held by another body. At one site the disclosure officer is encouraged to give a named contact of the third party. We commend this approach.

8.24 We recommend that CCPs consult with the police to ensure that the disclosure officer endorses on the form MG6 the identity of any third party and the nature of the material they are believed to possess.

8.25 If the disclosure officer or the investigating officer has viewed, but not obtained, the third party material, this becomes information which must be recorded to comply with paragraph 4.4 of the Code of Practice. The record made by the disclosure officer is unused material and therefore should be listed complete with a description of the material on the appropriate schedule. This must be sufficient for the prosecutor to decide whether the record should be disclosed to the defence under the requirements of the CPIA. We believe that the record itself almost inevitably ought to be fully disclosed to the defence at the secondary stage, on the basis that it might assist the defence.

8.26 We have recommended at paragraph 4.39 that the CPS seek to agree with ACPO procedures for reducing the number of schedules which do not describe items sufficiently to enable the prosecutor to make an informed decision about whether they should be disclosed. This of course includes the description of items in the possession of third parties that have been viewed in the course of the investigation.

Disclosure of third party material

8.27 Where material is retained by the third party, and has not become subject to the terms of the Code of Practice, procedures for applying to the court for its disclosure are laid down in section 2,

Criminal Procedure (Attendance of Witnesses) Act 1965. New provisions have been introduced by The Crown Court (Miscellaneous Amendments) Rules 1999. If the court considers that the material should be disclosed, it will order the third party to make disclosure. We were told that these procedures generally work well when the material is held by the Social Services departments of Local Authorities, as is likely to be the case in allegations of child abuse.

8.28 There was third party unused material in 48 cases in our file sample. In 29 of the 48 cases the defence requested disclosure of the material. The third party objected to disclosure of the material in six cases. The court ordered disclosure in three of these.

8.29 At two of the sites, a protocol has been agreed between the CPS and the Local Authority that sets out the responsibilities of each party when an application is made to the court for third party material. At another site, there is a similar protocol between the police and the Social Services department.

8.30 We commend this approach. If the responsibilities of each party are set out clearly many difficulties can be avoided.

8.31 We recommend that CCPs consult with local organisations which commonly hold third party material in order to develop protocols on its handling, and that the development of these protocols should be co-ordinated by the Director of Policy.

INFORMAL DISCLOSURE

9.1 It is clear from our file examination that prosecutors were for the most part applying the provisions of the CPIA restrictively and that very little unused material is actually disclosed to the defence at either the primary or secondary stage. Conversely, our findings while on-site are that a considerable amount of unused material that is not considered to either undermine or assist is being actually disclosed to the defence.

9.2 In this chapter, we consider to what extent this takes place, when it takes place and on what basis it is decided to make informal disclosure. By informal disclosure we mean providing the defence with copies of documents, or providing them with access to material that is not thought either might undermine the prosecution case or might assist the defence.

Routine disclosure of certain documents

9.3 We have referred at paragraph 4.61 to the practice at one site of prosecutors automatically disclosing on request copies of the crime report and log of messages. At other sites, we found that the extent to which informal disclosure is made can depend on which prosecutor is making the decision. Generally, we found that counsel are in favour of the informal disclosure of documents requested by the defence. The approach of defence solicitors varies. Some automatically request disclosure of certain types of document. Some make reasoned and reasonable requests for certain material, and find these are usually granted. Others, particularly in magistrates' court cases, take little interest in unused material. This last scenario is supported by our file examination where we found it rare for a defence statement to be served in summary trial cases, or for non-disclosure to be pursued.

9.4 Many interviewees considered that there were a number of documents which should be routinely disclosed to them. We dealt with the question of provision of copies of the log of messages and the crime report to prosecutors, and disclosure of them to the defence, in paragraphs 4.60 to 4.67. Some felt that these documents should always be

disclosed. Others felt that disclosure should be made after a defence statement had been provided. We were also told that in one Area, although not one we visited, the defence are allowed to inspect all documents listed on the MG6C schedule once a defence statement has been served.

9.5 Documents included in interviewees' lists of items which they considered should be disclosed routinely were: crime reports, logs of messages, police note books, details of witnesses not being called by the prosecution, medical notes, and neutral or negative forensic or fingerprint evidence.

9.6 In most cases, any material that might either undermine the prosecution case or assist the defence is likely to be found in these documents. At the very least, we consider firstly that they should be copied to prosecutors, so that they can examine them to determine whether or not they fall to be disclosed under the CPIA to the defence, and secondly that prosecutors follow the guidance about secondary disclosure we referred to at paragraphs 5.64 to 5.66. This will result in a considerably greater degree of actual disclosure. This will go some way to remedying the inconsistent approach of prosecutors.

Prosecutors' interpretation of their role

9.7 We found that some prosecutors considered that their training and guidance had led them to see their role as being to uphold the CPIA. Generally, they do not disclose material unless the CPIA clearly requires it to be disclosed. This results in restrictive disclosure decisions. Other prosecutors are more generous in their interpretation of the CPIA, and will disclose material upon any reasonable request from the defence.

9.8 There is substantial evidence, from our file examination and particularly from interviews, that there is a much more liberal interpretation of the CPIA when the case gets before the Crown Court. Indeed, in some parts of the country the CPIA is being ignored. This results in the prosecution disclosing material after the secondary stage, on the grounds of openness and fairness to the defendant. This may be occurring occasionally as the result of a formal court order, but generally as a result of a strong indication from the judge at the PDH, or because prosecuting counsel takes a pragmatic view rather than strictly interpreting the CPIA. It is perhaps inevitable if prosecuting counsel is unable to assure himself on the documents and instructions he has been provided with that disclosure has been undertaken properly and so allows disclosure as a failsafe position.

9.9 Some external interviewees told us that they are not satisfied that prosecutors are able to make proper decisions on disclosure when they do not inspect all of the material themselves. They therefore seek copies of the material, in order to satisfy themselves that it contains nothing that might undermine the prosecution case or assist the defence.

9.10 Some prosecutors we interviewed felt that, in view of the approach taken at the Crown Court, there was little point applying the tests laid down by the CPIA. On the other hand, the defence, counsel and judges felt that a more liberal approach to disclosure is being adopted because of a lack of confidence in the system, based on concerns about the ability and lack of training of the disclosure officer, and because prosecutors are not, in their view, making informed decisions. The result is that considerable time is spent by prosecutors considering and rejecting requests for material; friction arises because of the different expectations; an unhelpful atmosphere is created; and material is sometimes disclosed later anyway. Furthermore, the different approaches

adopted by prosecutors and prosecuting counsel mean that what is disclosed to a defendant may depend on who is dealing with the case. Overall, the position is clearly unsatisfactory.

Failure to disclose

9.11 Failure to make proper disclosure can lead to miscarriages of justice. It can also very occasionally lead to cases being lost on the basis that there has been an abuse of process. At a lower level, a failure to recognise or accept the approach of the Crown Court can lead to a delay in the trial process while informal disclosure is made. Alternatively, it can lead to adjournments and delay in trials when material which should have been disclosed comes to light. We found that caseworkers, who spend a considerable amount of time in the Crown Court, could provide prosecutors with valuable guidance on the approach of the court. This closer working relationship still needs development in some CPS Areas.

9.12 We recognise that allowing the defence access to all unused material could be a return to the discredited previous system and could render the CPIA redundant. We also recognise that many prosecution teams consider that they are not currently provided with the appropriate level of assurance by all disclosure officers and are not utilising resources to examine all unused material.

Failsafe disclosure after receipt of defence statement

9.13 Our view is that if in the end prosecutors are not confident that they are able to make informed decisions about what should be disclosed then they must allow the defence access to all non-sensitive unused material. This is a regrettable failsafe position, but one which we consider might, in the end, be required in the interests of justice. It is the only legitimate reason for a level of disclosure being made, as we describe in paragraph 9.8, which does not accord with what Parliament intended. We emphasise that prosecutors should do all they can to ensure that they make informed decisions, and we do not want them to abdicate their responsibilities.

9.14 There may be occasions when the prosecutor cannot inspect all unused material that his skills and experience cause him to suspect might assist the defence, or all material that the defence can show reasonably may be relevant to the case and may assist them. In these circumstances, subject to the overriding requirement to inspect sensitive material, the requested documents should be disclosed upon receipt of a clear defence statement. Local prosecutors should make the position clear to the defence when undertaking their duties of secondary disclosure whether they consider the defence statement adequate to trigger full secondary disclosure. This system will place a proper onus on the defence to comply with the CPIA and demonstrate that it does make a difference to the prosecution decision-making and practice.

9.15 In this approach, we recognise that there will be an increase in the burden upon the prosecution. We also note, however, that it will require in most cases, a substantial change in approach by defence solicitors. The meaningless defence statement that recites merely that the defendant denies the offence should no longer be accepted as the trigger for the disclosure of any document requested. A reasoned defence statement justifies a reasoned response by way of either full consideration of material by the prosecutor, or full disclosure of non-sensitive material when this cannot be done.

Recording of all unused material which is actually disclosed

9.16 Informal disclosure sometimes takes place by way of correspondence before the start of the

trial. Interviewees told us that it also takes place at court at the PDH, before the start of the trial or even, in some cases, during the trial. When informal disclosure takes place in these circumstances we found that there is no system to ensure that a record of what is disclosed is kept on the prosecution file. This made it difficult for us, in the course of our file examination, to say with any certainty what material had been disclosed. More importantly, it means that it is difficult, if not impossible, for anyone looking at a file to be certain that material has been disclosed. This could be vitally important in any appeal.

9.17 We recommend that prosecutors, caseworkers or prosecuting counsel keep a record on the file or brief of all unused material which is actually disclosed to the defence at any stage.

9.18 In making this recommendation we are reluctant to suggest the adoption of yet another special form, but the Director of Policy or the disclosure working group will no doubt wish to consider how best to ensure proper records are kept.

FILE MANAGEMENT

10.1 At various parts of this report we have commented on the difficulty we had when examining files in determining whether CPS staff had carried out certain actions. Some examples are:

- in 26 cases we could not tell whether the correct primary disclosure letter was sent to the defence;
- in 33 cases we could not tell whether a copy of the MG6C schedule was sent with the letter;
- in 35 cases we could not tell whether a copy of the primary disclosure letter and schedule was sent to the police;
- in nine cases we could not find the defence statement on the file; and
- in 33 cases we could not tell whether a copy of the defence statement was sent to counsel.

10.2 The physical state of many of the files that we examined was such that we could only discover the disclosure trail after lengthy consideration of all the case papers. On some files there appeared to be no system for retaining unused material in such a way as to readily distinguish it from the evidence in the case.

10.3 Unused material was mixed in with correspondence and we found schedules at various random locations on the file. In some cases no copies of the relevant documents could be found, although correspondence indicated that they had been present at some stage. In others, there were several copies of the same schedule, not all of which had the same endorsement and there was no clear master schedule.

10.4 Some files contained separate folders for the storage of unused material, and correspondence about unused material. We commend this system, but we found that in practice these were not used fully. Material was still mixed in with other documents, and correspondence that related to decisions on disclosure was kept in the general correspondence bundle. Sometimes this was because it was a mixed letter dealing with disclosure and other matters, and sometimes not.

10.5 A checklist system has been adopted at some sites (see paragraph 4.128). This consists of either a box that is stamped on a folder or a pre-printed form. The checklist has space to indicate when disclosure decisions are made and what type of letter is sent to the defence. We commend this system (as long as it does not replace the

requirement to keep copies of correspondence), but again found that in practice the boxes would often be only partially completed, if at all. This, together with the failure to date standard letters, meant that it was impossible to determine when certain actions were carried out.

10.6 The requirement to comply scrupulously with the disclosure provisions cannot be met if poor file housekeeping prevents the prosecution from being able to prove that compliance. The consequences of poor file management can impact adversely on the effective conduct of the prosecution. We have given an example at paragraph 4.129 of cases where the prosecution could not show when primary disclosure had been made and therefore could not challenge the timeliness of the defence statement. In numerous files we suspect that informal disclosure of most, if not all, non-sensitive material was made at some point, but nothing was noted on the files. Good practice does exist around the country and we have referred to this in paragraphs 10.4 and 10.5. It needs to be promulgated and maintained.

10.7 We recommend that all non-sensitive unused material, the relevant schedules, related correspondence and a disclosure record sheet are kept in a separate folder within the file, and that the disclosure working group identifies and promulgates good practice in relation to varying types of files, from the simple to the complex.

THE JOINT OPERATIONAL INSTRUCTIONS FOR THE DISCLOSURE OF UNUSED MATERIAL

11.1 The JOPI was developed to provide the police and prosecutors with guidance on practical issues. The intention was for the document to provide the principles that should enable both the police and the CPS to understand their responsibilities under the CPIA and the Code of Practice. It underpins both the Act and the Code. It is entitled "instructions", but is said to be guidance, although it is in many respects directive, and it is meant to be followed. We comment on it in paragraphs 3.28 to 3.32, commending its purpose and content, whilst drawing attention to some of its implicit uncertainties. Elsewhere in the report we have commented on parts of it that merit review or clarification. If the JOPI had been complied with more strictly then the disclosure regime would be on a much sounder footing.

11.2 Interviewees expressed differing views on the usefulness of the JOPI. Some told us that they found it very useful, others said that it was not referred to a great deal, or that whilst helpful it was too long and detailed.

11.3 Much of the guidance in the JOPI and elsewhere was written before the implementation of the legislation, and we suspect that it has not been reconsidered by experienced practising prosecutors in the light of their handling of a wide variety of cases. Additionally, we have seen only superficial assessment of the impact of the duty of disclosure, and its implementation in practice.

11.4 We have considered the JOPI against the findings in this report. Where appropriate, we have made recommendations, suggestions and observations about how the document could be amended to reflect those findings, to improve the integrity of the system. It needs to be amended in consultation with prosecutors and police officers who have considerable practical experience of the workings of the CPIA.

11.5 We recommend that the Director of Policy consults with ACPO in order to agree amendments to the JOPI.

11.6 To assist those who may have to consider the JOPI in the light of our report and recommendation, we draw together in this chapter our findings. For ease of reference we refer to them under the appropriate chapter heading.

Primary disclosure

11.7 The reference in the JOPI to the disclosure officer being responsible for handling the administrative side of disclosure does not convey properly the importance of the role.

11.8 We have recommended that paragraphs 2.87 to 2.89 of the JOPI should be reviewed and a procedure incorporated which facilitates swifter amendment of MG6C schedules with a view to service on the defence.

11.9 We have recommended that the CPS Policy Directorate should consider with ACPO an amendment to the JOPI and the Manual of Guidance which would have the effect that in all cases a copy of the crime report and log of messages is provided with the MG6C.

11.10 The CPS will wish to consider whether the JOPI should be amended to make it clear that a record should be made of all decisions in relation to disclosure, including (in appropriate cases) the prosecutor's opinion that there is no material which might undermine the prosecution case. This should include consideration of whether this is best done on a separate disclosure record sheet/log.

11.11 We have suggested that the Director of Policy should pursue with ACPO whether the JOPI should be amended, to make it a requirement for disclosure officers to endorse on the report that they have considered all the material listed on the MG6C and MG6D (and other material if retained and not listed), and that, in their opinion, there is no material which might undermine the prosecution case.

11.12 The CPS will wish to consider in conjunction with the police whether the form MG9 is the appropriate document to convey information about witnesses' previous convictions.

Secondary disclosure

11.13 We have suggested that the Director of Policy should pursue with ACPO whether the JOPI should be amended, to make it a requirement for disclosure officers to endorse on the report that they have considered all the material listed on the MG6C and MG6D (and other material if retained and not listed), and that, in their opinion, there is no material which might assist the defence case.

11.14 The CPS will wish to consider in conjunction with the police whether the JOPI should be amended to include a requirement for the prosecutor to endorse fully on the MG6C schedule, in appropriate cases, that in their opinion there is no material which might assist the defence, and that prosecutors must provide reasons for their decisions upon the file. This should include consideration of whether this is best done on a seperate disclosure record sheet log.

Sensitive material

11.15 Consideration should be given to including more detailed instructions in the JOPI about how disclosure officers should list on the schedules material that contains a mix of sensitive and non-sensitive information, in particular the crime report.

11.16 The CPS will wish to consider in conjunction with the police whether the JOPI (and the MG6D schedule) should be amended to include a requirement for the prosecutor to endorse fully on the MG6D schedule, in appropriate cases, that in his opinion there is no sensitive material which might undermine the prosecution case or assist the defence case, and to record the reasons for it on the file. This should include consideration of

whether this is best done on a seperate disclosure record sheet log.

11.17 The guidance in the JOPI about consideration by the prosecutor of sensitive material needs to be amended in the light of our recommendation that prosecutors should inspect sensitive material.

LEARNING LESSONS FROM INSTANCES OF FAILURE TO DISCLOSE

12.1 We were told of a number of cases in which there were failures on the part of the prosecution to disclose relevant material to the defence. Most of these related to items which were not on any of the schedules, or were not described so as to raise concern that they might undermine or assist. A large number of similar assertions were made in response to the BAFS/Criminal Bar Association Survey.

12.2 The case reports and records held by the CPS Areas and Branches did not reveal problems to such an extent. We suspect that this is because only a minority of cases actually fail by way of judge ordered acquittal or judge directed acquittal and it is only in these cases that CPS procedures require that a failed case report be prepared and retained.

12.3 We therefore consider that a duty should be placed on prosecuting advocates to provide a written report in every case where the court has ruled that there has been a failure on the part of the prosecution as a whole to disclose relevant material under either the primary or secondary tests, or where counsel believes that there has been such a failure. This should be included in a standard paragraph in instructions to counsel. The report, in conjunction with the file, could be used by CPS managers to investigate what occurred. The reports should be collated by the CCP and used to monitor the extent of any failures to disclose in the Area, and as a means of learning lessons. This would also be a valuable means through which the CPS as a whole could assess the situation in relation to disclosure, in order to disseminate nationally lessons to be learned.

12.4 **We recommend that the Director of Policy issues guidance that a standard paragraph is inserted in instructions to counsel, requesting a written report in any case where a court has ruled that there has been a failure on the part of the prosecution as a whole to make proper disclosure, or counsel believes that there has been such a failure, and that these reports are collated by CCPs.**

CONCLUSIONS, GOOD PRACTICE, RECOMMENDATIONS AND SUGGESTIONS

The operation of the disclosure regime

13.1 The evidence we have gathered during the course of our review indicates clearly that the disclosure regime provided for by the CPIA does not operate in practice as Parliament envisaged. We understand that it was intended to create structured arrangements which avoid multiple scrutiny of large quantities of material by both prosecutors and defence practitioners. Instead there should be a careful two-stage appraisal by the prosecution team, informed at the second stage by a statement of the defence case, of all the material relevant to the investigation on the basis of clear and unequivocal responsibilities to make disclosure (subject to any question of public interest immunity) of that which might undermine the prosecution case, or which might be reasonably expected to assist the defence. It is equally clear that the operation of the present

regime does not command the confidence of criminal practitioners or the judiciary. Our specific remit has been to consider CPS compliance with its duties in relation to prosecution disclosure and it is clear that numerous aspects of CPS performance are inadequate and contribute to the unsatisfactory situation we describe and the lack of confidence. But, as we indicated at the outset, CPS performance cannot be considered in isolation from the issues thrown up by the structure of the regime itself and the performance of other criminal justice agencies.

13.2 A notable feature of the CPIA scheme is the awkward split of responsibilities, in particular between the police service and the CPS. There will be inherent in any system of disclosure the initial difficulty for the police of defining from the huge databases operated by the police service (particularly in an age of intelligence and target led investigation) the body of material which is to be considered as pertaining to the particular proceedings and therefore subject to scrutiny. There is no simple solution to that problem. But the present arrangements require that whole pool of material, sometimes voluminous, to be scheduled and described in a manner which will facilitate reasoned and informed decisions by prosecutors and advocates at the later stages of the criminal proceedings. That is difficult in itself. Doing the task properly will often be resource intensive at a time when there is severe competition for police resources. Inadequacy at this stage, however, undermines the effectiveness of all subsequent stages.

13.3 In addition, police officers are required to make judgments which are usually regarded as more suitable for lawyers. The position is complicated by the fact that the present arrangements for the handling of prosecutions often means that there is little feedback to police officers about the progress of cases so that the decisions for which disclosure officers are responsible (ie. does material undermine the prosecution case or assist the defence) cannot always be taken with the benefit of up-to-date knowledge of what issues have emerged in the case.

13.4 These weaknesses are compounded by time constraints which are meant to be applied to the various stages of the disclosure process so that prosecutors only infrequently seek further and better particulars about scheduled material or inspect it. We think it right to highlight these matters because they permeate throughout our findings.

Suggested changes to the respective responsibilities of the police service and the CPS

13.5 We do not seek by highlighting the unsatisfactory split of responsibilities under the CPIA regime to minimise the effect of the shortcomings in CPS practice which we have identified. There is undoubtedly much which the CPS can do to enhance its compliance with the prosecution disclosure regime and the recommendations and suggestions made in this report identify many means by which this could be achieved. It seems likely, however, that the respective responsibilities of the police service and the CPS could be realigned without resort to primary legislation because the key provisions which underpin the prosecution disclosure requirements are contained in the Code of Practice. The amount of material which prosecutors are at present required to consider is limited by the fact that "prosecution material" comprises only that which is in the possession of the prosecutor, or has actually been inspected by the prosecutor. If the Code of Practice were amended to require the provision by the police to the CPS of considerably more material than it does at present, the provisions of the primary legislation would then bite on that material.

13.6 This change could be brought about by amendments to the JOPI requiring the prosecutor to request a defined amount of material from police under paragraph 7.3 of the Code of Practice, thereby expanding the amount of material which becomes "prosecution material" under the Code. The weakness of this solution is that the JOPI is regarded only as guidance. Furthermore, the position that it is a restricted document may mean that any amendment to it may not lead to enhanced public confidence in the disclosure regime as a whole.

13.7 Such change, however it is implemented, would have very significant resource implications both for the CPS, whose prosecutors would be required to examine far more material and determine issues of disclosure, and for the police service who would be required to copy far more material than at present. It is doubtful in our view whether the CPS could properly discharge such enhanced responsibilities without significant additional resources for that purpose. We suspect that the present structure of the regime may owe much to such considerations and simply represented the best which could be achieved on the basis of the resources available. But it is difficult to escape the conclusion that, although modest improvement to the operation of the present regime may be achieved within the framework of existing responsibilities, the degree of improvement, which the present level of public concern requires, can only be brought about by arrangements which ensure that material which is potentially disclosable is scrutinised by a member of the prosecution team who has a full and up-to-date knowledge of the issues in the particular case. We therefore think that the full implication of this, especially in terms of resources, would be a particularly fertile and fruitful area for further consideration by those appointed by the Home Office to effect more detailed research into the working of the legislation. Their work might usefully include some more detailed assessment of the likely volume of material presently held by disclosure officers and not copied or inspected by prosecutors which would in future have to be scrutinised under the sort of arrangements suggested above. The expectation at the time the CPIA was passed would undoubtedly have been that resources would be saved. It is, however, clear that, even under the new regime, the burden on both police and prosecutors is far greater than that which existed before the common law development of the mid-1990s.

13.8 We have mentioned above the detailed research commissioned by the Home Office into the operation of the whole of the disclosure regime. We consider that all the issues we have highlighted here, together with those that we consider need further examination, should be considered further in the context of that research. This would then provide a firm basis for reaching any conclusions on what changes are needed.

Scope for improvement of performance within the present regime

13.9 As to the scope for improvement of performance without such change, our review found that prosecutors are uncertain about what is expected of them to ensure that they comply scrupulously with their duties of disclosure. Some take a restrictive view and consider that compliance is achieved by disclosing only that material which actually undermines the prosecution case or assists the defence. Others apply a looser test, considering whether in fairness to the defence the item should be disclosed. Such a test, whilst in line with what many outside the CPS would prefer, is difficult to apply. Some CPS staff and external interviewees, in the current climate of uncertainty, would prefer to revert to the practice that existed prior to the introduction of the CPIA (see paragraphs 3.4 to 3.5).

13.10 All too often in the course of this review, we have been told that compliance by the disclosure officer and the prosecutor appears to involve nothing more than the undertaking of mechanical tasks. Whilst we saw examples of unused material schedules that indicated clearly that the disclosure officer had considered the issues in the case, frequently the MG6C was nothing more than a list of items. There was no description of the items and the prosecutor asked for none. In some cases, it was clear on the face of the file that material had been omitted from the MG6C schedule. Only in a few did the prosecutor ask for amendment. The sending out of a standard letter to the defence indicating that there is no undermining material, without informed consideration of that material, cannot be regarded as compliance with the requirements of the CPIA. This is highlighted by those cases where the standard letter was sent to the defence before the disclosure officer had informed the prosecutor whether there was material which might undermine/assist.

13.11 Some Areas impressed us with the quality of their work on disclosure, and the police officers and prosecutors we spoke to displayed a clear understanding of the CPIA and the Code of Practice and a determination to achieve proper standards within their area. Even in those Areas we nevertheless found instances of omissions. We can but recognise the fact that the weakest link in the chain, or the mistakes of the few, unfortunately undermines and removes faith in the efforts of the many.

13.12 Another significant factor may also be the present relative lack of experience on the part of CPS prosecutors in relation to Crown Court casework. Prosecutors are now being encouraged to concentrate more on Crown Court work and, in addition, more CPS prosecutors are acquiring, and exercising, rights of audience before the higher courts. This is likely to give them more direct experience of handling disclosure issues in the Crown Court, and a better feel for the approach of the Crown Court which in turn will be reflected in their judgment and decision-making.

Failures to disclose

13.13 The experiences and examples quoted by counsel about occasions when clearly defective schedules of unused material had been served on the defence replicated our own findings. The percentages were small, but the failure by prosecutors to pick up on basic omissions by disclosure officers undermines the system and destroys its credibility. There are also the fundamental doubts referred to earlier about whether prosecutors can make proper or informed judgements or decisions by merely looking at schedules and certificates provided by the disclosure officers. It was accepted that some documents which were described in detail or in which descriptions or passages were set out within the schedule, could be the basis of an informed decision, but not where the schedules were bare lists of items. The same interviewees considered that the system would not be wholly cured by better practices. We agree.

13.14 Our inspection has indicated that in most cases there was little unused material that actually either undermined the prosecution case or assisted the defence. Nevertheless, there are a significant number of cases where there is material that **might** do so, and in some of those it is not being identified by the disclosure officer or by the prosecutor. Cases will therefore progress with the defence in ignorance, unless determined probing by them, often only on an expectation borne out of general experience, reveals the existence of the material.

13.15 We were told of specific examples of this happening. These included the following:

- the disclosure officer referring to a video tape, with no additional description, when in reality the video tape showed dubious behaviour by a police officer;
- relevant CCTV material held by third parties, and known about by police, but not referred to on any schedule, being tracked down by the defence; and
- significant police comments made to a scientist only coming to light when the scientist appeared at court with the file to give evidence.

Disclosure decisions taken by the prosecution

13.16 In most cases the extent of actual disclosure by the prosecutor follows the view of the disclosure officer about whether material might undermine the prosecution case or might assist the defence. In the event of failure, it is the disclosure officer who is more likely to be criticised. In the most serious and sensitive of cases prosecuting counsel frequently considers it his duty to check all the material (himself or by a junior counsel), something for which there are resource issues, albeit in the end it is generally accepted that it is justifiable work. In middle ranking cases prosecution counsel try and get by with checking the material at the court door, and/or by allowing the defence to see all the non-sensitive unused material in a failsafe discharge of the duty to disclose. In minor cases we suspect that it is often merely hoped that there is no material of any significance.

13.17 At the moment an unsatisfactory situation prevails. The disclosure officer reveals and identifies unused material, and prosecutors make decisions entirely based upon this. The disclosure officer identifies whether any of the unused material might undermine the prosecution case or might assist the defence. If he says there is none, then the prosecutor duly informs the defence there is nothing to disclose; if he says there is such material, then the prosecutor discloses it. Many of these decisions are uninformed because of lack of detailed descriptions or personal assessment of key material.

13.18 A number of CCPs have issued recent guidelines to prosecutors urging a tighter and more scrupulous undertaking of their duties. These urge prosecutors to ensure that disclosure officers provide their schedules in a timely fashion and in sufficient detail. The initiatives have not addressed the need for prosecutors to spend more time examining material themselves. We suspect that resource considerations are a major factor in this regard.

Primary disclosure

13.19 We consider that better compliance can be achieved within the existing framework by a more concerted joint approach. The following should be achieved in all cases:

- prosecutors requiring more accurate and detailed schedules of material from police;
- prosecutors seeing and assessing more material themselves;
- prosecutors recording decisions and reasons for them;
- prosecutors passing on quality information to prosecuting counsel; and
- prosecuting counsel preparing so as to be in a position to exercise the continuing duty of disclosure throughout the trial.

This will involve high quality work at the front end, high quality assessment and decision-making by the prosecutor, high standard of instruction to prosecuting counsel, and the examination of key material by prosecuting counsel themselves.

13.20 We express our concern elsewhere about the small amount of material actually considered or

examined by prosecutors. The guidance in the JOPI makes it clear that a prosecutor should actively consider whether it is necessary to see any item that has not been sent by police. Furthermore, if the description of an item in a schedule contains insufficient detail to enable the test to be applied, the prosecutor may ask for a copy of the items not already supplied or to inspect it. The present arrangements can only work properly if prosecutors (including counsel) take a more positive approach to this aspect of their duties.

The way forward for primary disclosure

13.21 Firstly, prosecutors must examine copy documents, or inspect the material itself, whenever they cannot with confidence make an informed decision upon the schedules, reports and certificates by themselves.

13.22 We also consider that prosecutors must apply the tests for relevance and primary disclosure bearing in mind the guidance provided within the JOPI. This is material which might undermine the case for the prosecution and generally includes any material that has an adverse effect on the strength of the prosecution case (see paragraph 4.118).

13.23 The arrangements will also work more satisfactorily and command greater confidence if prosecutors record their decisions and the reasons for them.

13.24 These fundamental steps which we have sought to reflect in our recommendations will greatly improve the quality of decisions about primary disclosure.

Secondary disclosure

13.25 The perception that lip service is paid to the approach to the provisions of the CPIA increases at the secondary disclosure stage. No decisions were "clearly wrong", but we were surprised at the few occasions when it was considered that material might assist the defence. On the other hand, the defence were frequently not complying with the CPIA and no defence statement was served at all. Even more frequently, prosecutors were asked to consider secondary disclosure on the basis of a defence statement that is a mere denial of the charge. It is difficult to see how a defence statement that recites merely that the defendant denies the offence, and does not even adopt any explanation made in interview, can help the prosecution in identifying material that may assist.

13.26 We found little guidance provided to prosecutors as to what they should do on receipt of a very basic defence statement. We came across examples of the prosecutor rejecting the defence statement as inadequate. We explain in paragraphs 5.23 to 5.24 why we consider this to be inappropriate. We consider that the prosecutor should write to the defence setting out his view of the defence statement and its inadequacy, and describing the limited extent of secondary disclosure triggered by it. This will demonstrate a fair and balanced response by the prosecution, which will clarify the matter in the instant case and be the first step to putting legitimate pressure upon the defence to meet their duties under the CPIA.

13.27 We are aware that the DPP has already indicated that in his view prosecutors should do more to put themselves in the position of the defence and assess what material they would wish to have that would assist them in the defence. We suggest that a group of experienced prosecutors and police officers (see paragraph 13.36) takes this into account, in formulating practical guidelines about the undertaking of the duty of secondary disclosure in the light of the nature and extent of the defence statement. The working group needs also to draw upon its collective experience of the quality and timing of defence statements in providing this guidance.

The way forward for secondary disclosure

13.28 Firstly, we consider that decisions on secondary disclosure should be made in the light of the defence statement and on reappraisal of all the evidence.

13.29 Secondly, the test must be applied following the guidance provided in the JOPI, to see if there is any material which has not previously been disclosed, and which might reasonably be expected to assist the accused's defence as disclosed by the defence statement. Furthermore, this must be considered from the point of view of the defence (see paragraph 5.64).

13.30 Thirdly, a much more open and generous interpretation of material "which might assist the defence" should inevitably follow on from a full and clear defence statement. Experience that crime reports and logs of messages almost inevitably contain material which the defence think might assist their case ought to be applied (see paragraph 4.75). There must be a response to a defence statement which is considered inadequate which makes clear the extent to which secondary disclosure has been considered. If no defence statement is provided in Crown Court cases this must be pursued at a hearing before the judge.

13.31 Fourthly, prosecutors must record their decisions and the reasons for them.

13.32 These steps which we have sought to reflect in our recommendations about secondary disclosure, should substantially improve the quality of decisions about secondary disclosure and, importantly for the defence, greatly increase the amount of material consistently disclosed under the CPIA.

Sensitive material

13.33 We have made a number of recommendations designed to improve how sensitive unused material is dealt with, although we found generally that the procedures for withholding this type of material work well. There is, however, a need for greater clarity as to the CPS role in making applications in relation to public interest immunity, closer supervision of such cases and more thorough recording of the steps taken.

The reaction of others

13.34 We consider that the statutory tests as expressed in the JOPI should be applied, specifically giving the benefit of any doubt on the side of disclosure. We believe that our recommendations in this report, if implemented, will increase confidence in the integrity of the current system, and allay many of the current concerns expressed about the workings of the CPIA.

13.35 In saying this, we recognise that even this is unlikely to gain the full endorsement of defence practitioners. At the end of the day, they will never wholly willingly rely on the assurances of the prosecution that there is nothing that might undermine/assist. They ultimately wish to see it for themselves. We can only point out that, if followed, our recommendations and suggestions will provide a much higher level of assurance through informed decisions being made, and if better quality defence statements are provided, then a higher level of actual disclosure will follow.

National guidance and training

13.36 We found a variety of practices around the country in relation to unused material. We consider that a group of experienced practising prosecutors and police officers responsible for disclosure issues from around the country, plus representatives from the CPS Policy Directorate, should be established to work in close juncture with the new CPS disclosure working group to produce practical guidelines that will go into a revised JOPI. Consideration should be given to inviting external members of the legal profession

and possibly also the judiciary to participate. A consensus needs to be attained throughout the CPS, and with the Bar, about what degree of personal checking of material is needed, and is feasible. This needs to be related to the full range of cases, from minor traffic to homicide, in order to provide the correct level of assurance that no material might undermine the prosecution case or assist the defence and to meet the CPS objective of scrupulous disclosure. There needs to be a clear view as to how this is to be undertaken in the full range of offences in terms of seriousness, case weight and complexity.

13.37 The CPS is already working towards publishing a set of guiding principles. These will be welcomed, but it is only when these have been related to practical propositions that prosecutors around the country will gain a clearer understanding of the extent of their duty and be in a position to give effect to this.

13.38 We would add that ongoing training to supplement and up-date that undertaken on the introduction of the CPIA is required for both CPS prosecutors and caseworkers, and for operational police officers who investigate and deal with disclosure issues. Wherever possible this should be undertaken jointly to reinforce the partnership approach needed to undertake successfully the duties of disclosure by the prosecution.

General caveat

13.39 No disclosure regime will defeat the determined and dishonest who deliberately destroy or hide relevant material or information. Nevertheless a clear, consistent, well-structured regime will help to provide fair trials and avoid injustice.

GOOD PRACTICE

13.40 In the course of this review, we have observed a number of systems and practices that assist the CPS in complying with the disclosure provisions. We have highlighted several of them in the appropriate sections of the report. For ease of reference, we list them here under the chapter headings in which they appear. We commend those practices where:

Primary disclosure

1. The disclosure officer is provided with a chart detailing how unused material should be dealt with (paragraph 4.40).

2. The prosecutor endorses in appropriate cases that in his opinion there is no material which might undermine the prosecution case (paragraph 4.79).

3. The disclosure officer endorses on the MG6E that he has considered all the unused material, and confirms that, in appropriate cases, there is no material which might undermine the prosecution case (paragraph 4.94).

Secondary disclosure

4. The disclosure officer endorses on the MG6E that he has considered all the unused material, and confirms that, in appropriate cases, there is no material which might assist the defence case (paragraph 5.47).

5. The prosecutor inspects all material that the defence have made a reasoned request to see or have copies (paragraph 5.54).

6. The prosecutor endorses his decision in relation to secondary disclosure (paragraph 5.85).

File management

7. Separate folders are used for the storage of unused material, schedules and reports (paragraph 10.4).

8. A checklist is used to record actions taken in relation to disclosure (paragraph 10.5).

RECOMMENDATIONS

13.41 In the light of our findings, we have identified where improvements may be made. For ease of reference we have grouped our recommendations under the chapter headings in which they appear in the report. We recommend that:

Primary disclosure

1. Prosecutors always request unused material schedules where they are missing before proceeding to trial (paragraph 4.18).

2. Prosecutors examine the MG6C schedule carefully, in the light of the evidence in the case, and if omissions are apparent that they send the schedule back to the disclosure officer for rectification (paragraph 4.35).

3. The CPS examines with ACPO means of reducing the proportion of defective MG6C schedules submitted to the CPS. This should include the setting of targets using our findings as an initial benchmark (paragraph 4.39).

4. The Director of Policy, in conjunction with ACPO, devises a chart, for wall or desktop use, which provides clear guidance about unused material, its inclusion on schedules, and descriptions to be provided, to assist disclosure officers and prosecutors in achieving national consistency (paragraph 4.41).

5. The Director of Policy seeks to agree with ACPO standards for the preparation of schedules so that material is described in sufficient detail to enable the prosecutor to make an informed decision about primary disclosure (paragraph 4.51).

6. The Director of Policy should consider with ACPO an amendment to the JOPI and the Manual of Guidance which would have the effect that in all cases a copy of the crime report and log of messages is provided with the MG6C (paragraph 4.74).

7. Prosecutors endorse their opinion whether any material revealed might undermine the prosecution case, and record the reasons for it on the file, or upon a disclosure record sheet within the file (paragraph 4.82).

8. Prosecutors should be more proactive in scrutinising the MG6C to identify that which might undermine the prosecution case, with a view to ascertaining whether any further material may exist which is not recorded on the MG6E but which ought to be (paragraph 4.105).

9. The DPP should consider issuing further guidance about the application of the statutory tests to be considered and applied by prosecutors in relation to disclosure, whether he does so may depend on the content of the proposed Attorney General's guidelines (paragraph 4.120).

10. In all cases, letters are correctly dated when sent, and files contain a record of the date on which primary disclosure is made (paragraph 4.131).

11. CCPs should consult with the police to ensure that a timely CRO check is made on the antecedent history of all prosecution witnesses (paragraph 4.142).

12. The Director of Policy:

    - supplements the instruction and guidance given in the September 1999 Casework Bulletin with suitable instructions or guidance relating to the disclosure of cautions and disciplinary findings; and

    - monitors the practical effect of the disclosure of previous convictions of witnesses. This should be done in conjunction with the inter-departmental working group set up by the Home Office to evaluate the operation of the legislation on disclosure (paragraph 4.150).

13. The Director of Policy should seek to agree with ACPO more effective arrangements for ensuring that:

- an MG6B is submitted in all appropriate cases;
- the MG6B contains sufficient detail about the finding or allegation against the police officer; and
- the MG6 contains an appropriate statement that there are no disciplinary findings or convictions against all the police officers who are witnesses in the case (if that be the situation) (paragraph 4.155).

14. The Trials Issues Group develops arrangements for monitoring the quality and timeliness of disclosure schedules (paragraph 4.158).

15. Instructions to counsel should address fully:

- any decision the prosecutor has made at the primary stage about the disclosure of material which might undermine the prosecution case;
- any decision the prosecutor has made about sensitive material;
- the prosecutor's comment upon the defence statement; and
- if appropriate, any decision the prosecutor has made at the secondary stage about the disclosure of material which might assist the defence (paragraph 4.161).

Secondary disclosure

16. Prosecutors should give guidance to the disclosure officer on any key issues raised by the defence (paragraph 5.31).

17. CCPs should remind police forces that the Code of Practice requires a certificate in every case where a defence statement is served; and that they should remind police that prosecutors cannot properly complete secondary disclosure without one (paragraph 5.42).

18. Prosecutors should be more proactive in scrutinising the MG6C to identify any material which, in the light of the defence case statement, might assist the defence, with a view to ascertaining whether any further material may exist which is not recorded on the MG6E but which ought to be disclosed (paragraph 5.53).

19. CCPs take steps to ensure that defence statements are sent to disclosure officers expeditiously (paragraph 5.71).

20. Instructions to counsel should address fully:

- any decision the prosecutor has made at the primary stage about the disclosure of material, which might undermine the prosecution case;
- any decision the prosecutor has made about sensitive material;
- the prosecutor's comment upon the defence statement; and
- if appropriate, any decision the prosecutor has made at the secondary stage about the disclosure of material which might assist the defence (paragraph 5.75).

21. In relation to secondary disclosure prosecutors endorse their opinion whether any material revealed might assist the defence, and record the reasons for it on the file, or upon a disclosure record sheet within the file (paragraph 5.87).

Sensitive material

22. CCPs remind the police of the requirement that the disclosure officer provides an MG6D in all cases where there is sensitive material, or, where there is none, confirms that fact on the MG6 (paragraph 6.10).

23. The CPS examines with ACPO means of reducing the proportion of defective MG6D schedules submitted to the CPS. This should include the setting of targets using our findings as an initial benchmark (paragraph 6.13).

24. Prosecutors endorse the MG6D with their opinion whether any material revealed might undermine the prosecution case or assist the defence, and record the reasons for it on the file, or upon a disclosure record sheet within the file (paragraph 6.24).

25. The DPP should issue guidelines requiring that the conduct of cases involving applications for public interest immunity be supervised by prosecutors of suitable seniority who have received appropriate training. No application of Type III (ie. without notice to the accused) should be made save on the authority of the relevant CCP (or Director of Casework where appropriate) (paragraph 6.47).

26. Each CPS Area and the Casework Directorate should maintain a log of all PII applications that should record:

- the type of application;
- the nature, in general terms, of the sensitive material; and
- the result of the application (paragraph 6.48).

27. Prosecutors should inspect all sensitive material, or be fully informed about it by a senior police officer (paragraph 6.55).

The duty of continuing review

28. CCPs discuss with the police ways of ensuring that relevant unused material, in particular negative fingerprint and forensic evidence, created after primary disclosure, is submitted on the appropriate schedule (paragraph 7.5).

Third party material

29. CCPs consult with the police to ensure that the disclosure officer endorses on the form MG6 the identity of any third party and the nature of the material they are believed to possess (paragraph 8.24).

30. CCPs consult with local organisations which commonly hold third party material in order to develop protocols on its handling, and that the development of these protocols should be co-ordinated by the Director of Policy (paragraph 8.31).

Informal disclosure

31. Prosecutors, caseworkers or prosecuting counsel keep a record on the file or brief of all unused material which is actually disclosed to the defence at any stage (paragraph 9.17).

File management

32. All non-sensitive unused material, the relevant schedules, related correspondence and a disclosure record sheet are kept in a separate folder within the file, and that the disclosure working group identifies and promulgates good practice in relation to varying types of files, from the simple to the complex (paragraph 10.7).

The joint operational instructions for the disclosure of unused material

33. The Director of Policy consults with ACPO in order to agree amendments to the JOPI (paragraph 11.5).

Learning lessons from instances of failure to disclose

34. The Director of Policy issues guidance that a standard paragraph is inserted in instructions to counsel, requesting a written report in any case where a court has ruled that there has been a failure on the part of the prosecution as a whole to make proper disclosure, or counsel believes that there has been such a failure, and that these reports are collated by CCPs (paragraph 12.4).

SUGGESTIONS

13.42 In the light of our findings, we have identified where improvements may be made. For ease of reference we have grouped our suggestions under the chapter headings in which they appear in the report. We suggest that:

Primary disclosure

1. Paragraphs 2.87 to 2.89 of the JOPI should be reviewed and a procedure incorporated which facilitates swifter amendment of MG6C schedules with a view to service on the defence (paragraph 4.28).

2. The Director of Policy should pursue with ACPO whether the JOPI should be amended, to make it a requirement for disclosure officers to endorse on the report:

   - that they have considered all the material listed on the MG6C and MG6D (and other material if retained and not listed); and
   - that, in their opinion, there is no material which might undermine the prosecution case (where this is the position) (paragraph 4.96).

3. CCPs ensure that primary disclosure is made timeously, to allow the defence to prepare and serve a defence statement, and for the consideration of this before the PDH (paragraph 4.127).

Secondary disclosure

4. The Director of Policy draws up and issues more detailed guidance on how prosecutors should respond to inadequate defence statements (paragraph 5.25).

5. The Director of Policy issues further guidance about the circumstances in which a defence statement may be used properly by the prosecution in the course of the trial (paragraph 5.38).

6. CCPs ensure that all documentation relating to disclosure is sent to counsel formally, with covering instructions (paragraph 5.77).

The duty of continuing review

7. Counsel should in every case specifically consider whether he or she can satisfactorily discharge the duty of continuing review on the basis of the material supplied by the CPS, or whether it is necessary to inspect further material (paragraph 7.9).

Third party material

8. CCPs consider whether CCTV material is suitable to be included in any protocols that are entered into by the CPS (paragraph 8.10).

9. The Trials Issues Group should consider amending the draft protocol to include arrangements for the revealing of medical notes to the prosecution (paragraph 8.21).

ANNEX A

THEMES OF THE REVIEW

A PRIMARY DISCLOSURE

1 Do the police list everything they should on the non-sensitive unused materal schedule?
2 Do prosecutors request missing information?
3 Is material listed on the correct schedule?
4 If not, do prosecutors ask for it to be corrected?
5 Do the police provide an adequate description of the unused material?
6 If not, do prosecutors ask for clarification?
7 Do prosecutors endorse schedules correctly?
8 Are disclosure letters completed properly?
9 Do prosecutors examine some types of material as a matter of course?
10 Do prosecutors disclose some types of material as a matter of course?
11 Is undermining material identified correctly by the police?
12 Do prosecutors apply correctly the statutory requirements la make plimary disclosure of material which undermines the prosecution case?
13 Is disclosure timely?

B SECONDARY DISCLOSURE

1 Is secondary disclosure dealt with by a prosecutor?
2 What is the quality of defence statements?
3 Are they timely?
4 Is the defence statement sent to the police with the appropriate observations?
5 Do the police respond on the correct schedule?
6 If not, do prosecutors ask for it?
7 Do prosecutors apply correctly the statutory requirements to make secondary disclosure of material which assists the defence case?
8 How timely is the provision of material which assists the defence case by the police?
9 Is the prosecution ordered to disclose material that does not assist the defence case?
10 Do prosecutors seek to revisit or challenge court orders?

C SENSITIVE MATERIAL

1 Do the police list sensitive material on the correct schedule?
2 If not, do prosecutors request the correct schedule?
3 Do prosecutors endorse the sensitive material schedule correctly?
4 Are the proper procedures adopted for withholding sensitive material?
5 Are office systems for the storage of sensitive material adequate?
6 Are PII applications made by the right party and at the right level?

D THIRD PARTY MATERIAL

1 Do protocols exist for obtaining material from third parties?
2 Are prosecutors familiar with protocols and are they being applied correctly?

BREAKDOWN OF SAMPLE BY CASE CATEGORY

	Summary trial	Crown Court conviction	Crown Court acquittal	TOTAL
Berkshire Branch (CPS Thames Valley)	20	18	10	**48**
Camberwell Branch (CPS London)	21	20	10	**51**
CPS Durham	20	18	9	**47**
East Sussex Branch (CPS Sussex)	20	20	10	**50**
CPS Leicestershire	20	18	12	**50**
CPS Lincolnshire	20	19	10	**49**
Mid-Glamorgan Branch (CPS South Wales)	20	19	13	**52**
CPS Norfolk	20	20	10	**50**
Plymouth and Cornwall Branch (CPS Devon and Cornwall)	19	20	9	**48**
South Liverpool Branch (CPS Merseyside)	21	20	10	**51**
Stockport/Sale Branch (CPS Greater Manchester)	19	19	10	**48**
Wakefield Branch (CPS West Yorkshire)	12	20	7	**39**
Wolverhampton Branch (CPS West Midlands)	19	18	11	**48**
TOTAL	**251**	**249**	**131**	**631**

STATISTICS

The following tables illustrate further data obtained as a result of the thematic review file examination.

Unless stated to the contrary, the data is based on the number of cases where there was a yes or no answer. It does not include those cases where it was not possible to ascertain the answer to the question from the file.

In cases where there was more than one defendant, only the lead defendant was counted for that data which is defendant based, e.g. if a defence statement was supplied by defendant A, but not defendant B, and defendant A was the lead defendant, then the case was counted as one where a defence statement was supplied.

MAGISTRATES' COURT FILE SAMPLE

TOTAL NUMBER OF CASES EXAMINED: 251

PRIMARY DISCLOSURE

Category	No. Of cases	Percent ge
THE NON-SENSITIVE UNUSED MATERIAL SCHEDULE – MG6C		
Number of cases where it was possible to ascertain whether or not the police submitted an MG6C	249	
Proportion of those 249 cases in which the police initially supplied a copy of the MG6C	230	92.4%
Proportion of those 249 cases in which the police did not initially submit an MG6C	19	7.6%
Proportion of those 19 cases in which the police did not initially submit an MG6C and the prosecutor requested one	14	73.7%
Proportion of those 14 cases where the police submitted an MG6C following a request by the prosecutor	12	85.7%
Proportion of those 249 cases which proceeded without an MG6C	7	2.8%
QUALITY OF THE SCHEDULE		
Number of cases where it was possible to ascertain whether or not the MG6C was filled in correctly by the police	241	
Proportion of those 241 cases where the MG6C was filled in correctly	162	67.2%
Proportion of those 241 cases where the MG6C was not filled in correctly	79	32.8%
Proportion of those 79 incorrect MG6Cs the prosecutor asked the police to correct	9	11.4%
Proportion of those 9 incorrect MG6Cs that were corrected by the police following a request from the prosecutor	4	44.4%
Proportion of those 79 incorrect MG6Cs that were corrected by the prosecutor	3	3.8%
Proportion of those 241 cases which proceeded with an incorrect MG6C	71	29.5%
Proportion of those 79 cases in which it was not possible to tell whether the MG6C was corrected	1	1.3%

PRIMARY DISCLOSURE (Continued)

Category	No. Of cases	Percentage
THE CRIME REPORT AND LOG OF MESSAGES		
Number of cases where the crime report ought to have been listed on the MG6C	228	
Proportion of those 228 cases in which the crime report was listed on the MG6C	176	77.2%
Proportion of those 228 cases in which the crime report was not listed on the MG6C	52	22.8%
Proportion of those 228 cases in which crime report was sent to the prosecutor whether or not listed on the MG6C	46	20.2%
Proportion of those 46 cases where the crime report was sent to the prosecutor and disclosed to the defence	16	34.8%
Number of cases where the log of messages ought to have been listed on the MG6C	229	
Proportion of those 229 cases in which the log of messages was listed on the MG6C	149	65.1%
Proportion of those 229 cases in which the log of messages was not listed on the MG6C	80	34.9%
Proportion of those 229 cases in which the log of messages was sent to the prosecutor whether or not listed on the MG6C	43	18.8%
Proportion of those 43 cases where the log of messages was sent to the prosecutor and disclosed to the defence	15	34.9%
ENDORSEMENT OF THE MG6C SCHEDULE		
Number of cases in which it was possible to ascertain whether or not the MG6C schedule was endorsed by the prosecutor	240	
Proportion of those 240 cases in which the MG6C schedule was endorsed by the prosecutor	193	80.4%
Proportion of those 193 cases where the MG6C schedule was endorsed correctly	140	72.5%
Proportion of those 240 case where the MG6C was not endorsed at all. or was endorsed incorrectly	99	41.3%
Proportion of those 240 cases where it was not possible to ascertain whether schedule endorsed correctly	1	0.4%

PRIMARY DISCLOSURE (Continued)

Category	No. Of cases	Percentage
THE DISCLOSURE OFFICER'S REPORT ON UNDERMINING MATERIAL – MG6E SCHEDULE		
Number of cases in which it was possible to ascertain whether or not the police provided a copy of the MG6E	249	
Proportion of those 249 cases in which the police initially supplied a copy of the MG6E	224	90%
Proportion of those 249 cases in which the police did not initially supply a copy of the MG6E	25	10%
Proportion of those 25 cases in which the police did not initially supply a copy of the MG6E but were requested to do so by the prosecutor	13	52%
Proportion of those 13 cases in which the police provided a copy of the MG6E after being requested by the prosecutor	8	61.5%
Proportion of those 25 cases in which the police did not initially supply a copy of the MG6E, but did subsequently without prompting by the prosecutor	1	4%
Overall number of cases in which the police did not provide a copy of the MG6E	16	6.4%
Overall number of cases in which the police provided a copy of the MG6E	233	93.6%
Proportion of those 233 cases in which the MG6E was filled in correctly by the police	143	61.6%
Proportion of those 233 cases in which the MG6E was not filled in correctly by the police	90	38.6%
Proportion of those 233 cases where it was not possible to tell whether the MG6E was filled in correctly	0	0%
Proportion of those 90 cases in which the MG6E was not filled in correctly by the police and the prosecutor asked the police to correct the schedule	4	4.4%
Proportion of those 4 cases in which the prosecutor asked the police to correct the MG6E and it was corrected	2	50%
Proportion of those 249 cases which proceeded with no MG6E, or where the MG6E was defective	104	41.8%
Proportion of those 233 cases in which the MG6E revealed undermining material	8	3.4%
Proportion of those 8 cases in which it was possible to ascertain from the file whether or not the prosecutor disclosed the undermining material	7	87.5%
Proportion of those 7 cases in which the undermining material was disclosed to the defence	6	85.7%
Proportion of those 7 cases in which the undermining material was not disclosed to the defence	1	14.3%

PREVIOUS CONVICTIONS OF RELEVANT WITNESSES

Category	No. Of cases	Percentage
Number of applicable cases in which it was possible to ascertain whether or not a CRO check had been carried out on relevant witnesses	178	
Proportion of those 178 cases in which CRO checks were made on relevant witnesses	54	30.3%
Proportion of those 54 cases in which the prosecutor had to request the check	12	22.2%
Proportion of those 54 cases where the relevant witness had previous convictions which were sent to the prosecutor	16	29.6%
Proportion of those 16 cases in which the prosecutor had to prompt the police to send the previous convictions	4	25%

SECONDARY DISCLOSURE

Category	No. Of ses	Percent ge
THE DEFENCE STATEMENT		
Number of cases in which it was possible to ascertain whether or not a defence statement was provided	248	
Proportion of those 248 cases in which a defence statement was not submitted	237	95.6%
Proportion of those 248 cases in which a defence statement was submitted	11	4.4%
Proportion of those 11 cases in which the defence statement was timely	7	63.6%
Proportion of those 11 cases in which the defence statement was adequate	7	63.6%
Proportion of those 4 cases in which the defence statement was inadequateand the prosecutor asked for further detail	0	0%

SECONDARY DISCLOSURE (Continued)

Category	No. Of cases	Percentage
THE DISCLOSURE OFFICER'S REPORT ON ASSISTING MATERIAL - THE SECOND MG6E SCHEDULE		
Proportion of those 11 cases in which the prosecutor sent a copy of the defence statement to the police	9	81.8%
Proportion of those 9 cases in which the police initially sent a second MG6E without prompting by the prosecutor	4	44.4%
Proportion of those 9 cases in which the police did not initially send a second MG6E without prompting by the prosecutor	5	55.6%
Proportion of those 5 cases in which the police did not initially send a second MG6E and the prosecutor requested the police to send one	0	0%
Proportion of those cases in which the police sent a second MG6E after being prompted by the prosecutor	NA	NA
Proportion of those 141 cases in which the police did not initially supply a copy of the MG6E, but did subsequently without prompting by the prosecutor	0	0%
Overall number of cases in which the police sent a second MG6E	4	
Proportion of those 4 cases where the police sent a correctly completed second MG6E	1	25%
Proportion of those 4 cases where the second MG6E revealed assisting material	3	75%
Proportion of the 11 cases where there was a defence statement which proceeded without a second MG6E, or where the second MG6E was not filled in correctly	10	90.9%

SENSITIVE MATERIAL

Category	No. Of cases	Percentage
THE SENSITIVE UNUSED MATERIAL SCHEDULE - MG6D		
Number of cases in which the police submitted an MG6D	27	
Proportion of those 27 cases in which there was sensitive material	26	96.3%
Proportion of those 27 cases in which the disclosure officer provided additional comment on the MG6 about items listed on the MG6D	3	11.1%
Proportion of those 27 cases in which the MG6D was completed correctly by the police	23	85.2%
Proportion of those 27 cases in which the MG6D was not completed correctly by the police	4	14.8%
Proportion of those 4 cases in which the prosecutor asked the police to correct the MG6D	0	0%
Proportion of those cases in which the police corrected the MG6D	NA	NA
Proportion of those 26 cases in which there was sensitive material that proceeded with an incorrectly filled in MG6D	4	15.4%
ENDORSEMENT OF THE MG6D SCHEDULE		
Proportion of those 26 cases where there was evidence of the prosecutor considering the MG6D	10	37%
Proportion of those 26 cases where the MG6D was endorsed correctly by the prosecutor	7	25.9%
Proportion of those 26 cases where there was sensitive material which proceeded without evidence that the prosecutor had considered it or endorsed correctly the schedule	19	73.1%

THIRD PARTY MATERIAL

Category	No. Of cases	Percentage
Number of cases which involved third party material	1	
Proportion of cases in which the defence requested disclosure of third party material	0	0%
Proportion of those cases in which the third party objected to disclosure	NA	NA
Proportion of those cases in which the third court was asked to rule on disclosure	NA	NA
Proportion of those cases in which the court ordered disclosure	NA	NA

CROWN COURT FILE SAMPLE

TOTAL NUMBER OF CASES EXAMINED: 380

PRIMARY DISCLOSURE

Category	No. Of cases	Percentage
THE NON-SENSITIVE UNUSED MATERIAL SCHEDULE – MG6C		
Number of cases where it was possible to ascertain whether or not the police submitted an MG6C	379	
Proportion of those 379 cases in which the police initially supplied a copy of the MG6C	374	98.7%
Proportion of those 379 cases in which the police did not initially submit an MG6C	5	1.3%
Proportion of those 5 cases in which the police did not initially submit an MG6C and the prosecutor requested one	5	100%
Proportion of those 5 cases where the police submitted an MG6C following a request by the prosecutor	5	100%
Proportion of those 379 cases which proceeded without an MG6C	0	0%
QUALITY OF THE SCHEDULE		
Number of cases where it was possible to ascertain whether or not the MG6C was filled in correctly by the police	377	
Proportion of those 377 cases where the MG6C was filled in correctly	217	57.6%
Proportion of those 377 cases where the MG6C was not filled in correctly	160	42.4%
Proportion of those 160 incorrect MG6Cs the prosecutor asked the police to correct	24	15%
Proportion of those 24 incorrect MG6Cs that were corrected by the police following a request from the prosecutor	19	79.2%
Proportion of those 160 incorrect MG6Cs that were corrected by the prosecutor	10	6.3%
Proportion of those 377 cases which proceeded with an incorrect MG6C	115	30.5%
Proportion of those 160 cases in which it was not possible to tell whether the MG6C was corrected	16	10%

PRIMARY DISCLOSURE (Continued)

Category	No. Of cases	Percentage
THE CRIME REPORT AND LOG OF MESSAGES		
Number of cases where the crime report ought to have been listed on the MG6C	359	
Proportion of those 359 cases in which the crime report was listed on the MG6C	300	83.6%
Proportion of those 359 cases in which the crime report was not listed on the MG6C	59	16.4%
Proportion of those 359 cases in which crime report was sent to the prosecutor whether or not listed on the MG6C	137	38.2%
Proportion of those 137 cases where the crime report was sent to the prosecutor and disclosed to the defence	75	54.7%
Number of cases where the log of messages ought to have been listed on the MG6C	321	
Proportion of those 321 cases in which the log of messages was listed on the MG6C	237	73.8%
Proportion of those 321 cases in which the log of messages was not listed on the MG6C	84	26.2%
Proportion of those 321 cases in which the log of messages was sent to the prosecutor whether or not listed on the MG6C	116	36.1%
Proportion of those 116 cases where the log of messages was sent to the prosecutor and disclosed to the defence	67	57.8%
ENDORSEMENT OF THE MG6C SCHEDULE		
Number of cases in which it was possible to ascertain whether or not the MG6C schedule was endorsed by the prosecutor	375	
Proportion of those 375 cases in which the MG6C schedule was endorsed by the prosecutor	319	85.1%
Proportion of those 319 cases where the MG6C schedule was endorsed correctly	247	77.4%
Proportion of those 375 case where the MG6C was not endorsed at all, or was endorsed incorrectly	128	34.1%
Proportion of those 375 cases where it was not possible to ascertain whether schedule endorsed correctly	0	0%

PRIMARY DISCLOSURE (Continued)

Category	No. Of cases	Percentage
THE DISCLOSURE OFFICER'S REPORT ON UNDERMINING MATERIAL – MG6E SCHEDULE		
Number of cases in which it was possible to ascertain whether or not the police provided a copy of the MG6E	374	
Proportion of those 374 cases in which the police initially supplied a copy of the MG6E	350	93.6%
Proportion of those 374 where the police did not initially supply a copy of the MG6E	24	6.4%
Proportion of those 24 cases in which the police did not initially supply a copy of the MG6E but were requested to do so by the prosecutor	3	12.5%
Proportion of those 3 cases in which the police provided a copy of the MG6E after being requested by the prosecutor	3	100%
Proportion of those 24 cases in which the police did not initially supply a copy of the MG6E, but did subsequently without prompting by the prosecutor	0	0%
Overall number of cases in which the police provided a copy of the MG6E	353	
Proportion of those 353 cases in which the MG6E was filled in correctly by the police	200	56.7%
Proportion of those 353 cases in which the MG6E was not filled in correctly by the police	151	42.8%
Proportion of those 353 cases where it was not possible to tell whether the MG6E was filled in correctly	2	0.6%
Proportion of those 151 cases in which the MG6E was not filled in correctly by the police and the prosecutor asked the police to correct the schedule	10	6.6%
Proportion of those 10 cases in which the prosecutor asked the police to correct the MG6E and it was corrected	9	90%
Proportion of those 374 cases which proceeded with no MG6E, or where the MG6E was defective	163	43.6%
Proportion of those 353 cases in which the MG6E revealed undermining material	40	11.3%
Proportion of those 40 cases in which it was possible to ascertain whether or not the prosecutor disclosed the undermining material	38	95%
Proportion of those 38 cases in which the undermining material was disclosed to the defence	36	94.7%
Proportion of those 38 cases in which the undermining material was not disclosed to the defence	2	5.3%

PREVIOUS CONVICTIONS OF RELEVANT WITNESSES

Category	No. Of cases	Percentage
Number of applicable cases in which it was possible to ascertain whether or not a CRO check had been carried out on relevant witnesses	291	
Proportion of those 291 cases in which CRO checks were made on relevant witnesses	174	59.8%
Proportion of those 174 cases in which the prosecutor had to request the check	50	28.7%
Proportion of those 174 cases where the relevant witness had previous convictions which were sent to the prosecutor	94	54%
Proportion of those 94 cases in which the prosecutor had to prompt the police to send the previous convictions	19	20.2%

SECONDARY DISCLOSURE

Category	No. Of cases	Percentage
THE DEFENCE STATEMENT		
Number of cases in which it was possible to ascertain whether or not a defence statement was provided	377	
Proportion of those 377 cases in which a defence statement was not submitted	44	11.7%
Proportion of those 377 cases in which a defence statement was submitted	333	88.3%
Proportion of those 333 cases in which the defence statement was timely	169	50.8%
Proportion of those 333 cases in which the defence statement was inadequate	81	24.3%
Proportion of those 81 cases in which the defence statement was inadequate and the prosecutor asked for further detail	12	14.8%

SECONDARY DISCLOSURE (Continued)

Category	No. Of cases	Percentage
THE DISCLOSURE OFFICER'S REPORT ON ASSISTING MATERIAL – THE SECOND MG6E SCHEDULE		
Proportion of those 333 cases in which the prosecutor sent a copy of the defence statement to the police	**308**	**92.5%**
Proportion of those 308 cases in which the police initially sent a second MG6E without prompting by the prosecutor	**155**	**50.3%**
Proportion of those 308 cases in which the police did not initially send a second MG6E without prompting by the prosecutor	**148**	**48.1%**
Proportion of those 148 cases in which the police did not initially send a second MG6E and the prosecutor requested the police to send one	**11**	**7.4%**
Proportion of those 11 cases in which the police sent a second MG6E after being prompted by the prosecutor	**4**	**36.4%**
Proportion of those 141 cases in which the police did not initially supply a copy of the MG6E, but did subsequently without prompting by the prosecutor	**1**	**0.7%**
Overall number of cases in which the police sent a second MG6E	**160**	
Proportion of those 160 cases where the police sent a correctly completed second MG6E	**117**	**73.1%**
Proportion of those 160 cases where the second MG6E revealed assisting material	**22**	**13.8%**
Proportion of the 333 cases where there was a defence statement which proceeded without a second MG6E, or where the second MG6E was not filled in correctly	**216**	**64.9%**

SENSITIVE MATERIAL

Category	No. Of cases	Percentage
THE SENSITIVE UNUSED MATERIAL SCHEDULE – MG6D		
Number of cases in which the police submitted an MG6D schedule	120	
Proportion of those 120 cases in which there was sensitive material	119	99.2%
Proportion of those 120 cases in which the disclosure officer provided additional comment on the MG6 about items listed on the MG6D	34	28.3%
Proportion of those 120 cases in which the MG6D was completed correctly by the police	93	77.5%
Proportion of those 120 cases in which the MG6D was not completed correctly by the police	27	22.5%
Proportion of those 27 cases in which the prosecutor asked the police to correct the MG6D	6	22.2%
Proportion of those 6 cases in which the police corrected the MG6D	5	83.3%
Proportion of those 119 cases in which there was sensitive material that proceeded with an incorrectly filled in MG6D	22	18.5%
ENDORSEMENT OF THE MG6D SCHEDULE		
Proportion of those 119 cases where there was evidence of the prosecutor considering the MG6D	67	56.3%
Proportion of those 119 cases where the MG6D was endorsed correctly by the prosecutor	52	43.7%
Proportion of those 119 cases where there was sensitive material which proceeded without evidence that the prosecutor had considered it or endorsed correctly the schedule	67	56.3%

THIRD PARTY MATERIAL

Category	No. Of cases	Percentage
Number of cases which involved third party material	47	
Proportion of those 47 cases in which the defence requested disclosure of third party material	29	61.7%
Proportion of those 29 cases in which the third party objected to disclosure	6	20.7%
Proportion of those 6 cases in which the third court was asked to rule on disclosure	6	100%
Proportion of those 6 cases in which the court ordered disclosure	3	50%

OVERALL FILE SAMPLE

TOTAL NUMBER OF CASES EXAMINED: 631

PRIMARY DISCLOSURE

Category	No. Of cases	Percentage
THE NON-SENSITIVE UNUSED MATERIAL SCHEDULE – MG6C		
Number of cases where it was possible to ascertain whether or not the police submitted an MG6C	**628**	
Proportion of those 628 cases in which the police initially supplied a copy of the MG6C	**604**	**96.2%**
Proportion of those 628 cases in which the police did not initially submit an MG6C	**24**	**3.8%**
Proportion of those 24 cases in which the police did not initially submit an MG6C and the prosecutor requested one	**19**	**7.9%**
Proportion of those 19 cases where the police submitted an MG6C following a request by the prosecutor	**17**	**89.5%**
Proportion of those 628 cases which proceeded without an MG6C	**7**	**1.1%**
QUALITY OF THE SCHEDULE		
Number of cases where it was possible to ascertain whether or not the MG6C was filled in correctly by the police	**618**	
Proportion of those 618 cases where the MG6C was filled in correctly	**379**	**61.3%**
Proportion of those 618 cases where the MG6C was not filled in correctly	**239**	**38.7%**
Proportion of those 239 incorrect MG6Cs the prosecutor asked the police to correct	**33**	**13.8%**
Proportion of those 33 incorrect MG6Cs that were corrected by the police following a request from the prosecutor	**23**	**70%**
Proportion of those 239 incorrect MG6Cs that were corrected by the prosecutor	**13**	**5.4%**
Proportion of those 618 cases which proceeded with an incorrect MG6C	**186**	**30.1%**
Proportion of those 239 cases in which it was not possible to tell whether the MG6C was corrected	**17**	**7.1%**

PRIMARY DISCLOSURE (Continued)

Category	No. Of cases	Percentage
THE CRIME REPORT AND LOG OF MESSAGES		
Number of cases where the crime report ought to have been listed on the MG6C	**587**	
Proportion of those 587 cases in which the crime report was listed on the MG6C	**476**	**81.1%**
Proportion of those 587 cases in which the crime report was not listed on the MG6C	**111**	**18.9%**
Proportion of those 587 cases in which crime report was sent to the prosecutor whether or not listed on the MG6C	**183**	**31.2%**
Proportion of those 183 cases where the crime report was sent to the prosecutor and disclosed to the defence	**91**	**49.7%**
Number of cases where the log of messages ought to have been listed on the MG6C	**550**	
Proportion of those 550 cases in which the log of messages was listed on the MG6C	**386**	**70.2%**
Proportion of those 550 cases in which the log of messages was not listed on the MG6C	**164**	**29.8%**
Proportion of those 550 cases in which the log of messages was sent to the prosecutor whether or not listed on the MG6C	**159**	**28.9%**
Proportion of those 159 cases where the log of messages was sent to the prosecutor and disclosed to the defence	**82**	**51.6%**
ENDORSEMENT OF THE MG6C SCHEDULE		
Number of cases in which it was possible to ascertain whether or not the MG6C schedule was endorsed by the prosecutor	**615**	
Proportion of those 615 cases in which the MG6C schedule was endorsed by the prosecutor	**512**	**83.3%**
Proportion of those 512 cases where the MG6C schedule was endorsed correctly	**387**	**75.6%**
Proportion of those 615 case where the MG6C was not endorsed at all, or was endorsed incorrectly	**227**	**36.9%**
Proportion of those 615 cases where it was not possible to ascertain whether schedule endorsed correctly	**1**	**0.2%**

PRIMARY DISCLOSURE (Continued)

Category	No. Of cases	Percentage
THE DISCLOSURE OFFICER'S REPORT ON UNDERMINING MATERIAL – MG6E SCHEDULE		
Number of cases in which it was possible to ascertain whether or not the police provided a copy of the MG6E	**623**	
Proportion of those 623 cases in which the police initially supplied a copy of the MG6E	**574**	**92.1%**
Proportion of those 623 where the police did not initially supply a copy of the MG6E	**49**	**7.9%**
Proportion of those 49 cases in which the police did not initially supply a copy of the MG6E but were requested to do so by the prosecutor	**16**	**32.7%**
Proportion of those 16 cases in which the police provided a copy of the MG6E after being requested by the prosecutor	**11**	**68.8%**
Proportion of those 49 cases in which the police did not initially supply a copy of the MG6E, but did subsequently without prompting by the prosecutor	**1**	**2%**
Overall number of cases in which the police provided a copy of the MG6E	**586**	
Proportion of those 586 cases in which the MG6E was filled in correctly by the police	**343**	**58.5%**
Proportion of those 586 cases in which the MG6E was not filled in correctly by the police	**241**	**41.1%**
Proportion of those 586 cases where it was not possible to tell whether the MG6E was filled in correctly	**2**	**0.3%**
Proportion of those 241 cases in which the MG6E was not filled in correctly by the police and the prosecutor asked the police to correct the schedule	**14**	**5.8%**
Proportion of those 14 cases in which the prosecutor asked the police to correct the MG6E and it was corrected	**11**	**78.6%**
Proportion of those 623 cases which proceeded with no MG6E, or where the MG6E was defective	**167**	**26.8%**
Proportion of those 586 cases in which the MG6E revealed undermining material	**48**	**8.2%**
Proportion of those 48 cases in which it was possible to ascertain whether or not the prosecutor disclosed the undermining material	**45**	**93.8%**
Proportion of those 45 cases in which the undermining material was disclosed to the defence	**42**	**93.3%**
Proportion of those 45 cases in which the undermining material was not disclosed to the defence	**3**	**6.7%**

PREVIOUS CONVICTIONS OF RELEVANT WITNESSES

Category	No. Of cases	Percentage
Number of applicable cases in which it was possible to ascertain whether or not a CRO check had been carried out on relevant witnesses	469	
Proportion of those 469 cases in which CRO checks were made on relevant witnesses	228	48.6%
Proportion of those 228 cases in which the prosecutor had to request the check	62	27.2%
Proportion of those 228 cases where the relevant witness had previous convictions which were sent to the prosecutor	110	48.2%
Proportion of those 110 cases in which the prosecutor had to prompt the police to send the previous convictions	23	20.9%

SECONDARY DISCLOSURE

Category	No. Of cases	Percentage
THE DEFENCE STATEMENT		
Number of cases in which it was possible to ascertain whether or not a defence statement was provided	625	
Proportion of those 625 cases in which a defence statement was not submitted	281	45%
Proportion of those 625 cases in which a defence statement was submitted	344	55%
Proportion of those 344 cases in which the defence statement was timely	176	51.2%
Proportion of those 344 cases in which the defence statement was inadequate	85	2.5%
Proportion of those 85 cases in which the defence statement was inadequate and the prosecutor asked for further detail	12	14.1%

SECONDARY DISCLOSURE (Continued)

Category	No. Of cases	Percentage
THE DISCLOSURE OFFICER'S REPORT ON ASSISTING MATERIAL – THE SECOND MG6E SCHEDULE		
Proportion of those 344 cases in which the prosecutor sent a copy of the defence statement to the police	**317**	**92.2%**
Proportion of those 317 cases in which the police initially sent a second MG6E without prompting by the prosecutor	**159**	**50.2%**
Proportion of those 308 cases in which the police did not initially send a second MG6E	**153**	**49.7%**
Proportion of those 153 cases in which the police did not initially send a second MG6E and the prosecutor requested the police to send one	**11**	**7.2%**
Proportion of those 11 cases in which the police sent a second MG6E after being prompted by the prosecutor	**4**	**36.4%**
Proportion of those 153 cases in which the police did not initially supply a copy of the MG6E, but did subsequently without prompting by the prosecutor	**1**	**0.7%**
Overall number of cases in which the police sent a second MG6E	**164**	
Proportion of those 164 cases where the police sent a correctly completed second MG6E	**118**	**72%**
Proportion of those 164 cases where the second MG6E revealed assisting material	**25**	**15.2%**
Proportion of the 344 cases where there was a defence statement which proceeded without a second MG6E, or where the second MG6E was not filled in correctly	**226**	**65.7%**

SENSITIVE MATERIAL

Category	No. Of cases	Percentage
THE SENSITIVE UNUSED MATERIAL SCHEDULE – MG6D		
Number of cases in which the police submitted an MG6D schedule	**147**	
Proportion of those 147 cases in which there was sensitive material	**145**	**99.3%**
Proportion of those 147 cases in which the disclosure officer provided additional comment on the MG6 about items listed on the MG6D	**37**	**25.2%**
Proportion of those 147 cases in which the MG6D was completed correctly by the police	**116**	**78.9%**
Proportion of those 147 cases in which the MG6D was not completed correctly by the police	**31**	**21.1%**
Proportion of those 31 cases in which the prosecutor asked the police to correct the MG6D	**6**	**19.4%**
Proportion of those 6 cases in which the police corrected the MG6D	**5**	**83.3%**
Proportion of those 145 cases in which there was sensitive material that proceeded with an incorrectly filled in MG6D	**26**	**17.9%**
ENDORSEMENT OF THE MG6D SCHEDULE		
Proportion of those 145 cases where there was evidence of the prosecutor considering the MG6D	**77**	**53.1%**
Proportion of those 145 cases where the MG6D was endorsed correctly by the prosecutor	**59**	**40.7%**
Proportion of those 145 cases where there was sensitive material which proceeded without evidence that the prosecutor had considered it or endorsed correctly the schedule	**86**	**59.3%**

THIRD PARTY MATERIAL

Category	No. Of cases	Percentage
Number of cases which involved third party material	**48**	
Proportion of those 48 cases in which the defence requested disclosure of third party material	**29**	**60.4%**
Proportion of those 29 cases in which the third party objected to disclosure	**6**	**20.7%**
Proportion of those 6 cases in which the third court was asked to rule on disclosure	**6**	**100%**
Proportion of those 6 cases in which the court ordered disclosure	**3**	**50%**

ANNEX D

LIST OF LOCAL REPRESENTATIVES OF THE CRIMINAL JUSTICE AGENCIES WHO ASSISTED IN OUR REVIEW

Judges

His Honour Judge Clarke QC, Recorder of Liverpool

His Honour Judge Evans QC, Recorder of Cardiff

His Honour Judge Clifton

His Honour Judge Mellor

His Honour Judge Scott-Gall

His Honour Judge Woodward

Magistrates' Courts

Mr P Firth, Stipendiary Magistrate, Liverpool

Mr H Gott, Metropolitan Stipendiary Magistrate

Mr V Manning-Davies, Stipendiary Magistrate, Pontypridd

Mr P Tain, Stipendiary Magistrate, East Sussex

Miss P Watkins, Stipendiary Magistrate, Pontypridd

Mrs V Carlisle, Justice of the Peace, Chairman of the Camberwell Bench

Mr B Childs, Justice of the Peace, Chairman of the West Norfolk Bench

Mrs F Davies, Justice of the Peace, Chairman of the Norwich Bench

Mr G Morgan-Jones, Justice of the Peace, Chairman of the Miskin Bench

Mr P Thomas, Justice of the Peace, Chairman of the Merthyr Tydfil Bench

Mrs R Thomas, Justice of the Peace, Chairman of the Stockport Bench

Mr J Wareham, Justice of the Peace, Chairman of the Brighton Bench

Mr F Wastie, Justice of the Peace, Chairman of the Eastbourne and Hailsham Bench

Mr G Waters, Justice of the Peace, Chairman of the Hastings and Rother Bench

Mr D Jones, Justice of the Peace, Deputy Chairman of the Merthyr Tydfil Bench

Mr D Carrier, Justices' Clerk, Norwich

Mr P Cuddy, Justices' Clerk, Stockport

Ms B Morse, Justices' Clerk, Camberwell

Mr C Roberts, Justices' Clerk, Central and West Norfolk Division

Ms J Clark, Head of Legal Services, Kings Lynn

Mr S Malins, Deputy Clerk to the Justices, Lewes

Mr R Williams, Legal Adviser, Eastbourne and Hailsham

Police

Detective Superintendent Baines, Merseyside Police

Detective Superintendent A Simister, Stretford Police Station

Superintendent L Brigginshaw, Criminal Justice Department, Lewes

Detective Chief Inspector W Goreham, Great Yarmouth Police Station

Chief Inspector K Duerden, Criminal Justice Unit, Lewes

Detective Inspector M Jones, Criminal Investigations Department, Bridgend

Detective Inspector S Lancaster, Criminal Investigations Department, Merthyr Tydfil

Detective Inspector P Williams, Criminal Investigations Department, Pontypridd

Inspector D Goad, Criminal Justice Support Unit, Eastbourne Police Station

Inspector Goffin, Great Yarmouth Police Station

Inspector Harrison, Criminal Justice Unit, Kings Lynn Police Station

Inspector P Hurren, Criminal Justice Unit, Norwich

Inspector K Lewis, Criminal Justice Unit, Stretford Police Station

Detective Sergeant S Burke, Criminal Investigations Department, Pontypridd

Detective Sergeant P Kennedy, Criminal Investigations Department, Merthyr Tydfil

Detective Sergeant Wright, Criminal Justice Unit, Wavertree

Sergeant N Adams, Criminal Justice Unit, Kings Lynn Police Station

Sergeant J Arter, Criminal Justice Unit, Lewes

Sergeant D Cole, Criminal Justice Unit, Streatham

Sergeant M Glover, Stockport Police Station

Sergeant A Jones, Criminal Investigations Department, Merthyr Tydfil

Sergeant A Laurie, Stretford Police Station

Sergeant A May, Criminal Justice Unit, Walworth

Sergeant H Phillips, Administrative Support Unit, Bridgend

Sergeant C Taylor, Criminal Justice Unit, Norwich

Detective Constable Harries, Criminal Justice Unit, Wavertree

Detective Constable P Mann, Pontypridd Police Station

Detective Constable A Mellor, Stretford Police Station

Detective Constable J Simpson, North Walsham Police Station

Detective Constable Spencer, Criminal Justice Unit, Wavertree

Mrs J Behan, Merseyside Police

Mr S Byrne, Criminal Justice Unit, Wavertree

Mr T Cox, Criminal Justice Unit, Kings Lynn Police Station

Defence Solicitors

Mr W Griffiths

Mrs V Limont

Ms A Preston

Mr C Reynolds

Mr S Wedd

Legal Executives

Miss M Farnham

Ms H Norman

Counsel

Mrs S Wooley QC

Mr A Bates

Mr E Brown

Mr N Griffin

Mr R Griffiths

Mr A Heaton-Armstrong

Mr G Jones

Mr M Monoghan

Mr A Niblett

Mr I Paton

Mr G Pickavance

Mr M Seymour

Mr D Sunman

Mr A Turner

Mr A Wheetman

STATEMENT OF PURPOSE

To promote the efficiency and effectiveness of the Crown Prosecution Service through a process of inspection and evaluation; the provision of advice; and the identification and promotion of good practice.

AIMS

1 To inspect and evaluate the quality of casework decisions and the quality of casework decision-making processes in the Crown Prosecution Service.

2 To report on how casework is dealt with in the Crown Prosecution Service in a way which encourages improvements in the quality of that casework.

3 To carry out separate reviews of particular topics which affect casework or the casework process. We call these thematic reviews.

4 To give advice to the Director of Public Prosecutions on the quality of casework decisions and casework decision-making processes of the Crown Prosecution Service.

5 To recommend how to improve the quality of casework in the Crown Prosecution Service.

6 To identify and promote good practice.

7 To work with other inspectorates to improve the efficiency and effectiveness of the criminal justice system.

8 To promote people's awareness of us throughout the criminal justice system so they can trust our findings.

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