

A THEMATIC REVIEW OF THE DUTIES OF DISCLOSURE OF UNUSED MATERIAL UNDERTAKEN BY THE CROWN PROSECUTION SERVICE

HM Crown Prosecution Service Inspectorate (HMCPSI) has today published its report on the duties of disclosure of unused material undertaken by the Crown Prosecution Service (CPS). Disclosure has, for many years, been a difficult issue within the criminal justice system (CJS) and an earlier report (published in 2000) found that the system was not working as Parliament intended.

This review found that significant aspects of non compliance with the regime and the joint police/CPS guidance meant that the CPS was undertaking its duties properly in only just over half of the cases examined. Nonetheless the nature of the breaches were not such as to give rise to potential miscarriages of justice. Although the CPS is central to the process, the overall position is substantially influenced by others involved in the CJS.

Because of this, but also on matters of principle, there remains a lack of confidence in the disclosure regime on the part of some criminal practitioners (both prosecution and defence) and some members of the judiciary. A more consistent approach to the description and examination of unused material, the recording of decisions and the reasons for them is needed if that confidence is to be regained.

Although the report focuses on the role of the CPS, non compliance by other players in the CJS also contributed or added to the problems.

Main findings include:

- Both police and crown prosecutors find complying with the duties of disclosure onerous and in some respects the procedure can be convoluted. The division of responsibility between the police service and CPS remains problematic.
- In too many cases the comprehensive guidance (set out in the Disclosure Manual published by the Association of Chief Police Officers and CPS) is not followed sufficiently. Deficiencies include the description of material in schedules compiled by the police disclosure officer; the revelation of certain material to crown prosecutors; lack of examination of the material itself by crown prosecutors; and the lack of adequate recording of actions, decisions and the reasons for them by crown prosecutors.
- In some cases there is wide or 'blanket' provision of unused material to the defence at a late stage, often at the instigation of prosecuting counsel or sometimes the trial judge. Passing the burden of examining material to the defence can cause delay to the trial and excessive costs to the defence Legal Aid fund.
- In the file sample examined and cases observed at court the initial duty of disclosure was properly complied with in 56.6% of cases, continuing disclosure in 71.3% of relevant cases and sensitive material in 47.5%. Non compliance was generally procedural, or by way of excessive disclosure of material that did not fulfil the disclosure test. In some cases additional disclosure was undertaken only on the morning of or during the course of the trial.

- Some non compliance resulted in adjournments and ineffective trials whilst disclosure issues were resolved, amounting to 5.3% of the cases observed. Delays of two to four hours on the morning of trials whilst the trial advocates sorted out disclosure issues were not uncommon, with a detrimental impact on court listing practices and the progress of other cases listed for trial. Juries were forced to wait for significant periods and victims, witnesses and defendants were inconvenienced.
- Voluntary or extra disclosure of material that did not fulfil the disclosure test on the morning of trial appeared to generate a number of pleas of guilty, with the risk that the defence would try to claim an inappropriate discount on sentence on the basis of the plea being entered soon after that disclosure. (This could occur for a number of reasons even when there had been previous CPS compliance.)
- Sensitive material is that which, if disclosed, creates a real risk of serious prejudice to an important public interest. Too often material was put forward as sensitive by the police disclosure officer when it did not meet that criteria and it was not always subject to appropriate scrutiny by prosecutors. Conversely, crown prosecutors did not always examine or receive sufficient information about the truly sensitive material.
- Material held by a third party, for example a children's services department or a medical doctor, was not always dealt with expeditiously.
- Inspectors found that the Crown Court Protocol in relation to unused material issued on 20 February 2006 (with the aim of ensuring a more uniform and compliant approach) needed to be highlighted and adhered to more consistently by all parties – not merely the prosecution.
- There must be clear, positive and demonstrable compliance with the statutory disclosure regime at all stages by all parties.
- The resource costs on both the police and CPS in undertaking the statutory requirements fully are considerable. Inspectors did not find reasons for proposing extensive change to the duties, but in considering issues of proportionality there may be scope for consideration of the triggers for disclosure (entering a plea of not guilty in the magistrates' courts, committal for trial, or the service of prosecution case papers in cases sent to the Crown Court) in the light of the significant numbers of pleas of guilty in the Crown Court and late pleas of guilty in the magistrates' courts.
- To raise confidence in the regime as a whole inspectors made 21 recommendations designed to support a consistent and authoritative application of it and identified 15 issues of good practice that might warrant adoption nationally.

Stephen Wooler CB, HM Chief Inspector said:

“The proper discharge of the prosecution’s duties of disclosure is essential for the fairness of trials. For there to be real prospect of the current regime succeeding there needs to be a unified and agreed process, which is understood fully by all those involved, and which is upheld and supported by all within the criminal justice system. There must be clear, positive and demonstrable compliance with the statutory disclosure regime at all stages by all parties. The present degree of non compliance undermines confidence and can lead to additional court hearings, duplication of effort, or unnecessarily wide disclosure ‘just in case’. More consistent and timely compliance with the statutory disclosure regime, with a crown prosecutor having considered the material itself when it is key or sensitive unused material, could reduce the overall resource demands of disclosure.”

This Press Release should be read in conjunction with the Report itself and the Executive Summary which is integral to it.

Notes to Editors

HMCPSP was established as an independent statutory body on 1 October 2000 by the Crown Prosecution Service Inspectorate Act 2000. The Chief Inspector is appointed by, and reports to, the Attorney General.

This review included detailed scrutiny of files relating to 152 ‘live’ and finalised cases from eight CPS Areas and also took into account the findings in inspections and assessments that HMCPSP has undertaken since 2000, which involved the scrutiny of disclosure issues in about 6,526 cases.

Inspectors did not examine any cases which commenced before the Criminal Procedure and Investigations Act 1996 (CPIA), to which common law rules still apply, and did not note any specific issues relating to other disclosure outside the requirements of the Act.

The Inspectorate’s report on the Thematic Review of Disclosure of Unused Material was published in March 2000. That review found that the CPIA was not then working as Parliament had intended, nor did its operation command the confidence of criminal practitioners. In a significant proportion of contested cases CPS compliance with CPIA procedures was defective in one or more respects.

The prosecution is under a statutory duty to undertake disclosure of any unused prosecution material which has not previously been disclosed to the accused and might reasonably be considered capable of undermining the case for the prosecution or assisting the case for the accused. Following initial application of the test there is a continuing duty of disclosure of any material that satisfies the revised disclosure test. The law has developed to ensure that the accused receives a fair trial.

The law as set out in the CPIA has since been amended by the Criminal Justice Act 2003 which provided for a revised disclosure test. There is a single objective test as to the disclosure of any unused prosecution material and, following initial application of the test, a continuing duty of disclosure of any material which satisfies the revised test. This should be re-appraised following receipt of a defence statement, which remains voluntary in the magistrates’ courts and mandatory in the Crown Court.

In certain respects the statutory amendments, together with the revised Code of Practice, made the duties of the prosecution more onerous in that a greater amount of material would be disclosable at the initial stage.

Since the 2000 report inspectors have noted incremental improvements in the prosecution's handling of disclosure. Nevertheless, there remain a variety of criticisms directed both at the structure of the regime and how disclosure was undertaken by the CPS in a number of cases. The latter are now less marked than at the time of the first review. Some defence (and prosecution) practitioners remain concerned as to the inherent fairness of the system and its handling by police and prosecutors. There was also significant concern on the part of the Association of Chief Police Officers on the resource demands of undertaking their duties in relation to unused material, and concerns on the part of the Office of Criminal Justice Reform and the senior judiciary in some cases about delay and in others of the cost to the defence Legal Aid fund in passing the task of inspecting large volumes of unused material on to the defence.

The review recognises the resource demands of the disclosure arrangements on the police and the CPS but also the basis of them, which is to ensure that an accused has a fair trial.

Many of the recommendations in the report are designed to provide for better compliance with the regime and, furthermore, to demonstrate compliance with it. These are not extra burdens or costs, in that they are only what the prosecution should be undertaking at present.