

DISCLOSURE

A thematic review of the duties of disclosure of unused material undertaken by the CPS

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ABBREVIATIONS

Common abbreviations used in this report are set out below, with local abbreviations explained in the report. A glossary explaining common terms can be found at Annex I.

ABC	Activity Based Costings	MG6C	The form on which the disclosure officer lists and describes items of non-sensitive unused material
ACPO	Association of Chief Police Officers		
AEI	Area Effectiveness Inspection	MG6D	The form re: sensitive unused material
CCP	Chief Crown Prosecutor		
CCTV	Closed Circuit Television	MG6E	The disclosure officer's report which identifies material they consider may meet the disclosure test, and which contains a signed certification by the disclosure officer
CJA 2003	Criminal Justice Act 2003		
CJS	Criminal Justice System		
CJSSS	Criminal Justice: Simple, Speedy, Summary	NRFAC	Non Ring-Fenced Administrative Costs
CMS	Case Management System (Compass)	OPA	Overall Performance Assessment
CPIA	Criminal Procedure and Investigations Act 1996	PCD	Pre-Charge Decision
CPS	Crown Prosecution Service	PCMH	Plea and Case Management Hearing
CPSD	CPS Direct	PII	Public Interest Immunity
CQA	Casework Quality Assurance	PTPM	Prosecution Team Performance Management
DCW	Designated Caseworker	TU	Trial Unit
DP	Duty Prosecutor		
DRS	Disclosure Record Sheet		
HCA	Higher Court Advocate		
HMCPSP	Her Majesty's Crown Prosecution Service Inspectorate		
LCJB	Local Criminal Justice Board		
MG	Manual of Guidance		
MG3	Form on which a record of the charging decision is made		

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Disclosure of Unused Material undertaken by the CPS

FOREWORD

Development of the law concerning the prosecution's obligations of disclosure in relation to unused material has been a dominating feature of the criminal justice system for the past two decades. This process has been characterised by changes in emphasis often linked with difficulties on the part of the criminal justice agencies in coming to terms with the resource implications of full compliance with the structured arrangements for disclosure. It is therefore instructive to recall that the disclosure regime was strengthened by developments in the common law in order to ensure that an accused had a fair trial, minimising the risks of injustice. On the other hand, the Criminal Procedure and Investigations Act 1996 introduced modified arrangements reducing the disproportionate burdens on both the prosecution and the defence which had flowed from the manner in which the law had been developed.

The last in-depth study by HM Crown Prosecution Service Inspectorate of the way in which the Crown Prosecution Service deals with disclosure was published in March 2000. This report builds on that work and the focus maintained throughout our more routine CPS Area and thematic inspections to provide an up-to-date picture – taking account of amendments to the law made by the Criminal Justice Act 2003 which provided for a revised disclosure test.

A feature of this review is the extent to which inspectors relied on an observational methodology rather than evidence culled from the scrutiny of prosecution files. More time was spent observing how disclosure was handled in practice at court; and in talking to all those involved – police disclosure officers, CPS staff, prosecuting counsel, defence practitioners and the judiciary.

We have found nothing to suggest that the present obligations exceed what is necessary for a fair trial, but many aspects of disclosure remain problematic. These include the division of responsibility between the police service and the CPS. Variations in the degree to which police disclosure officers are involved in the trial process and the lack of continuity between CPS prosecutors and the prosecuting advocate in the trial (still usually counsel) both raise concerns. These flow mainly from the fact that neither prosecutor nor counsel may have examined the unused material, or be in a position to assess the requirements of continuing disclosure. Administrative arrangements associated with the disclosure regime remain in some respects rather convoluted.

One of the notable features of current arrangements is the extent to which some of the less satisfactory handling of the early stages of the process contributes to a lack of confidence at later stages, which may need to be remedied with duplication of effort and unnecessarily wide disclosure 'just in case'. In essence, this report therefore calls for more consistent compliance with the CPIA disclosure regime, and in a more timely fashion. We do suggest some adjustment to the processes associated with some stages. This should lead to a reduction of the resource expended for all parties through the provision of blanket disclosure of large amounts of material, or the provision of wider (sometimes referred to as 'extra' or 'voluntary') disclosure by the prosecution. This would in turn help ensure greater readiness for effective trials, and at the same time provide greater assurance to the defence that the prosecution has undertaken its duties carefully, and that a crown prosecutor has considered the material itself when it is key or sensitive unused material. There are at present significant variations in the quality of decision-making and handling in relation to unused material. These need to be addressed.

I should like to thank the members of the reference group who have provided insights and guidance to the team, and further more for the co-operation and support of all those whom inspectors came into contact during the review, including staff within the CPS, prosecution and defence practitioners as well as members of the judiciary.

A handwritten signature in black ink that reads "Stephen J. Wooler". The signature is written in a cursive style and is underlined with a single horizontal stroke.

Stephen Wooler CB
HM Chief Inspector
HMCPsi

14 March 2008

1 INTRODUCTION

- 1.1 This is the report by Her Majesty's Crown Prosecution Service Inspectorate (HMCPSI) on a thematic review of the undertaking of the duties of disclosure of unused material by the Crown Prosecution Service (CPS). This included detailed scrutiny of files relating to 152 'live' and finalized cases from eight CPS Areas, and took into account the findings in inspections and assessments undertaken since 2000, which involved the scrutiny of disclosure issues in about 6,526 cases.
- 1.2 Inspectors did not examine any cases which commenced before the Criminal Procedure and Investigations Act 1996 (CPIA) and to which common law rules still apply, and did not note any specific issues relating to other disclosure outside the requirements of the Act.
- 1.3 HMCPSI's report on the Thematic Review of the Disclosure of Unused Material was published in March 2000. It found that the CPIA was not then working as Parliament and 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.
- 1.4 The law as set out in the CPIA has since been amended by the Criminal Justice Act 2003 (CJA 2003) which provided for a revised disclosure test. This provides a single objective test as to the disclosure of any unused prosecution material, which has not previously been disclosed to the accused, which might reasonably be considered capable of undermining the case for the prosecution or of assisting the case for the accused. Following the initial application of the test there is a continuing duty of disclosure of any material which satisfies the revised disclosure 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.
- 1.5 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.
- 1.6 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 were perhaps 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. Some non compliance is also the result of shortcomings on the part of other players in the criminal justice system (CJS). There was also significant concern on the part of the Association of Chief Police Officers (ACPO) 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.

- 1.7 The review recognises the resource demands of the disclosure regime on the police and the CPS, but also the basis of the regime, which is to ensure that an accused has a fair trial.
- 1.8 Many of the recommendations in the report are designed to provide for better compliance with the disclosure 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.
- 1.9 If issues of costs to the CJS (and thus the public) are to be considered afresh, then in assessing proportionality of the implementation of the requirements it would be valuable to focus on the triggers for the undertaking of the disclosure regime. These are the entering of a plea of not guilty in the magistrates' courts, the committal for trial and service of the prosecution case if the accused was sent to the Crown Court, and the preferment of a voluntary bill of indictment in relation to Crown Court cases. Pleas of guilty are entered by approximately 80% of defendants in the Crown Court and there is a significant volume of cases in the magistrates' courts in which the defendant pleads guilty on the day of trial, or in which a late plea of guilty is entered shortly before the date fixed for trial (43,818 defendants in 2006-07). The undertaking of the duties of the disclosure by the prosecution may in some way bring about the pleas of guilty because the defence are assured that there is no other material which might undermine the prosecution case or assist the defence. In many other cases, however, it is merely a sharpening of the mind of the defendant that increases with the proximity to the trial or court door, and in other cases the presence of the prosecution witnesses, which drives the plea of guilty.
- 1.10 Provisions to enable pleas of guilty to be entered in the magistrates' courts before the venue of the case is considered have assisted, but the level of pleas of guilty in the Crown Court or at a late stage in the magistrates' courts still provide scope for reducing the number of cases in which disclosure has to be undertaken. More assertive case management by courts under the Criminal Procedure Rules may provide some benefit, but a substantial reduction in the number of cases in which the duties of disclosure arise, or in the extent of the duties themselves, would require changes to legislation or the Code of Practice.

2 EXECUTIVE SUMMARY

- 2.1 This is the summary of HMCPSI's thematic review of the undertaking of the duties of disclosure of unused material by the CPS. This review has focused on disclosure handling in 152 'live' and finalised cases from eight CPS Areas, combined with interviews with the individuals within the CJS who played an active part in the way those cases were handled. We also interviewed the Resident Judges of all Areas visited. In addition to the detailed scrutiny of those cases we also took into account CPS performance on disclosure handling from our last thematic review in 2000, in two full cycles of inspections of all 42 Areas between 2000-05, and the more recent Area effectiveness inspections (AEIs) of 11 Areas undertaken between August 2006-April 07.

Background to the review

- 2.2 In the last 15 years there has been considerable change to the legislative provisions and case law which set out the duties of disclosure handling for all parties. The first statutory requirement for the handling of unused material came from the Criminal Procedure and Investigations Act in 1996. Prior to this, the prosecutor's duty had developed through the guidelines issued by the Attorney General and case law. The disclosure provisions of the CPIA were amended significantly by Part V of the Criminal Justice Act 2003.
- 2.3 There are currently three distinct disclosure regimes in operation, the use of which will depend on the date the relevant criminal investigation began. In cases in which the criminal investigation began prior to 1 April 1997 the common law will apply, with the test for disclosure being that set out in *R v Keane* [1994]. If the investigation commenced on or after 1 April 1997, but before 4 April 2005, the CPIA in its original form applies, with separate tests for disclosure of unused prosecution material at the primary stage and following service of a defence statement at the secondary stage. Finally, where the investigations commenced on or after 4 April 2005, the law set out in the CPIA as amended by the CJA 2003 applies. This Act created a single objective test for the disclosure of any unused material which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused (the revised disclosure test). It provided for a continuing duty of disclosure of any material which satisfies the revised disclosure test, which should be re-appraised following receipt of a defence statement (which the amended legislation required to be more specific). In certain circumstances the obligation remains on the prosecution to provide early disclosure to the accused. Guidance is set out in *R v DPP ex parte Lee* 1999 2 All ER 737 which held that the CPIA did not abolish common law obligations relating to the disclosure of material by the prosecutor prior to committal.
- 2.4 In order to implement the new provisions the Code of Practice issued under the CPIA was amended. New joint operational instructions between the police and CPS were agreed and issued in the form of the Disclosure Manual. In addition the Attorney General's Guidelines on Disclosure were revised in 2005. These Guidelines address the roles and responsibilities of the participants in the disclosure process and, in some instances, address aspects not covered by the CPIA. They are applicable to all police investigations and prosecutions undertaken by the Crown.

- 2.5 Two protocols have been developed to assist in the case management and handling of unused material in the Crown Court: the Protocol for the Control and Management of Unused Material in the Crown Court, issued by the Court of Appeal on 20 February 2006, and the Protocol for the Control and Management of Heavy Fraud and other Complex Criminal Cases, issued by the Lord Chief Justice of England and Wales, which came into force on 22 March 2005.
- 2.6 The Criminal Procedure Rules 2005 (as amended) provide an overriding objective that criminal cases be dealt with justly and codify the court's duty of active case management, both pre-trial and throughout the trial itself. They also set out the duties of the participants in a criminal trial.
- 2.7 The two cycles of inspections carried out by HMCPSI of the 42 CPS Areas between 2000 and 2005, overall performance assessments (OPAs) in 2005, and 11 AELs in 2006-07 have all revealed some incremental improvement in some aspects of handling of the duties of disclosure, but also non compliance. This has included failure to record decisions, prosecutors not examining items which they ought, and 'blanket' (wide scale) disclosure of items to the defence that did not pass the statutory disclosure test. The OPAs in 2007 have further confirmed this overall picture.
- 2.8 Our measures of compliance have mainly been in the 60-80% range, including in relation to dealing with sensitive material. Most of the non compliance related to extra disclosure outside the statutory test, poor endorsements of decisions, or poor recording of actions. It reflected a wide spread belief that whatever the prosecutor did there would be wide or blanket disclosure undertaken close to, or at, trial. There have been instances of non-disclosure of items that ought to have been disclosed which we have brought to the attention of CPS Chief Crown Prosecutors (CCPs) and judges have told us of examples in which the existence of unused material was revealed during the trial process, so that in the event there was no risk of a miscarriage of justice.

The purpose of the review

- 2.9 The purpose of this review has been to assess the quality and timeliness of the undertaking of the prosecution's duties of disclosure by the CPS, in respect of material obtained in the course of a criminal investigation which does not form part of the prosecution case in Crown Court and magistrates' courts' cases; and the effectiveness of compliance with the CPIA disclosure regime and the impact of non compliance upon the fairness of trials and on the wider costs and resources within the CJS.
- 2.10 The main themes were to:
- assess the quality of CPS decision-making and recording of decisions taken in respect of the disclosure or withholding of unused material, including the adherence by prosecutors and prosecuting advocates to the requirements imposed by relevant legislation, case law, and guidance;
 - assess compliance with the Protocol for the Control and Management of Unused Material in the Crown Court; the Disclosure: Experts' Evidence and Unused Material Guidance Booklet for Experts; and the Protocol for the Control and Management of Heavy Fraud and other Complex Criminal Cases;
 - assess the effectiveness of joint working with the police to ensure all relevant material is correctly captured and recorded;

- assess performance management by managers to ensure compliance and secure improvement;
- assess the effectiveness and adequacy of ongoing training and materials provided to prosecutors;
- consider the cost and resource issues of disclosure handling and its impact on the prosecution process; and
- identify good practice and make recommendations to secure improvements in practice.

Methodology

- 2.11 We examined a total of 152 files. Of these 48 (16 magistrates' courts and 32 Crown Court) were finalised cases, which were sent to us prior to the on-site visits to the Areas. The remaining 104 cases (55 magistrates and 49 Crown Court) were live trial files, which were observed at the relevant court centre. We also took into account the findings from our recent cycle of AEs and the performance of the CPS in both the first and second cycle of inspections which concluded in 2002 and 2005 respectively. Overall, these exercises had involved the scrutiny of disclosure issues in about 6,526 cases.
- 2.12 The inspection of live trial files was coupled with interviews of those involved in the decisions taken on those files. Wherever possible inspectors interviewed the defence and prosecution teams and the judge. Being present on the morning of the trial gave the inspectors a clear perspective of what was actually happening in practice, on the files 'there and then'. This has been of significant benefit in enabling us to come to our findings; it confirmed that what was happening at court with regard to disclosure handling is frequently not recorded on the file. This means there is a lack of overall awareness of the true position with regard to compliance with the disclosure regime.
- 2.13 The Areas visited were a representative sample of metropolitan and rural and reflected a mix of those receiving Excellent, Good, Fair and Poor assessments in the disclosure aspect of the OPAs.
- 2.14 A reference group was formed in order to provide guidance and focus to this review. Those invited to participate brought a wide range of perspectives and were included due to their skill and expertise with regard to disclosure handling in their particular background and organisation.
- 2.15 Part of the review was to gain an insight into cost and resource issues of disclosure handling for the CPS and the impact of this on the prosecution process.

Findings

- 2.16 Our overall key finding was that the current disclosure regime is not being adhered to fully. On the one hand less than full compliance by police disclosure officers and crown prosecutors manifests itself in inadequately described material and a lack of either informed decision-making or recording reasons for decisions. On the other there is too often a decision not to apply the statutory test, so that blanket disclosure is allowed by the prosecution (or influenced or ordered by some courts) so that responsibility and added resource costs are passed to the defence (and Legal Aid budget). We recognise that for the disclosure regime to work properly there is a need for sufficient time, effort and attention to be devoted to the task by investigators and lawyers who fully understand the nature of it. At present this is too often the exception rather than the rule.

- 2.17 The resource demands are without question considerable. The Association of Chief Police Officers (ACPO) considers the effort disproportionate, particularly in relation to cases dealt with in the magistrates' courts, and not fully workable within existing resources. Many CPS prosecutors consider that they do not have sufficient time to undertake the duties fully. Defence lawyers vary between an acceptance of proportionality and a desire in principle to see all unused material when they think it appropriate. The costs to the public through the funding of both public and private participants in the criminal process are considerable. It is of concern that 1% of cases take up 50% of the Crown Court Legal Aid budget and that examination of large quantities of unused material contributes to this, in particular if not actually required by the CPIA test.
- 2.18 In essence we make recommendations to ensure the existing legislation operates properly and fairly. We make some proposals as to the way forward in reducing burdens and seeking proportionality in summary (magistrates' courts) cases, but any large scale changes would require legislation and risk offending principles relating to the right to a fair trial within Article 6 of the European Convention and the Human Rights Act 1998.
- 2.19 The CPS complied with its duties of disclosure in the majority of cases. However, this was not universal and throughout this review we found frequent non compliance within the linked processes which support the disclosure regime. In the 152 cases in our file sample the initial duty of disclosure was properly complied with in 56.6% (86). In the 72 magistrates' courts' cases the initial duty of disclosure was complied with in 55.0% (40) and in the 80 Crown Court cases in 57.5% (46). The duty of continuing disclosure was properly complied with in 71.3% (62 of 87) of all relevant cases. This was made of up 81.8% (nine of 11) of cases in the magistrates' courts and 69.7% (53 of 76) in the Crown Court. The handling of sensitive material was properly complied with in 47.5% (28 of 59) of cases, which was made up of 26.6% (four of 15) of magistrates' courts' cases and 54.5% (24 of 44) of those from the Crown Court.
- 2.20 Very few cases were seen where there was total compliance with all the procedures and guidance within the disclosure regime. However, in the cases we examined and the trials we observed this did not result in any findings of abuse of process or cases being dismissed prematurely. What we identified as failures were either rectified on the morning of, or during the course of, the trial. On many files, where there were procedural failures these related to recording decisions or actions properly and would not cause the trial to be unfair. Other non compliance related to blanket disclosure.
- 2.21 Significant aspects of the non compliance were only seen by inspectors due to the methodology of seeing live contested cases as opposed to the Inspectorate's more usual practice of examination of finalised files, as the actions were not recorded. This tends to explain the lower levels of compliance found in this review compared to our earlier inspections.
- 2.22 In eight out of the 152 (5.3%) cases we examined some aspects of the non compliance resulted in adjournments and ineffective trials, whilst disclosure issues were resolved. We also saw significant delays on the morning of trials whilst the trial advocates sorted out disclosure issues. We were informed that these delays, often lasting for two to four hours or more, were not uncommon. This clearly has a detrimental impact on court listing practices and on the progress of other cases listed for trial. It also contributes to a lack of public confidence in the trial process; juries inevitably are forced to wait for significant periods of time before their trials can commence; and victims, witnesses and defendants are inconvenienced.

- 2.23 Some of the disclosure made on the morning of the trial related to non compliance with CPIA earlier in the life of the case, but in other cases this disclosure was wider than necessary under the Act. This disclosure often resulted from a combination of a need for expediency or a general lack of confidence by the trial advocate in the way the prosecution had discharged its duty of disclosure based on what was apparent from the file up to that point. Key contributing factors for this were the lack of information and limited endorsements on the file, combined with the inadequate instructions provided to the trial advocate. On many cases there was no evidence of cohesive 'prosecution team' working. This lack of information can result in the trial advocate almost working in a vacuum and there was often no CPS involvement at all in the decisions taken by them whether to disclose material or otherwise. When the trial advocate made disclosure at court to the defence there was generally no record made on the file that this had taken place, and no record of what material had been disclosed. This further reduced the audit trail of what had and had not been disclosed.
- 2.24 We saw a number of examples (and were told of others) of cases listed for trial in which wide disclosure of unused material was undertaken on the morning of the trial, following which the defendant pleaded guilty. This can happen even if the CPS has undertaken disclosure appropriately, because the prosecuting advocate at court allows it. It was generally impossible to say that this disclosure of unused material was the only factor in the change of plea as it often depended on additional factors, such as the presence or otherwise of prosecution witnesses. However, the handing over of (or provision of access to) material on the morning of the trial gives the defence the opportunity, whether this is the reason for the change of plea or not, to claim a discount for the guilty plea. Since the disclosure of material is new information the defence have not previously had sight of, it can be asserted that the plea was entered at the earliest opportunity. If the disclosure fell outside that required under the CPIA disclosure test, as often seems to be the case, this would be an inappropriate discount. Additionally, the impact of late guilty pleas is to waste resources on preparation of cases for trial and contribute to unnecessary activity relating to disclosure duties. The fact that there was a 'successful' outcome to the case (a conviction on a guilty plea) means that in a significant number of cases, where this occurs, there is no scrutiny or analysis of either whether there was any disclosure failure, or non compliance with CPIA through unnecessary disclosure. The issues are therefore not addressed at any level.
- 2.25 There were a number of instances of police officers not fully describing items on the schedules of unused material passed to the CPS. Frequently the inadequacy of these descriptions was not challenged and the items were not examined by the prosecutor during the review process. When looked at on the morning of the trial, some of these items were actually pieces of evidence that would have strengthened the prosecution case and should have been served as such. Specific examples we saw and others we were told of related to 999 calls from the victims of crime at the time of or shortly after the incident, photographs and documentary evidence in road traffic cases, and corroborative material relating to identification in a robbery case.

Sensitive material and public interest immunity

- 2.26 Sensitive material is that which, if disclosed, creates a real risk of serious prejudice to an important public interest. Police should compile a sensitive material schedule (form MG6D) setting out the sensitive material, or providing a nil return. The disclosure officer should include the reason for regarding the material as sensitive, using the definition above. The crown prosecutor will apply the usual disclosure test and, in the relatively rare instances when the material meets the test, determine with the 'owner' of the material whether it should be disclosed or a public interest immunity (PII) sought from the court for non-disclosure.

- 2.27 At present police are inclined to place too much material on the MG6D that clearly does not meet the real risk test. In only 15 out of 77 relevant cases did inspectors consider the material listed as sensitive capable of meeting the “real risk” test. Greater involvement of senior police officers is needed to substantiate the use of the MG6D. The dangers are that material of which the defence should be aware is never transferred to the MG6C, so that its existence is not known to them, or that prosecutors do not examine truly sensitive material because of it being obscured in lists of items that do not really belong on the sensitive schedule.
- 2.28 Any applications to the court for PII should follow the guidance and be supported by a written note of the reasons provided by a senior police officer. Inspectors considered that records of such applications should be kept securely, as there was a lack of clarity about the extent of such applications.

Third party material

- 2.29 There are cases in which material is held by a third party, for example a social services department or a medical doctor. If the material might meet the disclosure test prosecutors should take appropriate steps to obtain it. Inspectors considered that earlier consideration should be given to material held by third parties by the prosecutor in conjunction with the investigating police officer.
- 2.30 Thereafter either the prosecution, or the defence, should follow the proper procedures to obtain such third party material. It is necessary for the owner of the material, and at the discretion of the court any individual the subject of the material (e.g. the patient), to be given notice of the hearing. The Crown Court Protocol requires these applications to be made at an early stage. There is also the possibility of the hearings developing into applications for non-disclosure on the grounds of PII. It is anomalous and inequitable that neither of these parties who are drawn into the criminal court process can recoup their costs from central funds.

Prosecution resources

- 2.31 We also have concern about the resourcing of CPS Areas for disclosure handling. On the current activity based costings budget allocation there is no specific time allocation for disclosure handling - the assumption is that these activities are built into existing review and consideration time. The activity based costings do not provide for large or very large and complex cases and it is not designed to do so; Areas are expected to absorb this work from their budget allocation. Areas tend to ‘ring-fence’ legal staff for the more complex and high profile cases and this can have the effect of starving resources from the more routine ones.

Confidence in the disclosure regime

- 2.32 Many defence, and some prosecuting, practitioners spoken to consider that there should be routine disclosure of certain items such as crime reports, incident logs and all previous convictions of prosecution witnesses in all contested cases. They considered that whilst this would not by itself increase confidence in disclosure handling, it would remove a significant aspect of concern and reduce the number of requests for material, which almost invariably include those items.

- 2.33 Some experienced practitioners considered that the current regime could never work, as the requirement for continuing review makes the CPIA impracticable and unworkable. The point was made that unless the lawyer who considered the material and made all disclosure decisions on the file was present throughout the entirety of the trial, there was no way of ensuring that all earlier disclosure decisions would be reviewed at the time there was a change to the evidence or the way the case was presented.

Conclusions

- 2.34 We recognise that it is impossible to gain the whole hearted acceptance of all parties to the existing disclosure regime. Some defence practitioners will never trust the prosecution to take the appropriate view on what may assist the defence or undermine the prosecution case. It is arguable that the present arrangements require police officers to make decisions which they are not equipped to take. The police find it too onerous within their priorities and resources. The arrangements for describing material in schedules as the basis for prosecutorial consideration means that many decisions by crown prosecutors are taken on the basis of inadequate information; and they do not always examine sufficient material themselves or record the reasons for their decisions in appropriate detail. The single regime for all cases calls into question its proportionality within the field of summary justice in the magistrates' courts, whilst leading to some huge resource demands in large and complex fraud cases. There is concern amongst the senior judiciary to make the regime work within the CPIA, but this can be undermined in individual cases if an 'open' approach is taken to encourage the prosecution to disclose all non-sensitive unused material.
- 2.35 The present arrangements do not lend themselves to a consistent and authoritative application of the regime and, consequently, the prosecution lacks confidence in its own role. Non compliance with the CPIA, throughout the disclosure chain, has also resulted in a lack of confidence in the process on the part of practitioners and the judiciary. It hampers effective case progression and can result in significant delay and adjournments. It has resulted in material that would have supported the case not being included as evidence. On the other hand, in cases where the prosecution has handled disclosure in accordance with the CPIA, the disclosure of material which does not meet the statutory test on the morning of the trial has undermined the efforts of the crown prosecutors to deal with disclosure appropriately. This can then lead to a lack of care and individual responsibility for handling disclosure on the grounds that it 'will all be sorted out at court in any event'. A vicious circle then exists.
- 2.36 For there to be any real prospect of the current regime succeeding there needs to be a unified and agreed process, which is understood fully by all those who are involved and is upheld and supported by all. This means that there must be clear, positive and demonstrable compliance with the statutory disclosure regime at all stages by all parties. Compliance should be managed and monitored on a consistent basis by all relevant criminal justice agencies, both at an individual and multi-agency level.
- 2.37 Throughout this report we have made recommendations in order to secure improvement not only in actual compliance with CPIA, but also in *demonstrating* compliance with the Act. One of the repeated themes throughout this review has been the lack of a clear audit trail as to what unused material has been examined, when and by whom, and why the decisions taken have been reached. We have also highlighted the good practice found. Some of this relates to systems and processes which have been adopted throughout an Area and are in widespread usage. In other instances they are suggestions and good working practices being undertaken by individuals or a prosecution team on a particular case. Where we feel this could be of benefit in the wider criminal justice field, we have highlighted it in our findings.

Recommendations

2.38 We have made the following 21 recommendations:

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

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

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

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

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

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

 - 7 CPS Business Development Directorate consults with the Association of Chief Police Officers as to providing (initially on a pilot or experimental basis) unused material in magistrates' courts' cases directly to the crown prosecutor for examination instead of the disclosure officer describing them (paragraph 7.46).
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- 8 Crown prosecutors should examine items of unused material in which the description provided by police is not adequate to provide a sound basis for an informed decision as to the application of the disclosure test (paragraph 7.48).
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- 9 CPS Business Development Directorate should consult with the Association of Chief Police Officers to devise and implement an effective performance management scheme to raise the standard of the descriptions of material on the MG6C and the provision of copies of material if incapable of adequate descriptions (paragraph 7.48).
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- 10 CPS Business Development Directorate provides guidance to crown prosecutors about steps to take to ensure that the details of non-sensitive unused material not initially on the MG6C are provided to the defence at the earliest opportunity in order to avoid delay (paragraph 7.50).
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- 11 Crown prosecutors object appropriately to any defence applications to the court for disclosure which do not comply with section 8 Criminal Procedure and Investigations Act procedures (paragraph 8.8).
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- 12 CPS Business Development Directorate, in consultation and conjunction with the Association of Chief Police Officers, should take steps to ensure that disclosure officers only seek to withhold items listed on the sensitive material schedule when there is a real risk of serious harm to an important public interest and that such assertions are ratified by a senior officer; and
- Crown prosecutors examine all material on sensitive material schedules, or are fully informed about it by a senior police officer (paragraph 9.13).
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- 13 Chief Crown Prosecutors ensure that a log is maintained of all public interest immunity applications, together with a record of all parties involved in the decision-making process, and the results of ex parte applications without notice are collated nationally (paragraph 9.19).
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- 14 Crown prosecutors ensure that in any case with sensitive material a complete record is maintained of the application of the disclosure test and the decisions made in relation to such material, and that the trial advocate is fully informed of those decisions (paragraph 9.26).
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- 15 CPS Business Development Directorate, in conjunction with the Association of Chief Police Officers, considers amending the form MG3 to include a prompt for prosecutors to confirm that the possible existence of third party material and any appropriate action in relation to it has been considered and discussed with the officer (paragraph 10.9).
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- 16 The Ministry of Justice considers the case for providing courts with the power to award costs out of central funds to third parties and interested individuals drawn into the criminal court process and who have acted reasonably (paragraph 10.12).
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- 17 Chief Crown Prosecutors liaise with the police, local authorities and local health services to agree effective third party unused material protocols (where this has not already been achieved) and ensure that all protocols are regularly reviewed and updated (paragraph 10.17).
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- 18 CPS Business Development Directorate considers establishing uniform performance targets for disclosure against agreed criteria; and
- Chief Crown Prosecutors ensure their Area's performance is monitored and achieves the agreed target (paragraph 13.11).
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- 19 CPS Headquarters undertakes the necessary research to determine accurately the complexity profile of trial cases in the Crown Court and magistrates' courts, and clarifies if large and more serious cases are causing disclosure resource issues for the less serious cases (paragraph 14.34).
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- 20 Chief Crown Prosecutors should consider in those cases where examination of unused material represents a significant burden on the prosecution, whether the detailed work should be done by a specially instructed external disclosure counsel on a fixed fee basis attributed to the prosecution costs budget, and ensure that the guidance on the management of large scale cases is followed (paragraph 14.35).
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- 21 CPS Policy Directorate undertakes the collation of all relevant law and guidance on disclosure and provides itemised electronic links to this with the Disclosure Manual (paragraph 16.4).
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Good practice

- 2.39 We identified the following items of good practice, which might warrant adoption nationally:

Issues of practice

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- 1 Storing the MG20 forms (which accompany additional prosecution material received by the prosecution after service of the case on the defence) with the unused material schedules, clearly endorsed with the decisions taken, e.g. 'serve as evidence' or 'disclosure officer to add to next phase of unused material schedules' (paragraph 7.13).
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- 2 Using a bright coloured card disclosure record sheet, which is easy to identify in the file (paragraph 7.13).
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Review and decision-making procedures

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- 3 Any pre-charge liaison by the crown prosecutor with Major Incident Teams should routinely include discussion with the disclosure officer of how unused material schedules will be presented (descriptions, cross-referencing etc) and a timetable agreed for the phasing of

the supply of unused material after charge. This should be documented and recorded in any action plan agreed. In addition, any issues over unused material in Major Incident Team cases should routinely be discussed in post-case de-briefings to learn lessons and help with training (paragraph 6.6).

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

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

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

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

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

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

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

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

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

- 13 Managers checking the quality of initial disclosure letters as part of Casework Quality Assurance (paragraph 7.42).

- 14 Feedback sessions by Higher Court Advocates to other CPS staff on all aspects of Crown Court work, including the handling of unused material (paragraph 11.4).

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

3 BACKGROUND AND METHODOLOGY

Purpose and scope of the review

- 3.1 The purpose of the review has been to assess the quality and timeliness of the undertaking of the prosecution's duties of disclosure by the CPS, in respect of material obtained in the course of a criminal investigation which does not form part of the prosecution case in Crown Court and magistrates' courts' cases; and the effectiveness of compliance with the CPIA disclosure regime and the impact of non compliance upon the fairness of trials and on the wider costs and resources within the CJS.
- 3.2 The main aspects were to:
- assess the quality of CPS decision-making and recording of decisions taken in respect of the disclosure or withholding of unused material, including the adherence by prosecutors and prosecuting advocates to the requirements imposed by relevant legislation, case law and guidance;
 - to assess compliance with the Protocol for the Control and Management of Unused Material in the Crown Court dated 20 February 2006; with the Disclosure: Experts' Evidence and Unused Material Guidance Booklet for Experts; and with the Protocol for the Control and Management of Heavy Fraud and Other Complex Criminal Cases dated 22 March 2005;
 - assess the effectiveness of joint working with the police to ensure all relevant material is correctly captured and recorded;
 - assess performance management by managers to ensure compliance and secure improvement;
 - assess the effectiveness and adequacy of ongoing training and materials provided to prosecutors;
 - consider the cost and resource issues of disclosure handling and its impact on the prosecution process; and
 - identify good practice and make recommendations to secure improvements in practice.

Background to the review

- 3.3 Before any trial takes place the prosecution serves upon the defence the evidence upon which it relies to prove its case: copies of statements made by witnesses it proposes to call and a list of all exhibits, together with copies of documentary exhibits. However any criminal investigation generates or gathers a variable quantity of material which, either because of its content or by its very nature, does not assist in proving the offence charged and the prosecution, therefore, does not serve it as evidence. This is called "unused material" and the principle is that the prosecution (the police and the CPS) is under a duty to disclose to the defence such unused material which might undermine the prosecution case or assist that of the defence. This seeks to ensure that the prosecution, with greater resources at its disposal, do not have an unfair advantage over a defendant and that there is 'equality of arms'. Unless and until that duty is performed, the trial process cannot be regarded as fair.

- 3.4 The use of electronic equipment, surveillance technology, satellite and tracking advances, mobile phones, electronic financial transactions and digital technology, means that more information than ever before is being generated and stored. This is leading to a proliferation of information collected as part of the investigation which may be used as evidence of criminal activity. Computer hard drives, disks and other digital memory storage devices can hold huge amounts of data or information. Some of this information may neither support nor undermine the prosecution, nor assist the defence. However until it has been examined no decision about the nature of the item, or the assistance it may give, can be made. Therefore even in the most routine of investigations, more and more material is being generated, creating more and more work for the investigator and prosecutor.
- 3.5 It must also be borne in mind that the breadth of an investigation may be such as to bring into police possession extensive material which relates to the private or business affairs of individuals who are not defendants and may not feature in the events giving rise to charges. It is important that the operation of the disclosure regime should not intrude into the privacy of such individuals other than to the extent necessary for the fair administration of justice.
- 3.6 In tandem with this proliferation, there exists a perceived lack of confidence in the way disclosure of unused material is handled throughout the entirety of the process. In the early 1990s a number of successful high profile appeals resulted in significant changes in the way unused material should be handled by the prosecution. Despite changes to the legislation and case law since that time there remain significant fears that this duty is still not being complied with consistently and scrupulously, be it through a lack of time, resources or understanding. A number of individuals within the CJS consider that the defence should have access to all unused material, particularly if it is not sensitive. These considerations can result in a lack of compliance with the legislative requirements by many criminal justice practitioners so that the defence is allowed access to unused material which does not meet the statutory test. Whilst this approach can have some attractions (apparent simplicity and transparency amongst them) it can also have draw backs. It may be very resource-intensive and involve extensive duplication or replication of effort. This cannot be entirely ignored given that both prosecution and defence work is usually publicly funded. By contrast some defence practitioners perceive blanket disclosure as an inappropriate passing of the prosecution responsibility to scrutinise material to the defence.
- 3.7 Many defence practitioners spoken to consider that there should be routine disclosure in all contested cases of certain items - crime reports, incident logs, and previous convictions of prosecution witnesses. They believed that whilst this would not by itself lead to total confidence in the disclosure regime, it would remove a significant aspect of concern, reduce the number of requests for material which, almost invariably, included those items and would not be unduly disproportionate in resource costs.
- 3.8 Some senior practitioners felt that the current regime could never work as the requirement for continuing review makes the CPIA impracticable and unworkable. The point was made that, unless the lawyer who made all disclosure decisions on the file was present throughout the entirety of the trial, there was no way to ensure that all disclosure decisions were reviewed at any time there was a change to the evidence or the way the case was presented.

- 3.9 Other practitioners and senior members of the judiciary considered that the proper course was for there to be strict compliance with the CPIA disclosure regime, underpinned by scrupulous undertaking of their respective roles by the police, CPS and prosecuting advocate. Strict adherence to the Crown Court Protocol should reduce both delay and unjustified cost within the CJS.
- 3.10 ACPO were concerned that the resource demands of disclosure, in particular in summary cases, were disproportionate and indeed unsustainable. This was exacerbated by the renewed drive for speedy, simple, summary criminal justice (the CJSSS initiative).

Methodology

- 3.11 In this review we examined a total of 152 files against a set database of questions. Of these, 48 (16 magistrates' courts and 32 Crown Court) were finalised cases sent to us prior to the on-site Area visits. Areas were asked to provide concluded contested case files involving a road traffic offence, magistrates' courts' case, Crown Court case, major fraud case, murder case and one involving a PII application. The remaining 104 cases (55 magistrates' courts and 49 Crown Court) were live trials identified in conjunction with the Areas which we observed at the relevant court centres during our on-site visits. We took into account the findings from our recent cycle of AEIs of 11 Areas whose performance in the 2005-06 OPAs had been assessed as Poor or Fair. In the course of those inspections disclosure performance was assessed in 1,007 cases. We also compared the performance of the CPS in both the first and second cycles of full inspections which concluded in 2002 and 2005 respectively and involved the scrutiny of disclosure issues in a further 5,519 case files. However changes in law and the stricter practices incorporated in the CPS/ACPO instructions and later Disclosure Manual, against which CPS performance was measured, make direct comparisons difficult.
- 3.12 This review was based on an in-depth consideration of predominantly live trials, the observation of which took place at court, and examination of the files coupled with interviews of those involved in the decisions taken on them. Wherever possible we interviewed the defence and prosecution teams and the judge. Being present on the morning of the trial gave the review team a clear perspective of what was happening in practice on the files there and then. This has been of significant benefit in enabling us to come to our conclusions. It confirmed that what happened at court with regard to disclosure handling is often not recorded on the file, so frequently any late or non compliance was not recorded and not apparent clearly from file examination, consequently, there is a lack of overall awareness of the true position with regard to compliance with the disclosure regime. Moreover actions taken in relation to unused material lack consistency.
- 3.13 The Areas visited were a representative sample of metropolitan and rural and reflected a mix of Excellent, Good, Fair and Poor assessment in the disclosure aspect of the OPAs. To reduce duplication and the burden of inspection two of the Areas included in the review were visited in conjunction with the ongoing AEI and the results of the file examination, court observations and interviews with criminal justice agencies were shared with that team.
- 3.14 The Areas inspected, with performance assessed for the disclosure aspect of the OPA in brackets, were: Staffordshire (Excellent); Warwickshire (Excellent); Leicestershire (Good - in conjunction with AEI); London South (Fair - including cases at the Central Criminal Court); Derbyshire (Fair - in conjunction with AEI); West Mercia (Fair); South Wales (Poor); and Nottinghamshire (Poor).

- 3.15 A reference group was formed in order to provide guidance and focus to the review. Individuals were invited to participate due to their skill and expertise with regard to disclosure handling in their particular background and organisation and comprised members of HMCPSI (HM Chief Inspector, HM Deputy Chief Inspector and the Lead Inspector for this review), and members of the CPS, Attorney General's office, ACPO, judiciary, Criminal Bar Association, Law Society and an academic from the University of Manchester. The group met at various times throughout the course of this review and the Chief Inspector is very grateful for their time and valuable contribution to this review process. Full details of the membership are at Annex H.
- 3.16 Part of the review was to gain an insight into the cost and resource issues of disclosure handling and the impact of this on the prosecution process. In order to assess this three strands of work were undertaken:
- a complexity profile of the national caseload and the typical time a prosecutor spent on disclosure for each complexity category;
 - a review of the CPS activity based costing system to determine how much time was allocated for disclosure purposes; and
 - an assessment by inspectors on how long they thought disclosure activities should have taken for the cases in their file sample using the same complexity criteria.
- 3.17 Information was gained from CPS staff through a survey of 437 prosecutors working in the inspected Areas, of whom 173 responded. The questionnaire had a mix of factual questions, positively framed propositions relating to aspects of disclosure work, quantitative resource questions and wider CJS issues. Free text fields were included to solicit comments and respondents were asked to suggest three main improvements. Personal case profile information was analysed and apportioned using information on the total number of contested trials in the Crown Court and magistrates' courts to estimate the complexity of the national caseload. The information from the three data sets (prosecutors, activity based costing and inspectors) was then compared.

Structure of the report

- 3.18 In order to present the findings in a coherent and logical way, the report follows the basic disclosure process chronologically through each stage. Unused material which is sensitive or in the possession of a third party is dealt with separately due to the different procedures applicable to those situations. Finally, resourcing and management are considered.
- 3.19 A brief background to the development and practice in law has been included at Annex A to assist in understanding why the current regime is in being and also to place discussed performance in its correct context.

Acknowledgements

- 3.20 The Chief Inspector and the inspection team are grateful for the co-operation, support and assistance of all those with whom they came into contact throughout the inspection.

4 SETTING THE SCENE

Development of the law relating to disclosure

- 4.1 Although the existence of the prosecution's duty to disclose certain unused material was never in doubt (and is now enshrined in statute) the extent and way in which it should discharge this duty has, in recent years, caused a great deal of difficulty to the administration of criminal justice - a convenient short history is, in fact, set out in the case of *R v H & C* [2004] 2 Cr App R 179 at p.186.
- 4.2 Until December 1981 the prosecution's duty was to make available to the defence details of witnesses whom the prosecution did not intend to call, and earlier inconsistent statements of witnesses whom the prosecution were to call: see Archbold, Pleading, Evidence and Practice in Criminal Cases, 41st ed (1982), paras 4-178 to 4-179. Guidelines issued by the Attorney General in December 1981 (74 Cr App R 302) extended the prosecution's duty of disclosure somewhat, but laid down no test other than one of relevance ("*has some bearing on the offence(s) charged and the surrounding circumstances of the case*") and left the decision on disclosure to the judgment of the prosecution and prosecuting counsel. Practitioners in that era were not used to either giving, or receiving, much in the way of disclosure. In *R v Ward* (1993) 96 Cr App R 1, 50, [1993] 1 WLR 619, 674 this limited approach to disclosure was held to be inadequate:

"An incident of a defendant's right to a fair trial is a right to timely disclosure by the prosecution of all material matters which affect the scientific case relied on by the prosecution, that is, whether such matters strengthen or weaken the prosecution case or assist the defence case. This duty exists whether or not a specific request for disclosure of details of scientific evidence is made by the defence. Moreover, this duty is continuous: it applies not only in the pre-trial period but also throughout the trial."

The rule was stated with reference to scientific evidence, because that is what the case concerned, but the authority was understood to be laying down a general test based on relevance: see *R v Keane* (1994) 99 Cr App R 1, 6, [1994] 1 WLR 746, 752 and the Criminal Procedure and Investigations Act 1996.

- 4.3 The blanket disclosure flowing from *R v Keane* caused considerable public expense. In 1996 the Criminal Procedure and Investigations Act reaffirmed the prosecution's duty of disclosure, but changed the test and introduced a statutory regime. The police and CPS introduced policy guidance in the form of Joint Operational Instructions (JOPI). In 2003 the Act was amended to streamline and strengthen the procedure and a revised manual (the Disclosure Manual) was circulated. In addition, the last two years have seen the introduction of two protocols issued with the authority of the Court of Appeal, giving further guidance on the way in which the procedure should be conducted. The statute, Disclosure Manual and protocols are all directed to the same end: to ensure that a fair trial can take place by avoiding on the one hand, the miscarriages of justice that have occurred in the past through non-disclosure and, on the other, reducing the burden and the cost to the CJS when disclosure has been unnecessarily wide.

- 4.4 A synopsis of the law relating to disclosure, its historical background and development, and current application has been prepared by Dr Hannah Quirk of Manchester University and can be found at Annex A. Under the current test material is disclosable if, but only if, it might (on a reasonable and objective view) be thought capable either of undermining the case for the prosecution, or assisting that of the defence. It could be considered anomalous that one side in any litigation should have entrusted to it the task of deciding, without judicial supervision or a right of appeal, whether any particular item of potential evidence might undermine its own case or assist the other. The right to make an application to the court under section 8 of the CPIA presupposes that the defence are aware of the existence of the material. Fundamental to the role of the CPS, however, is its independence from the police and its duty to act fairly, not just to obtain a conviction. The CPS has already been entrusted by statute with the decision as to whether there is sufficient evidence to justify the prosecution of an individual and whether the public interest requires it. It is therefore argued that an organisation considered appropriate to exercise such power should also be trusted to decide whether any particular piece of potential evidence undermines the prosecution case.
- 4.5 So far as the second limb of the test is concerned - whether a piece of potential evidence might assist the case for the defence - that plainly can only be properly applied if, and to the extent that, the prosecutor knows what the defence actually is. The criminal law, unlike the civil, knows no duty of *mutual* disclosure and (with the exceptions of alibi and expert evidence) prior to the CPIA 1996 the defence were not obliged even in general terms to indicate what the defence would be. The 1996 Act introduced the defence statement, a formal document signed by the defendant requiring the defence to set out matters on which they took issue with the prosecution, the reason why they took issue and (in general) to state the nature of the defence. In 2003 the requirement was made more stringent and detailed, the sanction for not producing one being the making of an adverse comment by the prosecution.
- 4.6 At present a defence statement is usually produced in Crown Court cases (albeit not always at the stage required by the rules); the extent to which such statements contain a detailed exposition of the defence case is, however, very variable. Such a lack of rigour in respect of defence statements is becoming increasingly at odds with the requirement for criminal cases to be dealt with justly. This is the “overriding objective” as expressed in the current edition of the Criminal Procedure Rules, which go on to state that each participant must actively assist the court in the early identification of the real issues.
- 4.7 Whether a defence statement is received or not, section 7A of the Act imposes a continuing duty on the prosecutor to keep under review whether there is any material which ought to be disclosed to the defence. This can relate to additional material which comes to light after the original schedules have been submitted, or as a result of a change to the basis of the prosecution case, or changes in the evidential position as the case progresses.
- 4.8 Disclosure remains essentially a ‘one-way street’, although there is now a clearer level of understanding whether the street is leading. The scope for the prosecution to be ‘ambushed’ at trial has been restricted and at least the opportunity for better and earlier focus on the real issues in the case exists. In any view, there still remains room in most cases for greater indication by the defence as to what their case is. It would, however, require a fundamental change of the law, and one which would be contrary to the tradition of the adversarial system, for the defence to be required to give disclosure of material unfavourable to their position so as to mirror the prosecution duty.

Proliferation of unused material

4.9 Disclosure would never have caused the CJS the problems that it has if the amount of unused material was restricted to a handful of documents and other items where relevance could be quickly and easily ascertained by all. That situation exists only in the simpler and less serious cases, principally in the magistrates' courts (though not always even there). In an investigation of any seriousness or complexity the amount of unused material generated or gathered is surprisingly voluminous, even though only a small proportion (or none) of it is relevant in terms of assisting the defence or undermining the prosecution. The following is a non-exhaustive indication of the types of material in question:

- Documents or other material contemporaneous (or nearly so) with the alleged offence. These may comprise the tapes or transcripts of 999 calls, contents of police notebooks, contemporaneous police logs of a developing incident, first descriptions of suspects, Custody Records of suspects (which are in any event disclosable to the individual suspect under the Police and Criminal Evidence Act 1984), and the national Form 83 (medical examinations of arrested persons). This type of material can be of particular importance and special provisions make some of it disclosable, whether or not it passes the disclosure test.
- Unused witness statements. The police may take a statement from a witness but the evidence in the event is not used, because it does not take the prosecution forward or is merely repetitious of other evidence. House-to-house enquires may be made, or people stopped in the street to see if they recalled events. (A special view of this type of material is sometimes taken, particularly in homicide cases, where generally a practice exists of disclosing all unused witness statements regardless of the test.)
- Previous convictions of witnesses, the antecedents of the defendant and other 'bad character' evidence of either the defendant or witnesses. (In some cases the prosecution may apply to adduce in evidence the bad character of the defendant, and similarly the defence may wish to adduce any previous convictions or other bad character of prosecution witnesses.)
- Material seized on searches of, for example, the defendant's home or place of business and not used as part of the prosecution case. Such material may be particularly extensive in fraud cases yet much of it may, on examination, prove to be entirely irrelevant.
- Electronic material, for example, the contents of computer hard drives, mobile phone memories of dialled numbers and texts - a category of increasing importance and sometimes difficulty.
- CCTV recordings retained (not necessarily by prosecution), but not used as part of the prosecution case.
- Major enquiry material, for example, the products of the HOLMES computer program. HOLMES is used by the police to collate all actions and documents generated in the course of investigating major cases such as murder. Again, this material may be very voluminous but much of it wholly irrelevant.
- Material held by third parties, other organisations or government departments, some of which may be highly sensitive.

- 4.10 Much of the material generated is classified by the police as *non-sensitive material*: its existence and content is not regarded as confidential and, therefore, in principle if it is relevant and meets the CPIA test that it may undermine the prosecution case or assist the defence, can be disclosed. In addition, however, there is a very important category of material classified as *sensitive material*. This is information revealed to the CPS, but which the police assert should not be disclosed to the defence because there may be a real risk of serious harm to an important public interest. Sometimes the police seek to withhold even its existence for the same reason. It is for the CPS to apply the disclosure test to this as to the non-sensitive material and, if it neither undermines the prosecution case nor assists the defence, then it is not disclosable in any event. If it may undermine or assist then it may be necessary to apply to the court for non-disclosure on the basis of PII. This subject is covered in detail in Chapter 9.

Previous CPS performance in relation to disclosure

- 4.11 This review is set against a background of mixed CPS performance in fulfilling its disclosure obligations. Although performance has improved in several aspects since our Thematic Review of the Disclosure of Unused Material report in March 2000, it has also fluctuated. Our assessments of the degree of implementation of recommendations from the 2000 report are set out in Annex C. A number of themes have recurred in our inspections of CPS Areas over the last seven years (details of performance findings and problems points can be found in Annex D) and remain evident to date from our findings in this review.
- 4.12 At the beginning of 2006 the CPS concluded its Disclosure Performance Improvement Programme. In an effort to quantify and assess its impact the CPS carried out two surveys to measure its own and police confidence levels in handling a range of disclosure issues. The first survey was conducted in 2005 and prior to the implementation of the guidance generated as a result of the programme (which included the revised Disclosure Manual). This was in order to establish a baseline. A second survey was then conducted between September-December 2006 to report on progress.
- 4.13 The results showed that overall levels of confidence in the handling of disclosure within the CPS and police had increased. CPS staff and prosecution counsel who took part in the survey indicated that since 2005 there had been a decrease in the use of blanket disclosure and a decline in the frequency that the court made an order for disclosure of material that did not satisfy the disclosure test(s). There was also greater confidence by them that the police were correctly discharging their disclosure responsibilities. The police, however, had less confidence that the CPS was correctly discharging its responsibilities and there was also a decline in police satisfaction with disclosure training. The CPS were less positive about having had sufficient time for compliance with disclosure requirements and 43% of respondents felt that the current disclosure process was effective, compared with 38% of police respondents to the survey. It is anticipated by the CPS that this information should be helpful to Areas to identify strengths and weaknesses in their disclosure performance.
- 4.14 Our findings in the inspections and assessments in 2006-07 and this review, however, reveal that there is still much room for improvement.

5 THE ROLE OF THE POLICE

Investigate, record and retain

- 5.1 As investigators, the police are at the very start of the process of disclosure handling. Failure to investigate thoroughly all the evidence that points either towards or away from a suspect can result in, on the one hand, inappropriate discontinuance or acquittal or on the other wrongful conviction. Whilst not equivalent both such outcomes are ultimately miscarriages of justice. No system of disclosure can ever prevent the fraudulent or dishonest concealment of material by a party to an investigation. However a properly managed disclosure process, which complies fully with the CPIA and other key guidance, should support a competent and thorough investigation ensuring that, wherever possible, unresolved questions are answered long before the case is put before a jury or bench of magistrates. Thoroughness is the surest way to fair and just outcomes. The strongest prosecution case is developed and avenues of potential defence are closed off, potentially increasing the likelihood of a guilty plea. It also enables a more focussed presentation of both prosecution and defence cases to the jury or magistrates, with issues being more clearly defined. If material undermined the prosecution cases substantially then the prosecution could be dropped.
- 5.2 The Protocol for the Control and Management of Unused Material in the Crown Court states at paragraph 13 that, for the statutory scheme to work properly, investigators and disclosure officers responsible for the gathering, inspection, retention and recording of relevant unused prosecution material must perform their tasks thoroughly, scrupulously and fairly. In this, they must adhere to the appropriate provisions of the CPIA Code of Practice. This Code is issued under Part II of the Act and it sets out the manner in which police officers are to record, retain and reveal the unused material. It also gives definitions of the relevant terminology and responsibilities for all those who investigate crime. We consider that a proportion of this is an integral part of a high quality investigative process. There is however, a very significant resource burden on police in marshalling unused material, determining issues of relevance and sensitivity, providing detailed descriptions of items, certifying issues, and undertaking continuing duties on receipt of a defence statement.

Disclosure officers

- 5.3 The Code of Practice issued under section 23 of the CPIA creates the roles of disclosure officer and deputy disclosure officer, with specific responsibilities for examining material, revealing it to the prosecutor, disclosing it to the accused where appropriate, and certifying to the prosecutor that action has been taken in accordance with the Code. The disclosure officer is required to create schedules of relevant unused material retained during an investigation and submit them to the prosecutor together with certain categories of material. Non-sensitive material should be described on form MG6C and sensitive material should be described on form MG6D.
- 5.4 The chief officer of police for each police force is responsible for putting in place arrangements to ensure that in every investigation the identity of the officer in charge of an investigation and that of the disclosure officer is recorded. It is his or her duty to ensure that disclosure officers and deputy disclosure officers have sufficient skills and authority, commensurate with the complexity of the investigation, to discharge their functions effectively.

- 5.5 An investigator, disclosure officer and officer in charge of an investigation perform different functions and the three roles may be performed by different people or by one person. Where they are undertaken by more than one person, close consultation between them will be essential to ensure compliance with the statutory duties imposed by the Act and the Code.
- 5.6 In most straightforward cases the role of the disclosure officer is undertaken by the officer in the case and was so in 91% of the cases we examined. This has the benefit of reducing duplication and effort. In some police forces, albeit none of those we visited in this inspection, the duties of the disclosure officer are undertaken by crime file builders who are responsible for assimilating and collating the evidence prior to the file being submitted to the CPS. This gives consistency to the quality and content of the schedules but runs the risk that unused material might be missed and, in addition, does not assist the development and training of police officers, which can hamper them when they later come to handle more complex cases where they need to deal with unused material. It is generally only in the larger, more complex/serious cases that a specialist or dedicated disclosure officer is appointed.
- 5.7 In the 152 files we examined the duties of disclosure were carried out by the officer in the case in 131 cases and by a specialist disclosure officer in 13. In the remaining eight, all of which were straightforward magistrates' courts' trials, the disclosure officer was another officer who had some involvement in the case. We found, however, that in almost half the total number of cases the description of the unused material recorded on the schedules was insufficient for the reviewing prosecutor to make a decision on disclosure without actually inspecting the material.
- 5.8 We found few instances of the police by-passing the CPS and going straight to counsel, which occurred in six of the cases we observed. In the majority of those this was simply that the disclosure officer and counsel were at court on the morning of the trial sorting out disclosure issues without the presence of the CPS lawyer, rather than a deliberate attempt to discuss the case without the CPS being given the opportunity to attend. In only two cases did the disclosure officer contact counsel direct prior to the trial date. In both the officer had previously attempted to discuss the issues with the reviewing lawyer, but had received very little assistance.

The issue of relevance

- 5.9 The disclosure officer must record and retain all material which is relevant to the investigation. There is, however, an accepted lack of understanding over what exactly this means. Under the Code of Practice relevance is defined as material which it appears to the officer "*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*". It is this definition, and the interpretation of it, which is resulting in significant amounts of unused material being retained to no material effect. Within our file sample we found examples of material which should not have been listed on the schedules and the repeated inclusion of administrative forms which had been served on the defence during the earlier part of the investigation. Guidance on this is contained with the Disclosure Manual. Despite this, many of the police officers interviewed in the course of this review accepted that they did not in anyway apply a test of relevance to an item, but would retain and record all material gathered in the course of the investigation. This can result in lengthy schedules and make the sifting of the unused material more difficult than is necessary (although we appreciate that disclosure officers should err on the side of safety if

relevance was in doubt or not known at this stage and the limited guidance provided with the form MG6C provides for this - see Annex F). Further guidance is needed to ensure that police officers are able to make proper assessments of what is relevant, in the sense of having potential evidential value. In addition when material which does not fit the definition of relevance is recorded on the schedules, the reviewing lawyer should give appropriate feedback to the disclosure officer.

Feedback and training

- 5.10 Many police officers whom we interviewed expressed concern at the lack of practical training and guidance they had received to enable them to deal effectively with their duties of disclosure. Whilst this related mainly to officers handling the more routine cases, it was by no means limited to those cases. As one member of the judiciary expressed it:

“Disclosure needs to be done properly, by an investigator who is well enough informed to understand the issues with sufficient experience to be able to judge relevance.”

- 5.11 Whilst recommending a practically-based training course for police officers is not within the remit of this report, we consider that an assessment of joint police and CPS training needs should be undertaken.
- 5.12 In addition a common recurring theme throughout this report is the lack of feedback, positive and negative, informal and structured, case-specific and relating to general disclosure issues, which is provided to individual police officers and to police forces as a whole. We discuss the issue of joint performance management further at Chapter 8.
- 5.13 We have not inspected the roles and duties of the police in this review, but we are aware that ACPO considers that the resource burden on police is disproportionate and that they seek a more streamlined system for cases in the magistrates’ courts. It is likely that the sort of change ACPO has in mind would entail significant legislative change to the regime. We have explored with the CPS, in conjunction with ACPO, some re-assignment of duties between the police and CPS, but did not reach a consensus with them about what might both improve the quality of disclosure and reduce burdens on the police in cases in the magistrates’ courts. This is referred to at paragraph 745.
- 5.14 The alternative that may assist police is for there to be stricter case management under the Criminal Procedure Rules so that on the entering of a plea of not guilty the issues are identified and disclosure may be undertaken in the light of these. This would have the benefit of the police investigating officer (and disclosure officer) remaining central to disclosure issues. However this does not diminish the statutory duties of initial disclosure under the CPIA and so even in the magistrates’ courts this would only really affect the duty of continuing disclosure. Our findings about the quality of the MG6C and MG6D schedules indicates that an effective form of performance management would, in any event, have to be devised and implemented. At the very least the administrative forms we refer to in paragraph 5.9 might have an endorsement that they should not be included on forms MG6C without special reason.

6 PRE-CHARGE DECISION-MAKING

- 6.1 Since the last thematic report all CPS Areas have implemented statutory charging, whereby the CPS has taken over the responsibility from police for the decision to charge in the more serious or contested cases. In most charging centres a crown prosecutor will be available to give face-to-face advice and decisions during the working day and an out-of-hours service (CPS Direct) is available over the telephone at other times. The purpose of pre-charge decision-making (PCD) is to ensure that a case proceeds on the right charges with the key evidence available. An integral part of the process must be not only to consider all the elements of the case, but also the likely defence case and any foreseeable weaknesses. Whilst it is important that progress is made and the duty prosecutor does not request more information than is necessary, undermining material must be considered when assessing the prospects of conviction. Whilst on some occasions the weaknesses may result in a decision to take no further action, this may also be an opportunity to build a stronger case.
- 6.2 The Director of Public Prosecution's (DPP) Guidance on Charging states at paragraph 7.2(1) that in all cases proceeding to the Crown Court, or which are expected to be contested, a report to a crown prosecutor for a charging decision (on form MG3) must be accompanied by an evidential report containing the key evidence upon which the prosecutor will rely, together with any unused material which may undermine the prosecution case or assist the defence (including crime reports, initial descriptions and previous convictions of key prosecution witnesses). At this point it is important to stress that this is *not* the same as the requirement to provide copies of the crime report and log of messages when the 'full' file of evidence is submitted and which is termed 'routine', or 'automatic', revelation. At the charging stage the police are required to produce copies of documents only if they may undermine the prosecution or assist the defence. However at the full file stage the police are obliged to produce those documents routinely, or automatically, irrespective of whether they may undermine or assist. This routine revelation is discussed in more detail at paragraphs 7.18-7.20.
- 6.3 The Disclosure Manual specifies that the investigator should inform the prosecutor as early as possible if there is any material which weakens the case against the accused and should provide any material which satisfies the disclosure test to the prosecutor. We found, however, that unused material was rarely provided at the PCD stage. In 13 out of 135 cases (9.6%) there was potentially undermining material which should have been provided to the duty prosecutor (nine Crown Court cases and four magistrates' courts). Unused material was provided in six of the 13. Four of those where material was not provided were sexual offences where the undermining material related to the credibility of the witness and two resulted in the cases being dropped once the material was seen by the reviewing lawyer.
- 6.4 The Disclosure Manual at paragraph 10.11 specifically provides for early advice and consultation with the CPS on unused material which, where necessary, can include examination of material before the schedules are completed. This complements - but is separate to - the provisions in the Director's Guidance on PCD requiring duty prosecutors to be aware of, and take into account, any material which may undermine the prosecution case. We saw a number of complex cases where early consultation would have been beneficial to the management and scheduling of the unused material, but where there was no indication of any discussion about unused material until after the schedules had been submitted to the CPS.

- 6.5 Prosecutors need to ensure that they discuss the likelihood of potentially undermining or assisting unused material at the PCD consultation. It should not be merely assumed that because the officer does not mention the material, none exists. A full record of what unused material has been seen and discussed should be recorded on the MG3 form used to record pre-charge advice and decisions and agreed with the officer. In any complex cases where unused material is likely to be voluminous, the benefit of an early conference with the prosecution team to discuss the scheduling and handling of the material should be considered at the PCD stage.
- 6.6 The CPS and ACPO may wish to consider amending the format of the MG3 and MG3A forms to include a prompt to remind prosecutors to discuss unused material with the investigating officer and to note whether there is any that may undermine the prosecution or assist the defence, and that it has been produced by the officer to the prosecutor who has duly considered it.

RECOMMENDATION 1

Chief Crown Prosecutors should ensure:

- pre-charge revelation to the prosecutor of unused material which may undermine the prosecution case or assist the defence is received from the police in accordance with the existing Director's Guidance on Charging, and this is monitored;
 - feedback is given to police officers and prosecutors in cases of non compliance; and
 - performance in respect of compliance is considered by the CPS and police at Prosecution Team Performance Management meetings.
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RECOMMENDATION 2

Crown prosecutors handling complex cases with voluminous unused material should encourage the police to consult them at an early stage about scheduling and submission of the unused material.

GOOD PRACTICE

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

7 THE DUTY OF INITIAL DISCLOSURE

Overview

- 7.1 Initial disclosure means providing the defence with any material which has not previously been disclosed to them and which satisfies the disclosure test (subject to any PII). The duty to disclose under CPIA arises when a not guilty plea has been entered in the magistrates' courts on any offence, or when the defendant is committed to the Crown Court or the prosecution case is served if the defendant was sent to the Crown Court, or after the preferment of a voluntary bill of indictment. It is essential that service of initial disclosure takes place as expeditiously as possible, especially where a defendant is in custody.
- 7.2 In the course of this inspection we found that, overall, initial disclosure was dealt with properly in 86 out of 152 cases (56.6%). This was not as good performance as we found in the first and second cycles of inspection and in the most recent AEs. We acknowledge the difficulty of drawing comparisons between this in-depth examination of a high proportion of live cases and the earlier examination of much larger quantities of concluded files.
- 7.3 In the magistrates' courts trials involve offences from simple motoring matters up to dishonesty and violence. At present the maximum sentencing powers for magistrates for a single offence is six months' imprisonment, which will be extended to a maximum of two years under the Criminal Justice Act 2003 once this provision is brought into force. Trials in the Crown Court range from simple allegations of dishonesty or violence with one defendant - which typically last one or two days - through more complex ones involving, for example, sexual offences, child abuse or cases with several defendants, up to the most serious and complex of all including murder, large-scale fraud and terrorist cases, which may last weeks or even months and a few in excess of a year. The law of disclosure is the same in all of them, save that in the Crown Court the defence must produce a defence statement, whereas there is no requirement imposed upon the defence to do so in the magistrates' courts.
- 7.4 The real difference lies in the more complex cases where the nature of the police investigation produces a much greater volume and variety of unused material, such as evidence from computers and mobile phones and the products of special investigative techniques including surveillance, electronic 'eavesdropping' and the use of informers. Issues of sensitivity are likely to arise and there may be substantial amounts of third party material.
- 7.5 The result is that problems of disclosure become much more complex and time-consuming and, if not dealt with properly, are more likely to lead to injustice (to either side), cause delay, or generate unacceptable public expense. Therefore in such cases the objective to ensure that all relevant evidence is before the court, and irrelevant material is not, becomes more difficult to achieve. As we have already mentioned the role of the CPS is, under the current disclosure regime, pivotal. Disclosure is therefore one of the most important tasks that the CPS is called upon to perform.

CPS case ownership and case management

- 7.6 With the advent of PCD, greater use of Higher Court Advocates (HCAs) and changes in Area internal structures, some ongoing case review responsibilities have been altered. The MG6C should be signed and dated by the prosecutor undertaking the duty of disclosure which should, ideally, be the reviewing lawyer. However, this is increasingly more difficult to achieve and on those occasions where this is not possible the review of the prosecution case will have to be duplicated for the task to be performed properly. In any event, it is vital that the schedules are fully endorsed for the defence to have confidence that the duty of disclosure has been properly complied with.
- 7.7 Whilst team or unit case ownership can maximise development and training opportunities and make best use of geographical and time resources, any diminution in case ownership on the part of individual lawyers risks duplication or uninformed decision-making and review. This is especially so when, as is so often the case, the past events and decisions are not adequately recorded. Moreover, lack of continuity can result in follow-up work and requested police amendments not being actioned or completed and the prosecutor(s) who subsequently handles the case may not pick up the point - especially if the MG3 is less than full and/or the file endorsements are inadequate. This can cause delay to the evidential review of a file and any lack of priority given to unused material handling means that this aspect of file preparation can remain neglected, sometimes until the morning of the trial.
- 7.8 CPS caseworkers often supervise the management and handling of Crown Court cases. Despite an increase in the amount of Crown Court advocacy being carried out by HCAs, CPS lawyers responsible for the majority of these cases in an Area may play little part in them after committal, or after the first Crown Court hearing in sent cases. By that time, they should have completed initial disclosure by endorsing and signing the MG6C and MG6D schedules and sending the formal disclosure letter to the defence together with a copy of the MG6C. Thereafter, the day-to-day control of the case devolves to the Crown Court caseworker. Whilst problematic issues may be referred to the lawyer routine tasks, such as receiving the defence statement and forwarding it to the police, are usually handled by the caseworker alone. Defence statements often contain, or are accompanied by, a 'shopping list' of items from the MG6C which the defence wish to view. In some cases that we examined a simplified form of the disclosure regime was then adopted whereby, so long as the defence had produced a defence statement (of whatever quality), the items on the shopping list would be supplied without any apparent application of the statutory disclosure test. The caseworker would simply forward the list to the officer in the case (usually also the disclosure officer) with the request that they be sent to the defence. Occasionally, counsel might be asked to advise on more contentious items.

File housekeeping - the disclosure audit trail

- 7.9 The prosecution's duties of disclosure should be dealt with systematically and detailed guidance is provided in the Disclosure Manual. The disclosure officer prepares schedules and sends them to the prosecutor after the triggers of:
- a plea of not guilty in the magistrates' courts;
 - committal or transfer of a case to the Crown Court;
 - the preferment of a voluntary bill of indictment; or
 - the service of the prosecution case following the sending of the defendant to the Crown Court under section 51(1) Crime and Disorder Act 1998.

- 7.10 The crown prosecutor should review the schedules to check for omissions in quality or content. They should apply the statutory disclosure test objectively. This may be done on the disclosure officer's description of items, but prosecutors should always inspect material where it satisfies the disclosure test, the descriptions (or reasons for sensitivity) are inadequate, or if they are unsure if the material satisfies the disclosure test. A record should be kept of all decisions, enquiries or requests and the date upon which they are made relating to disclosure to the defence, withholding material from the defence, and inspection of material. This should all be noted on the disclosure record sheet. Schedules should be marked clearly with records of decisions and the reasons for them, and signed and dated. Prosecution material which satisfies the disclosure test must be provided (by copies or inspection as appropriate) to the defence. If there is no such material the defence must be informed in writing. The DPP's minute to CPS staff publishing the Disclosure Manual (jointly with ACPO) provided that audit trails must be clear and that disclosure record sheets are to be used.
- 7.11 In the last report we commented that it was often difficult to determine whether disclosure actions had taken place due to poor file housekeeping. We recommended that non-sensitive disclosure schedules and materials should be kept in a separate folder within the file. Since then there has been an improvement and, in most Areas, disclosure documents are kept in a separate folder within the file. In our sample disclosure documents were filed separately in 121 out of 152 cases (79.6%); however, we did see files with several MG6C forms (on which the disclosure officer lists and describes items of non-sensitive unused material) in different places within the file, making it difficult to ascertain which was the most up-to-date version.
- 7.12 The Disclosure Manual requires that a log be kept by the CPS on each file recording the actions taken in respect of disclosure on that file; this is known as the disclosure record sheet (DRS). The form itself varies between Areas, as does the extent to which it is filled out fully and conscientiously. The dual purpose behind the form is to act as a prompt for those completing all the necessary stages of disclosure and for others to ascertain at a glance what has and has not been done. It was stated on publication of the Manual that completion of the DRS is a simple but essential discipline in the proper management and administration of the prosecution team's duties. We endorse this, but its use is not being enforced and our other inspection activity has revealed some Areas in which it is not being used in summary cases, with management approval.
- 7.13 The DRS was not present on all files that we examined and, on some, although it recorded the early steps, was not kept up-to-date. The degree to which it had been completed varied between the impressively comprehensive (one ran to seven pages in a murder case) and totally blank. On one file it was used as a record of actions taken on a case that had nothing to do with disclosure. In 75 out of 152 cases (49.3%) it had been used to provide a clear audit trail of decisions and actions. We did receive some favourable comments from the judiciary who had been shown, and assisted by, a comprehensive DRS produced in the course of legal argument on disclosure. On just over half of the files we examined, however, we found very limited use of the sheet and often poor or non-existent file endorsements. This meant that it was difficult to navigate a precise disclosure trail and difficult to ascertain exactly what had been disclosed when, why, and by whom. At the present time the electronic case management system (CMS) used by the CPS does not specifically support disclosure issues fully. The DRS is generally a paper or card form on the file although there is an electronic Word document which can be used on CMS, but it does not update automatically. As CMS usage becomes more widespread it is logical for it to be used in relation to disclosure as well as review.

GOOD PRACTICE

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

Using a bright coloured card disclosure record sheet, which is easy to identify in the file.

RECOMMENDATION 3

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

The quality of the disclosure schedules

- 7.14 The ability of the prosecutor to undertake disclosure is dependent upon the police submitting good quality schedules of unused material at the right time. The disclosure officer should identify material which they consider may undermine the prosecution case or assist the defence and certify that they have dealt with all the material. This is done on the form MG6E. Dealing with disclosure would be more straightforward if the CPS regularly received from the police schedules of both sensitive and non-sensitive material which complied fully with the Disclosure Manual. Such schedules would:
- be complete, in the sense that all relevant material was on them;
 - contain only relevant material - that which has some bearing on any offence under investigation or any person being investigated;
 - feature descriptions of items which enabled the lawyer to assess whether the item was potentially undermining or assisting;
 - indicate if the relevant material was sensitive, with a clear and genuine reason for that sensitivity;
 - be accompanied by the actual material which the police are required to reveal routinely to the CPS;
 - be accompanied by a form MG6E which, having been conscientiously completed by the disclosure officer, indicates what, if any, items might undermine the prosecution case or assist the defence and why.
- 7.15 A number of prosecutors told us that the full file and schedules were sometimes delivered late by the police and they were often unable to tell whether the items were disclosable or not from the descriptions on the schedule. Consequently, they relied on the MG6E which stated "nothing to disclose" in order to avoid the possibility of a trial becoming ineffective as a result of a failure to complete initial disclosure. The correct procedure in these circumstances would have been to seek clarification from the disclosure officer and, where the schedule was inadequate, to return it to the police for correction or call for the material. In some Areas the actual material itself would be copied to the CPS so that, in cases of doubt, an item could be examined without having to be specially called for or an appointment made to visit the police station.

- 7.16 We saw examples of both poor descriptions on schedules and late delivery in our file sample. Conversely, however, there were cases where the full file containing the schedules of unused material had been received in a timely manner, but where initial disclosure had only been dealt with very close to the trial date. A positive feature was that there was only one case in our sample where an MG6C had not been provided by the police and two where a disclosure officer's report and certificate was not provided.
- 7.17 Most of the schedules we saw, whether in magistrates' courts or Crown Court cases, contained one or more of the following features:
- **Incompleteness.** Where standard items are missing this may be noticed and queried by the CPS lawyer, but where it is something out of the ordinary or specific to the case it is unlikely to be. Interviewees furnished us with several examples, whilst others were apparent from our file sample and observations. In one case, an attempt to pervert the course of justice arising out of an alleged false allegation of rape, we were told the first MG6C schedule did not contain three items which undermined the prosecution case. In a child abuse case the schedule did not reveal that certain items had been sent for forensic analysis which proved negative in circumstances where the negative finding was itself significant. In a case of murder which we were told about by the trial judge, audio tapes recording witnesses giving their statements were not listed on the MG6C and one of them differed significantly from the written statement. We were told by several interviewees about the omission from schedules of CCTV evidence and material showing how a defendant was first identified.
 - **Irrelevance.** Ironically the same schedule that is missing items of importance such as those above may also include a large number of items that have no real relevance. Under the Code of Practice relevance is defined as material which it appears to the officer "*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*". We dealt with this issue in paragraph 5.9.
 - **Inadequate descriptions.** The inadequate description of items is widespread and often no attempt has been made to be specific. For example a description 'Notebook of PC X' is of no help to the CPS lawyer unless the disclosure officer also indicates whether the notebook does or does not differ from the witness statement. Other unhelpful descriptions included "contents of a drawer [from a premises search]", "box of financial papers" and from a sensitive schedule "NCIS file of intelligence on [defendant]". There was a sufficiently detailed explanation of the unused material recorded on the MG6C schedule in only 77 out of 152 files that we examined (50.7%). The description is necessary for the prosecutor to make a properly informed decision without viewing the material. Of the remaining 75 cases, in only 31 (40.3%) had the reviewing lawyer sought clarification or inspection of the item concerned. Not only is there substantial risk in this, as prosecutors are making disclosure decisions based on insufficient information, but also the lack of feedback to the disclosure officer means that there is little opportunity for them to learn from the shortcoming or error. A cause for concern was that material which actually strengthened the prosecution case was being included on the unused material schedules. We found a number of examples of this including recordings of 999 calls clearly recording the victim's distress.

- **Incorrect or unclear reasons for sensitivity.** We found that the problem appears to be that many officers do not appreciate or apply the real harm¹ test or the possibility of editing material to remove confidential but irrelevant matter such as names and - particularly - addresses, so that the redacted version is included on the MG6C schedule. Only in 19.5% of cases we examined did all the material listed on the MG6D form on which the disclosure officer lists and describes sensitive material schedules meet the real harm test.
- **Inadequately considered MG6Es.** Although we did see some examples where these had been thoughtfully completed, on the whole completion was perfunctory and it was seldom that disclosure officers drew attention to undermining or assisting material, even where it was obviously present. The CPS often rely on these at least in part for their disclosure decisions, but in reality many do not provide reliable indication as to whether the unused material does, in fact, contain potentially undermining or assisting items.

Revelation of unused material to the prosecutor

- 7.18 The Disclosure Manual, at paragraph 10.8, states that “*copies of the crime report and log of messages should be routinely copied to the prosecutor in every case in which a full file is required*”. By their very nature these are more likely to contain important material such as first eye witness accounts, descriptions of the suspect or of the scene of the crime and details of people present. These are vital for the prosecutor and sometimes might assist the defence. Whilst many police forces did routinely reveal this material to the prosecutor, compliance with revelation was variable and, where there were failures, they tended to be widespread across the Area. The failure to provide this material clearly hampered the prosecutor’s ability to deal with review, and subsequently disclosure, in a timely and effective manner and there was little evidence of remedial action by police or CPS managers to rectify the situation.
- 7.19 The Disclosure Manual states, at paragraph 10.10, that the requirement to send the prosecutor copies of the crime report and log of messages should not prejudice any local agreement to include additional documents to be routinely revealed. We found that other material existed which, on inspection, contained information that either assisted the defence or, conversely, strengthened the prosecution case. This was often unused material created contemporaneously with events. For example, a 999 call recording the distress and fear of a victim reporting a crime which had just occurred, or conversely a 999 call recording in which a victim failed mention key facts which one might expect them to when first contacting the police; CCTV recordings of the alleged offence; officers’ pocket book entries; the medical examination report of the defendant undertaken on their arrival into custody; and contemporaneous incident report books.
- 7.20 Once revelation of this material to the prosecution has been made the reviewing lawyer should demonstrate close scrutiny of the items, bearing in mind what they are often likely to contain. Should the prosecutor consider that the material revealed would strengthen the prosecution case and ought to be adduced, it should then be returned to the police to be recorded in an admissible format and served on the defence as evidence. If it might assist the defence then it should be disclosed to them. There was a lack of consistency in how the material was treated and limited compliance with CPIA. We saw examples of instructions on the schedules for disclosure of contemporaneous material “on request” or by way of an invitation to inspect - even where lawyers had not themselves seen the material. We saw many examples of “voluntary” disclosure being given, or items disclosed as “background info”, categories not known under the Act.

¹ This is defined as material the disclosure of which carries a real risk of serious prejudice to an important public interest and is dealt with in detail in Chapter 9.

- 7.21 The disclosure of this type of material to the defence which did not meet the disclosure test in the CPIA appeared to be a pragmatic 'fail-safe' device. Experience has taught that contemporaneous material, even where consistent with prosecution witness statements, may potentially assist the defence when a fuller, or perhaps varying, account is given by witnesses in evidence. It is well known amongst practitioners that unforeseen developments of evidence do occur at trial.
- 7.22 The continuing duty of disclosure requires that such material, if it then may assist the defence, should be disclosed at that stage. In practice, however, it appears to be regarded as a safer course to disclose at the beginning. This practice is encouraged by some prosecution counsel and also some judges who do not have full confidence that the CPS has applied the CPIA test scrupulously, or consider it unsafe that the decision was made several months before trial when the real issues in the case were not yet clear. Accordingly some judges order the disclosure of contemporaneous items on a pragmatic basis and the advocate will frequently not be the lawyer who made the original decisions about disclosure.
- 7.23 The actions described in paragraphs 7.20-7.22, whilst no doubt done with the intention of being fair and open, all go against the statutory regime which provides for the proper application of the statutory disclosure test to be undertaken at the correct time. In the wider context, and in the individual case, the proper undertaking of this duty will uphold the overriding objective that criminal cases be dealt with justly.

RECOMMENDATION 4

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

Endorsement of schedules by prosecutors

- 7.24 The endorsements on the MG6C schedule are crucial because they are the only means by which the defence, counsel and - if the matter is brought to their attention - judges, can tell whether the CPS has carried out its disclosure function properly. In addition as the MG6D schedule is not seen by the defence, the endorsements on it are even more important as they indicate to the prosecuting advocate, and if necessary the judge, whether or not the CPS has correctly considered if the material is disclosable.
- 7.25 In our last report for both primary and secondary disclosure we recommended that prosecutors should endorse their opinion as to whether any material revealed might undermine the prosecution case and record the decision for it on the file or a disclosure record sheet.

- 7.26 The Disclosure Manual requires that every item on the MG6C schedule should be appropriately endorsed by the CPS lawyer and the schedule itself signed and dated. It further stipulates that the prosecutor should record decisions on the MG6C, giving brief reasons for the decisions in the comments column where:
- the disclosability or otherwise of the document may not be apparent from the description; or
 - the prosecutor has decided to disclose material not identified by the disclosure officer on the MG6E as satisfying the disclosure test; or
 - reasons might be helpful.
- 7.27 Whilst it is permissible to ‘block’ mark items, for example using brackets, this is only appropriate if they are all of the same category. It is not appropriate simply to leave an item blank of any endorsement. The reason is that no one else would be able to tell from looking at the schedule whether that item had been assessed or not. We found nonetheless that this was being done in more than one Area, and in one with the specific encouragement of its Disclosure Champion. (CPS Areas appoint an experienced lawyer to take the lead role in disseminating information and in taking steps to improve the quality of disclosure, which may be through monitoring, guidance and training.)
- 7.28 The quality of endorsements on schedules remains variable. In our file sample the schedule had been correctly completed, including signing and dating, in 97 out of 152 cases (63.8%); 44 out of 72 (61.1%) in the magistrates’ courts and 53 out of 80 (66.3%) in the Crown Court.
- 7.29 On magistrates’ courts’ files there was a lack of consistency in the application of the standard abbreviations “D” (disclose), “I” (inspect), or “CND” (clearly not disclosable). In one Area the comment “voluntary disclosure” was frequently used, but there was no explanation why. Items were sometimes left unendorsed and it was unclear whether this was because the prosecutor did not know whether it satisfied the test, had not had sight of the item, or simply did not know how to handle it. The comments column was often not completed. There were a number of cases where the disclosure officer had certified that there was no material which satisfied the disclosure test, yet the prosecutor had disclosed items without explanation. In many of these cases the item was not on the file, so it was not apparent whether it had been physically inspected by the prosecutor. Our findings showed that:
- in 29 out of the 72 magistrates’ courts’ cases (40.1%), the descriptions recorded on the schedule by the police were inadequate for the prosecutor to make a decision without seeing the material;
 - in 19 out of the 29 (65.5%) the prosecutor did not inspect the relevant items or seek clarification;
 - in 44 out of the 72 (61.1%) magistrates’ courts’ cases there was no indication that the lawyer had considered potentially undermining material.

7.30 As in the magistrates' courts the quality of CPS scrutiny of unused material in Crown Court cases is extremely variable - between individuals, Areas and categories of cases. We found a good standard of consideration and decision-making about disclosure issues in murder, fraud or other complex and high profile cases. These have large volumes of material, but normally receive the dedicated attention of an experienced lawyer with sufficient time to do the job properly. Similarly there were straightforward cases in which a small body of material was supplied by the police with papers that could be rapidly assessed and appropriate decisions made. In these instances some confidence can be placed in the initial and continuing duty having been carried out carefully and properly and that defence statements will also receive the attention they require, with inadequate ones being rejected and unjustified shopping lists receiving short shrift. There was, however, a large group of cases where performance was inconsistent and where it seemed there was either lack of care and action or simply insufficient time for CPS lawyers to do their own job properly, to insist that the police did theirs and to respond to inadequate defence statements.

7.31 It is the predominance of this group of cases both in our file sample, court observations and the experience of our interviewees that explains these significant findings in relation to the handling of initial (formerly primary) disclosure in the Crown Court. We found that:

- in 46 out of the 80 Crown Court cases (57.5%) the descriptions recorded on the schedule by the police were inadequate for the prosecutor to make a decision without seeing the material;
- in 27 out of the 46 (58.7%), the prosecutor did not inspect the relevant items or seek clarification;
- in 31 out of 80 files (38.8%) there was no indication that the prosecutor had considered any potentially undermining or assisting material before initial disclosure was made; and
- in 43 out of 80 cases (53.8%) there was no record of the reasons for the decision.

GOOD PRACTICE

Prosecutors recording on the schedules their decisions and whether an item had been seen by them in order to determine the decision to disclose.

Form of the schedule

7.32 The problem, in part, is that the form of the schedule does not lend itself to a clear demonstration that the duty has been properly carried out (see Annex F for the current form of schedule MG6C). It offers a choice of only three markings: clearly not disclosable; disclosable (in which a case a copy of the items should be sent to the defence with the disclosure letter); or inspect (by visiting the police station where the item is retained either because it is a physical object rather than a document, e.g. the defendant's clothing, or because it is part of a large collection of documents too bulky to copy and send). We doubt whether such extensive reliance on these abbreviations was intended. Whilst it may be right to endorse a document CND if its contents speak for themselves and it does not approach what might be regarded as disclosable, where an item is sufficiently relevant to require a judgement to be made that decision and the reason for it should be recorded.

- 7.33 The position is complicated further in practice because the CND marking is being used ambiguously covering situations where on the one hand, on the basis of the description provided by the police, the item itself is wholly irrelevant and, on the other, it appears neither to undermine the prosecution case nor assist the defence. These represent two separate categories in themselves, as in the first case the item is incapable in itself of having any impact in the case (and should not appear on the schedule at all), whereas in the second it is capable of having an impact but a judgment has been exercised by the CPS that it does not, in fact, potentially undermine the prosecution case or assist the defence. This may not greatly matter because, whichever may be the case, the CPS endorsement can be checked against the description of the item and neither category is disclosable under the statutory test. It is, however, important that the CND marking should not appear against an item that is inadequately described (which might, therefore, be undermining or assisting) simply because there is no alternative offered. If it is so used it is impossible to tell whether the CPS lawyer has, in fact, looked at it and concluded that it is not undermining or assisting, or has not looked at it all and therefore the marking is inappropriate.
- 7.34 The design of the schedule, in other words, seems to have been predicated on the assumption that the police disclosure officer will have described each item with sufficient clarity and particularity that a decision can be made. However, as we have already said, in the real world this is far from being the case.
- 7.35 It was because of this ambiguity that in one murder case (where disclosure had been carried out in a scrupulous and, indeed, exemplary fashion) we saw that the lawyer had resorted to devising acronyms of his own, explained in a key, to distinguish between these different situations. Thus the schedules had been variously marked in addition to CND (where the description itself made plain it was not disclosable), "NR" (not relevant) and "NUNA" (neither undermines nor assists). This last marking, as explained in the key, was reserved for an item not fully described but which the lawyer had inspected and which passed neither limb of the test. The schedules thus produced, though unconventional in appearance, constituted a clear and convincing demonstration that the duty of disclosure had been conscientiously complied with.
- 7.36 What is needed is a new scheme of endorsements which demonstrate that where an item might possibly be disclosable the lawyer has, in fact, seen it and determined that it is not. CND should be reserved for items not disclosable on the face of them, or because the description makes it clear that they are not. There may be interim stages in which the lawyer is making arrangements to examine items or to require the police disclosure officer to provide a more detailed description. These should be noted on the disclosure record sheet.
- 7.37 We found that the "D" and "I" markings are being used at present to designate a wide variety of items which are not, in fact, disclosable under the present law and frequently not seen by the lawyer. We saw numerous examples on the file sample and at court where this was apparent. This included some cases where the lawyer had written on the schedule that he had not seen them, but was nevertheless disclosing them. In these circumstances the "I" marking would be used not for the reasons set out in the Manual, but because the lawyer had no copy of the item which he could send with the disclosure letter and was, therefore, referring the defence directly to the police. At the same time, no request was made for a copy of the document to be sent to the CPS. (This was both failing to undertake the proper duty of the prosecution and throwing the

burden, and cost, on to the defence.) On some files the MG6C schedule was marked either entirely or virtually entirely “D” or “I”. It was not conceivable that the case could have so many items that potentially undermined it or assisted the defence and in reality they did not: it was because, through lack of time combined with an unwillingness to take responsibility for not disclosing, the lawyer had simply abrogated the CPIA duty to apply the tests whether on an adequate description or by examining the material.

- 7.38 If they are proposing to disclose prosecutors should be clear that the item in question might, in their judgment, undermine the prosecution case or assist the defence. They should not use the “D” and “I” markings simply as an indication (as at present) of how the defence are to gain access to it. They should, at all times, relate only to the prosecutor’s *assessment* of the item, as the law is clear and the protocol re-iterates: no item should be disclosed unless it undermines or assists. At present an additional test appears to be being applied - is this the sort of thing which the defence might like to see? A lawyer in one Area candidly told us of putting “I” “against stuff the defence would obviously want to see” even though the lawyer had not actually formed any judgment that the item was disclosable.

Reliance on the MG6E

- 7.39 We saw several occasions where the lawyer had endorsed either the MG6C or MG6D schedule or both with words to the effect ‘there is nothing undermining we are told’. In other words relying on the police certificate without having seen the unused material themselves, or requiring it to be described in a way sufficient for them to make the judgement for themselves. This included a case being prosecuted by an HCA in an Area that was otherwise performing well on disclosure.
- 7.40 The Disclosure Manual provides that the form MG6E must contain the disclosure officer’s opinion whether any material might meet the disclosure test (together with the certificate that all relevant material has been retained and revealed to the prosecutor) and that such material should be copied to the prosecutor together with any that is required to be routinely revealed to them. The certificate by the police is a statutory requirement. The disclosure officer’s opinion is an important safeguard and is CPS/ACPO policy, but it does not absolve the CPS of the duty to satisfy themselves about the items, otherwise there would be no need for CPS involvement in this process at all. This approach is, perhaps, indicative of the extent to which some prosecutors fail to appreciate the important and personal nature of their responsibilities.

RECOMMENDATION 5

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

Correspondence with the defence

- 7.41 Once initial disclosure has been completed the MG6C schedules are sent to the defence under cover of a pro-forma disclosure letter. We found numerous examples where the letters had omissions or where the standard alternative options had not been deleted. Some letters stated that an assessment had been made of initial disclosure and that there was no undermining or assisting material to be disclosed, but were then accompanied by a schedule with limited endorsements with copy documents which were, in fact, being disclosed contrary to the indication on the letter. These letters lacked clarity, together with a lack of proper consideration and individual responsibility, and would not enhance confidence that the duty of disclosure had been discharged properly.
- 7.42 However, we also found examples where there were full and appropriate endorsements on the disclosure schedules and where the letters were completed properly, containing all the relevant information. We also found examples where there had been cross-referencing of earlier disclosure decisions and, in one instance, where a change in the nature of the case had resulted in a revision to earlier disclosure decisions which were then well set out in the accompanying letter to the defence.

GOOD PRACTICE

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

Managers checking the quality of initial disclosure letters as part of Casework Quality Assurance.

Convictions of prosecution witnesses

- 7.43 The issue of disclosability of prosecution witnesses' previous convictions was raised by a number of defence solicitors seen during the inspection. Their overwhelming view was that whatever the age of the conviction or its potential relevance to the current proceedings, all previous convictions of potential witnesses should be disclosed, irrespective of any disclosure test. This is in contrast to the recent guidance issued by the CPS which states that the same disclosure test should be applied to previous convictions as applied to all other unused material; therefore, only convictions which potentially undermine the prosecution case or assist the defence should be disclosed. This is an area where failure properly to consider the material and apply the tests could have real significance for the conduct of the case. On the one hand, failure to disclose convictions which could have enabled the defence to make a bad character application under the Criminal Justice Act 2003, clearly hampers the defence in the presentation of their case. On the other, disclosing irrelevant and potentially embarrassing previous convictions of witnesses could lead to a reluctance of witnesses to come forward through fear that their previous offending would be revealed. In addition to this conflict, we also found that there was often no standard practice among police forces as to how and when previous convictions of prosecution witnesses were checked and recorded.

GOOD PRACTICE

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

- 7.44 We received strong comments from defence practitioners about not receiving the previous convictions of prosecution witnesses as a matter of course. However, we do not consider that this would be justified. In our view the CPS should be responsible for considering whether the convictions are of such a nature as to make them disclosable. We recognise that the current position in relation to the operation of the disclosure regime generally might mean that this approach commanded only limited confidence. It might therefore be appropriate to incorporate a safeguard whereby copies of the previous convictions of all prosecution witnesses are lodged with the judge in the Crown Court so that they would be in a position to intervene if a point were reached where the convictions might be regarded as particularly relevant. It would not appear appropriate or proportionate to undertake this in cases in the magistrates' courts. An addition to the Crown Court Protocol would be necessary to ensure a consistent approach.

RECOMMENDATION 6

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

Strengthening initial disclosure

- 7.45 We have found weaknesses in compliance with the duty of initial disclosure. We consider that it could be addressed proportionately in magistrates' courts' cases by removing the requirement for police to describe each item on forms MG6C and MG6D, and instead copy the documents (or if considered secure to deliver the originals) to the CPS. The CPS lawyer would then be required to examine the items and determine whether or not the disclosure test applied. This would not usually be unduly onerous as the documents are not extensive in nature and in many cases we consider that these should be examined in any event. This should remove a substantial burden from the police, albeit the beneficial effect would be off-set to some extent by the need to photocopy documents. We recognise, however, that lengthy tape recorded interviews or CCTV recordings would present a problem if they were not the subject of some report by the investigating officer as to their content. This proposal has been discussed with ACPO and the CPS who both have reservations because of perceived resource implications (the need to copy and to read respectively). However, the current level of non compliance cannot be remedied without some resource implications. We consider that the effect of our proposal is likely to be overall cost effective and that it should at least be piloted or undertaken on an experimental basis and evaluated. The adoption of the proposal would require an amendment to the Code of Practice.

- 7.46 An alternative approach would be for the CPS and ACPO to take more effective steps to ensure compliance with the current requirements and for the crown prosecutors to require revelation of material where appropriate. However, our findings suggest that this would increase the burden on the police at a time when there is extensive concern to reduce it.

RECOMMENDATION 7

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

- 7.47 Many of the weaknesses we have described in the compliance with the duty of initial disclosure are long-standing. The issues are the same in relation to both magistrates' and Crown Court cases, with the distinction that disclosure is only required in the magistrates' courts following a not guilty plea, whereas the duty arises in the Crown Court following committal for trial or the service of the prosecution case in indictable only cases. We have considered the issue of proportionality in the relation to magistrates' courts' cases in particular. Whilst wishing to uphold the concept of simple, speedy, summary justice there seems to be no basis within the principles of fairness and justice for removing the duties of disclosure, and we were unable to find a consensus between the CPS and ACPO as to re-balancing the burdens of dealing with the various duties imposed by statute and the Code of Practice. We have therefore made our recommendation above as reflecting our assessment of the most effective way to achieve some improvement, at the same time as a modest reduction in the overall burden, albeit conscious of the fact that this is unlikely to meet the aspirations of either the CPS or ACPO.
- 7.48 The inadequate description of material on the MG6C, the non provision of copies of material which is incapable of proper description and the failure of crown prosecutors to require items to be sent to them for examination are significant issues. They lead to what we consider to be uninformed decisions as to appropriate dealing with unused material. As any re-balancing of duties pursuant to Recommendation 7 would entail a consensus and changes to the Code of Practice, we recommend within the existing regime greater adherence to the Code of Practice linked to an effective performance management system. We note that the CPS introduced on 30 November 2007 a monitoring regime of Area performance in relation to the duties of disclosure of unused material. This is initially directed at Areas rated as Fair or Poor for disclosure in our OPAs.

RECOMMENDATION 8

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

RECOMMENDATION 9

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

- 7.49 We were told of difficulties in the CPS returning MG6C and MG6D schedules to the police for amendment. These usually involve occasions when it is necessary for items to be added to the original MG6C. Examples include where items put on the MG6D by the disclosure officer are not, in fact, sensitive and so should be put on the MG6C and their existence shown to the defence, or where the prosecutor decides not to use material as part of the case, or where the police have acquired further unused material. If the case is listed for trial then time may be restricted and delay could lead to the defence seeking an adjournment and an ineffective trial. The time likely to be occupied by sending back the schedules and receiving amended ones was the issue, in that it could delay case progress or trials. It is more conducive to expeditious progress of cases for the prosecutor to undertake some form of notification to the defence of the existence of the items and of the decision made as to disclosure, rather than for nothing to happen (the most likely outcome) or for an amended schedule to be available late and risk delaying a trial. There should be consultation with the police disclosure officer and a formal notification made to the defence.
- 7.50 The Code of Practice and instructions in the Disclosure Manual stipulate that the disclosure officer is responsible for creating the schedules and keeping them accurate and up-to-date. This is presumably based on the wish to demarcate responsibilities clearly and avoid additions to the schedules that cannot be attributed to an individual.

RECOMMENDATION 10

CPS Business Development Directorate provides guidance to crown prosecutors about steps to take to ensure that the details of non-sensitive unused material not initially on the MG6C are provided to the defence at the earliest opportunity in order to avoid delay.

8 THE DUTY OF CONTINUING DISCLOSURE

Overview

- 8.1 There is a continuing duty on the prosecutor to keep under review at all times the question of whether there is any prosecution material which satisfies the disclosure test. The duty applies whether or not a defence statement is received. If new material is obtained the prosecutor should ensure that it has been correctly described and itemised on a revised or continuation MG6C form and should endorse their decision whether to disclose the items or not on the schedule and the disclosure record sheet.
- 8.2 Overall, we found that the prosecution discharged its duty with regard to continuing disclosure slightly better than with regard to initial disclosure. We found compliance in 62 out of relevant 87 cases (71.2%) which is very similar to previous inspection findings.
- 8.3 In most routine cases police involvement following initial disclosure action tended to be very limited. The disclosure officer should always be given a copy of the initial disclosure schedule and letter sent to the defence. The lack of information recorded on either as to what material had been disclosed or why is a fertile source of confusion and misunderstanding.
- 8.4 We found instances where defence statements were not sent to the police at all or were sent late. (Others by necessity were sent late because the defence did not serve the statement on time.) This gave the disclosure officer no opportunity to respond to the statement prior to the morning of the trial. In other cases, where the defence statement was sent but there was a lack of police response, this was often not pursued by the CPS, so that cases proceeded to trial without any consideration of continuing disclosure being made. As the disclosure officer (who in many cases is the investigating officer) was often present at the trial, this resulted in hurried consideration and any appropriate disclosure being undertaken at court, often with little or no regard to the requirements of CPIA.
- 8.5 A further important point arises where an investigation or other enquiries continue after initial disclosure has been completed. The results may never be reflected in any subsequent or updated schedule. If these yield potential evidence it will, of course, be sent to the CPS for service on the defence as additional evidence to form part of the prosecution case, but if the enquiries are negative further MG6Cs were not always prepared, endorsed and served on the defence.
- 8.6 In many cases, additional material was provided by the police after the submission of the full file under cover of an internal memorandum, but corresponding requests for a revised MG6C by the prosecutor were rare. Continuing disclosure was provided to the defence in ten cases. It was sometimes difficult to identify as the information was filed with other correspondence in the case, rather than by using the correct CPIA letters and filing in the disclosure folder. There was a record kept of continuing disclosure in three out of the ten cases (30%). The proper wish for clear responsibilities and a clear audit trail could at times contrast with the actualities of lack of easy or timely communication between prosecutors and disclosure officers, and make the arrangements appear convoluted and slow (see paragraph 7.49).

GOOD PRACTICE

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

- 8.7 Where the defence have reasonable cause to believe that there is prosecution material which satisfies the disclosure test they may apply to the court under section 8 of the CPIA for an order requiring the prosecutor to disclose it. It is important to note that this can only be done in either the magistrates' courts or the Crown Court if a defence statement has been served following initial disclosure. The court has no power to make an order for disclosure if the correct procedure has not been followed.
- 8.8 The section 8 procedure is seldom used in either the magistrates or the Crown Court. We were told that in some places the defence will simply make written requests for disclosure of items and when the prosecutor does not respond, they will list the case for mention in order to assert non-disclosure. We found examples of this and subsequent orders for disclosure being made by courts in our file examination. It is, therefore, essential that prosecutors deal with requests promptly and are thereafter robust in resisting applications which are not made in accordance with the statutory procedure. The ability to do so, however, is dependent upon there being secure, informed and recorded decisions by the prosecutor in relation to disclosure. We were told of instances when the CPS does object to such applications. Prosecutors should cite the Protocol for the Control and Management of Unused Material in the Crown Court, which provides very clear guidance on this in paragraphs 44 and 45.

RECOMMENDATION 11

Crown prosecutors object appropriately to any defence applications to the court for disclosure which do not comply with section 8 Criminal Procedure and Investigations Act procedures.

Defence statements and continuing disclosure in the magistrates' courts

- 8.9 In the magistrates' courts there is no obligation upon the defence to make a defence statement, although they may choose to do so; in practice little use is made of them. In our file sample a defence statement was provided in only two of the 71 magistrates' courts' cases. Of those two, the defence statement was sent to the police in only one.

Defence statements and continuing disclosure in the Crown Court

- 8.10 We have already noted that in the standard Crown Court case input from lawyers reduces significantly after committal. This factor must be taken into account when considering our significant findings in relation to continuing (formerly secondary) disclosure that:
- in 59 out of 76 cases (77.6%), the defence statement was adequate. In the 17 cases where the defence statement received was inadequate, steps were taken to rectify the deficiencies in only five (29.4%);
 - in 73 of the 76 cases (96.0%), the defence statement was sent to the police;

- in 20 of those 73 cases (27.4%) where the defence statement had been sent to the police, no response had been received from them in the form of a second MG6E;
- in 43 out of the 76 cases (56.6%), continuing disclosure was completed to the defence (this included disclosing further material or formally confirming there was none);
- in 23 out of the 76 cases (30.1%), there was no record of reasons for decisions concerning continuing disclosure.

8.11 So far as defence statements are concerned, the statutory time limit for service is 14 days after the prosecution has completed initial disclosure and the rules provide for this to be in advance of the plea and case management hearing (PCMH) save for where initial disclosure is less than two weeks beforehand. There is by no means universal observance of this time limit for defence statements, which leads to a lost opportunity for narrowing the issues in the case. At one Crown Court centre the Resident Judge did insist on them being produced by the PCMH and, if they had not been, would put the case back in the list for one to be drafted and signed by the defendant. In most other places, however, this was not insisted upon and further time was given.

GOOD PRACTICE

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

- 8.12 Our finding that continuing disclosure was better handled than initial disclosure reflects the fact that material which ought to be disclosed (amongst much that need not) is often handed over just before, or on the morning of, trial. In the file sample there was evidence of this happening in 23 out of 80 cases (28.8%). Of those cases, three were finalised files and 20 were live. From our court observations it would appear that this is happening more often than the finalised file figure suggests, and that this is not evidenced on the file.
- 8.13 In a substantial number of cases, there was no indication on the file to demonstrate that the unused material had been re-examined by a lawyer in the light of the defence statement to ascertain whether there were any items that might assist. We found this of particular concern in relation to the sensitive material, much of which did not appear to be genuinely sensitive. In a majority of cases no adequate reason had been given for agreeing or disagreeing the material was sensitive and again in a majority of cases the material did not appear to pass the test for sensitivity as defined by the House of Lords in *R v H & C*. In some 51.5% of cases there was no evidence that the lawyer had re-considered any potentially assisting sensitive material in the light of the defence statement.

- 8.14 Whilst a defence statement may do little more than state the already obvious we would, nevertheless, have expected to see a clear indication on the file that they had been scrutinised by a lawyer. This would also give the opportunity for the lawyer to challenge those defence statements that did not fulfil the requirements of the amended CPIA and request a better one; especially, as we found 42.7% of defence statements to be inadequate by those criteria. We did see this happening in some Areas and in some cases. We also saw examples where the CPS lawyer had clearly re-appraised the unused material in the light of the defence statement and any request for further items or information, giving each item lengthy and detailed consideration. But this tended to be in the more complex and larger cases where the lawyer remained closely involved. In the more 'run of the mill' cases it was difficult to tell why further disclosure had been given, or not given, since in 58.0% of cases there was no record of the reasons for the decision.

GOOD PRACTICE

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

Timeliness of continuing disclosure

- 8.15 We found from our observations at court that there was a problem in some Areas with late disclosure or response to timely defence statements. Requests from the defence went unanswered for protracted periods; repeat letters were sent and threats made of applications to the court. It was not always possible to find out why this had happened, though in some cases it appeared that for one reason or another the lack of a response by police to the defence statement had not been followed up by the CPS. In some cases this may have been because the officer did not know what to do with it, having received no guidance from the lawyer. Such problems might be avoided if there was greater file ownership by prosecutors in standard Crown Court cases. It was noticeable that in cases handled by HCAs the degree and quality of attention to disclosure, including the timeliness of it, was better than the norm.
- 8.16 In cases where the prosecutor considers that defence requests for additional disclosure are not reasonable and the material does not satisfy the disclosure test, or where there have been a multiplicity of requests for disclosure of items, the prosecutor should reply to the defence. Non response allows the defence to raise issues at court by way of mention and places the prosecution in a weak position in relation to disclosure issues.

GOOD PRACTICE

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

9 SENSITIVE MATERIAL

Overview

- 9.1 The House of Lords' decision in *R v H & C* defines sensitive material as that which, if disclosed, creates "*a real risk of serious prejudice to an important public interest*". This prejudice might be cumulative, e.g. the public are likely to become unwilling to assist the police in covert surveillance or ID parades if they know that their identities are likely to be revealed. But each case must be considered on its own facts and merits. The revised Code of Practice, together with the Disclosure Manual and the Attorney General's Guidelines, all follow this definition.
- 9.2 The Code of Practice provides, at paragraph 6.12, 13 examples of categories of material which might be expected to be sensitive. Of these, the most likely examples to be encountered in significant numbers, actually satisfying the test for sensitivity, ought to include:
- informants or undercover police officers (particularly the former); and
 - material relating to child protection investigations generated by a local authority.
- 9.3 Most police investigations flow from a report of a crime which has already taken place and so are not concerned with proactive covert police techniques or intelligence material. A common justification for treating material as sensitive is that it 'reveals police methods', however this should always be carefully scrutinised since there are relatively few techniques used by the police which are not quite widely known – especially to criminals and their legal advisers. Where new techniques are developed for obtaining evidence they tend inevitably to be revealed in court over time. An example is the use of mobile phone records. Records of telephone contact have been used to support allegations of conspiracy for many years, it is not a secret method. Apart from the identity of the individual administering the records in question, there is no information which needs protecting; indeed, the prosecution routinely adduce such evidence. Disclosure can be handled appropriately by listing an edited copy (with the identity concealed) on the non-sensitive schedule. Most material which reveals the private details of individuals co-operating with the police can usually be edited, and thus the fact that it exists seldom requires being withheld from the defence by being kept to an MG6D schedule. Indeed, the fact that a member of the public must have assisted the police is usually obvious, where it occurs.
- 9.4 All files submitted to the prosecutor should include an MG6D schedule, even if there is no sensitive material, so that the disclosure officer can confirm that they have considered the possibility of its existence through a nil return. These schedules should, according to the instructions printed on them, include the reason identified by the disclosure officer for regarding the material as sensitive. If the prosecutor considers that the material has a bearing on the case and meets the test then it must be disclosed to the defence, unless the court grants an application for public interest immunity.

Content of the sensitive material schedule

9.5 As with non-sensitive material the descriptions of items on the MG6D need, under the arrangements agreed between ACPO and the CPS, to be sufficiently clear to identify the nature and sensitivity of the material. It is not sufficient merely to state the type of material. The Disclosure Manual provides, at paragraph 8.13, a comprehensive outline of the detailed information which the officer should provide the prosecutor to enable him to deal with unused sensitive material:

- The reasons why the material is said to be sensitive.
- The degree of sensitivity said to attach to the material, in other words, why it is considered that disclosure will create a real risk of serious prejudice to an important public interest.
- The consequences of revealing to the defence
 - (1) the material itself;
 - (2) the category of the material;
 - (3) the fact that an application may be made.
- The apparent significance of the material to the issues in the trial.
- The involvement of third parties in bringing the material to the attention of the police.
- Where the material is likely to be the subject of an order for disclosure, the police view regarding continuance of the prosecution.
- Whether it is possible to disclose the material without compromising its sensitivity.

9.6 One problem is that the issues are considered at the wrong level. It is very easy for a relatively junior and less experienced officer to take a simplistic view that it is undesirable to disclose a particular document without fully appreciating either the true implications of an assertion that material is 'sensitive', or the seriousness of seeking to withhold otherwise disclosable material. These issues merit consideration by a senior police officer, who would need to substantiate the claims in the event of an application to a court for non-disclosure on the grounds of PII. Additionally this schedule is not shown to the defence who will, therefore, be unaware of the existence of the material. Thus it is very important that the schedule contains no more material than strictly necessary.

9.7 Another problem is that the processes are inappropriate. The format of the MG6D schedule asks the prosecutor two questions: Is the material sensitive? Is a PII application necessary? Where the answer to the first question is "no" this should prompt the prosecutor to cause the item to be added to the non-sensitive schedule. It is for consideration whether a more straightforward mechanism should be devised for this purpose (see paragraph 7.49 in relation to amendments to schedules). In many cases, this was not done. The second question leapfrogs the issues of whether the material is disclosable, for not every sensitive item is disclosable (in our experience most would support the prosecution case and so not pass the statutory disclosure test) and, furthermore, whether the disclosable sensitive item needs to be withheld in its entirety. Some may be amenable to being revealed after sensitive parts are edited. In other cases the prosecutor ought to advise the police against applying for PII because it is clear that, on balance, the public interest in withholding it is outweighed by the effect on the fairness of the trial making an order for disclosure almost inevitable.

- 9.8 It is self-evident that there is a considerable amount of information to be given in respect of each item for which sensitivity is claimed. It is a reflection of the relative rarity with which “real risks” should be claimed. We found no examples that provided this level of detail and few had any input from a senior police officer to support the claim.
- 9.9 Out of a sample of 77 cases containing material believed by the disclosure officer to be sensitive, only 15 (19.5%) in the view of inspectors were capable of fulfilling the real risk test in *R v H & C*. We noted that there still exists uncertainty over categorising material which contains personal details of witnesses as sensitive and found crime reports and other documents listed on the MG6D for this reason.
- 9.10 There was an adequate description in 51 out of 77 cases (66.0%). The prosecutor, however, required either a copy of the item or a better description in only one third of the cases where the content was inadequately described.
- 9.11 Given the proportion of cases which were inappropriately identified by officers as containing sensitive material, there is a high statistical probability that the existence of material remains unknown to the defence when they should have been made aware of it. Because of the frequency of this, there is a significant risk that miscarriages of justice may occur. If the existing guidance in the Disclosure Manual was followed this risk would be reduced. We can therefore give no assurance as to the appropriateness of CPS handling of material categorised as sensitive by disclosure officers.

Examination of sensitive material

- 9.12 Our concern is that a significant proportion of material classed as sensitive by the disclosure officer is not receiving adequate scrutiny by either the prosecutor or the defence because of the combined effect of the following:
- too much material is incorrectly classified as “sensitive” by disclosure officers, without being challenged by the prosecutor;
 - too little material classified as “sensitive” by the disclosure officer is examined by the prosecutor; and
 - material which is truly sensitive and ought to require consideration of PII is not identified or detailed information is not provided (see paragraph 9.5).
- 9.13 In our previous thematic review we recommended that all sensitive material should be inspected, or the prosecutor should be fully informed about it by a senior police officer. In our file survey we found only 31.8% of cases had a record showing that the sensitive material had been examined, so we have serious doubts about the adequacy of examination and the audit trail. Given that we found that 76.6% of material should not have been assessed as sensitive, and that a significant amount of material is assessed as sensitive by disclosure officers, this indicates the existence of significant amounts of unused material which may be going without adequate scrutiny by either party.

RECOMMENDATION 12

CPS Business Development Directorate, in consultation and conjunction with the Association of Chief Police Officers, should take steps to ensure that disclosure officers only seek to withhold items listed on the sensitive material schedule when there is a real risk of serious harm to an important public interest and that such assertions are ratified by a senior officer; and

Crown prosecutors examine all material on sensitive material schedules, or are fully informed about it by a senior police officer.

Public interest immunity

- 9.14 Public interest immunity may be claimed where material is disclosable, but the Crown claims that the need to disclose is outweighed by the public interest in not doing so. Section 21(2) of CPIA preserves the rules of the common law as to whether disclosure is in the public interest. Applications are to be made in one of three types. Type I is an application made after notice to the defence specifying the nature of the material to which PII is said to attach. Type II is an application after notice to the defence, but in the absence of the defence, which does not specify the nature of the material where to do so would defeat the object of the application. In rare cases a Type III application is made without notice, where the mere fact that an application is being made would defeat the object of the application.
- 9.15 The House of Lords has stated in paragraph 35 of the judgement in *R v H & C*, “*neutral material or material damaging to the defendant should not be brought to the attention of the court. Only in truly borderline cases should the prosecution seek a judicial ruling on the disclosability of the material in its hands*”.
- 9.16 In our previous thematic review we noted that the pre-CPIA common law rules within *Keane (1994) 1 WLR 746* had required the prosecutor to place before the judge all the material which it wished to withhold, whether or not it undermined/assisted. Our finding then was that it was still often the practice to make applications to the judge where the material was not disclosable, because the prosecution were anxious to keep the judge ‘informed’. We considered that the practice of placing material before the judge for what are effectively trial management purposes needed to be approached with great caution, especially where this was done in the absence of the defence.
- 9.17 The Disclosure Manual now contains a section (13.36 to 13.44) entitled “Ex parte notifications to a judge”. This is correctly described as not strictly relating to unused material. The advice is that it should be emphasised to the court, where such applications are made, that the court is not being asked to make a ruling on unused material. The purpose of the hearing is to prevent trial mismanagement. Notification hearings are to be made in a similar fashion to PII applications, i.e. using notices akin to Types I, II and III where appropriate. The provision of advice in the Manual achieves an appropriate degree of caution, but has no clear basis in law. We remain concerned that one party to the proceedings should seek access to the trial judge for trial management purposes without there being a clear legal basis for this.

- 9.18 Because the numbers of PII cases identified are small statistics have to be approached cautiously. Fourteen cases were identified in our sample which involved PII issues and 12 of those were assessed as containing material which should have been disclosed to the defence. Of those 12 the information available was sufficiently clear to assess compliance in nine cases. Of those nine in only three did we find that PII was handled appropriately in all respects. Of particular concern was that in only four of the 12 cases with disclosable material were adequate reasons given for applying or not applying for a PII ruling. The other key issue was the lack of clarity about the actual material put before the judge.
- 9.19 Areas are required to notify CPS Headquarters of any Type III applications, but there is currently no collation of applications under Types I and II. Areas were recommended in the previous thematic review to keep a log of all applications, the type and nature in general terms of the material, and the outcome. The purpose of this logging was to ensure that the CCP or other senior manager would keep a tight control on this important procedure. From our enquiries it would appear that this recommendation is not widely adhered to. One Area gave us an ad hoc estimate that there were no more than two or three a year. Another that there had been none. A third Area did keep a log but there were no cases in it and had been none for several years, despite the fact that the inspectors identified three cases with PII issues, two from live files and one from a completed file, and one resulted in an application being made. Our conclusion is that there is an underestimate of the volume of cases with PII issues. This is in contrast to the over-reporting of sensitive material by disclosure officers.

RECOMMENDATION 13

Chief Crown Prosecutors ensure that a log is maintained of all public interest immunity applications, together with a record of all parties involved in the decision-making process, and the results of ex parte applications without notice are collated nationally.

Examining sensitive material and recording reasons for decisions

- 9.20 In interview prosecutors generally accepted that they did tend to rely on the disclosure officer and did not often examine all the sensitive material. One senior prosecutor accepted that he had not carried out his intentions and had not looked at any sensitive material in a large case due to pressure of work.
- 9.21 Within a sample of 70 files we assessed whether or not there were adequate reasons given by the prosecutor for agreeing or disagreeing with the disclosure officer as to the sensitivity of the material. In 42.9% we assessed the reasons as adequate, but in 55.7% they were not. We also assessed if there were adequate reasons given for whether a PII hearing was required. In 39.7% of cases we agreed, but in 58.7% we did not.
- 9.22 In 31.8% of cases the record showed that the prosecutor had examined the sensitive material, but in 68.2% showed that an examination had not taken place. This is in contrast to the last thematic review when we found that the sensitive material was examined “frequently”.

- 9.23 We recommended previously that prosecutors should endorse the schedule with their opinion whether any material might undermine the prosecution case or assist the defence and record the reasons for it on the file, or upon a disclosure record sheet. Since our last thematic review the MG6D schedule has been re-drafted so that it now prompts the prosecutor to agree or disagree that the material is sensitive by marking “Y” or “N”, and also if there is a need for a PII application by marking “Y” or “N” (see paragraph 9.7 for our concerns about this). There is then a small space for comments. We found that prosecutors rarely explained these two decisions in the comment column. The form does not prompt any comment on whether or not material assessed as sensitive undermines or assists nor what reasons the prosecutor has for coming to these conclusions. There tends to be very little space in which to record this important information.
- 9.24 The storage of sensitive material was not generally found to be an issue; most Areas had local agreements with the police that sensitive material would be examined by the reviewing lawyer at the police station. Where sensitive material was retained or copied to the CPS, there was clear guidance and widespread understanding by lawyers that such material should be stored in the safe. All Areas visited had suitable equipment for the storage of this material. In only three of the 31 (6.7%) relevant cases seen was the sensitive material not properly stored. There was, however, less consistency with regard to the storage and management of the sensitive unused material schedules, with copies stored on the file, either in a disclosure file, or even loose within the case papers.
- 9.25 The task of reviewing unused material can easily become something done by rote. Currently, there appears to be a danger that material which is truly sensitive and requires action (perhaps even a PII application) is hidden amongst quantities of material which is not truly sensitive. Material appears to be identified as sensitive by its category, not by the application of the real risk test. In our previous review we recommended that the CPS should examine with ACPO means of reducing the proportion of defective MG6D schedules, including using our findings as an initial benchmark. Notwithstanding this, the proportion of defective schedules in this review has increased to 32.9% from 21.5% in the last review.
- 9.26 It is vital that the prosecuting advocate is fully aware of the decisions made, and indeed should often be a party to the decision-making. The passing of information may sometimes be difficult in view of the need for security. There may be a need for a separate disclosure record sheet or a sub file and for information to be passed orally in conference.

RECOMMENDATION 14

Crown prosecutors ensure that in any case with sensitive material a complete record is maintained of the application of the disclosure test and the decisions made in relation to such material, and that the trial advocate is fully informed of those decisions.

10 THIRD PARTY MATERIAL AND EXPERTS' EVIDENCE

Overview

- 10.1 The Attorney General's Guidelines on Disclosure (April 2005) state: "*There may be cases where the investigator, disclosure officer or prosecutor believes that a third party (for example, a local authority, a social services department, a hospital, a doctor, a school, a provider of forensic services) has material or information which might be relevant to the prosecution case. In such cases, if the material or information might reasonably be considered capable of undermining the prosecution case or of assisting the case for the accused, prosecutors should take what steps they regard as appropriate in the particular case to obtain it*".
- 10.2 A recurring theme in the course of our review was the lack of understanding amongst CPS lawyers and the police of the proper enquiries which must be made of potential third parties. In only 17 of 34 relevant cases (50.0%) in our file sample, did the prosecutor properly enquire of the police about the possibility that there may be third party material. By way of example, in one case third party material in the form of social services records was not pursued by the prosecution until the defence requested it, despite it having been recorded on the schedule of sensitive unused material (MG6D, albeit incorrectly because schedules MG6C and MG6D are used to list material retained by police in the course of the investigation, and not for material held by third parties). The police were not in possession of the information and had not viewed it. The existence of the social services files should have been noted on the police MG6 form but were not. There were no endorsements in the file to suggest that the prosecutor had considered the MG6D. In this case, there had been no proper consideration of the third party material by both the CPS and police. Other cases showed similar lack of appreciation.
- 10.3 Enquiries are sometimes limited as to the existence of third party material from the outset of an investigation. There is inconsistency amongst duty prosecutors in requesting that the investigating officer makes further enquiries of any third party material at the pre-charge stage in appropriate cases (and similarly by prosecutors on first review if the case is not subject to a pre-charge decision). In cases where this had been requested it was not always followed up by the reviewing lawyer post-charge. If the prosecution are aware of the existence of third party material at the pre-charge stage, late disclosure, delays in proceedings and the dropping of cases at a late stage could be avoided. We found a lack of understanding as to when the prosecution should be requesting the material, with the defence being advised to obtain the material themselves, even in circumstances where the material was directly relevant to the credibility of the complainant.
- 10.4 Experts who undertake work at the request of the prosecution may well have ancillary material used in their examination and tests. This is not provided to police and specific guidance has been provided about dealing with this (see paragraph 10.18).

Third party procedure

- 10.5 The procedure for dealing with third parties who are unwilling to hand over material in their possession voluntarily is set out at paragraph 4.16 of the Disclosure Manual. Where, having received a request from the investigator or prosecutor the third party refuses to co-operate, the prosecutor should consider whether to make an application for a witness summons,

provided the statutory conditions are satisfied as set down in section 97 of the Magistrates' Court Act 1980 or, in the Crown Court, section 2 Criminal Procedure (Attendance of Witnesses) Act 1965, as amended. These require that the material is material evidence i.e. immediately admissible in evidence; it is not the test under the CPIA. Before applying for the witness summons it may be appropriate to make a formal request directly to the third party. We found several examples of a lack of understanding of the proper procedure in dealing with third party material. In seven cases where an application to the court was required, the prosecutor informed the third party in only one. In 15 relevant cases the lawyer/counsel took appropriate action in respect of the third party material in only seven (46.7%).

- 10.6 In one case the third party material (in the form of social services records) had been disclosed to the defence on the advice of counsel in the reviewing lawyer's absence and without the prior agreement of the local authority. In one case we observed the defence application for sight of the medical records was dealt with on an ad hoc basis following a hearing to vacate the trial. We also saw instances where third party material (in the form of medical notes) was informally disclosed to the defence without proper application of the disclosure test by the CPS. Such unstructured approaches risk compromising the legitimate interests of victims and witnesses.
- 10.7 Third party material is not always dealt with in a timely way. We found instances where the police had informed the CPS of the existence of third party material, but this was not followed up expeditiously by the reviewing lawyer.
- 10.8 In a number of cases third party material was not scheduled correctly by the police. We saw instances where it was incorrectly put on the schedule of sensitive unused material (MG6D) when it was not in the possession of the police and had not been examined by them. In one instance the material was not relevant to the case but there was no record confirming this on the file. We also found a number of examples when third party material was received after initial disclosure had been undertaken and was not properly scheduled by the police or considered by the reviewing lawyer.
- 10.9 Third party material was often insufficiently described on the schedules to enable the prosecutor to make an informed decision in relation to it, applying the statutory disclosure test. The MG6 forms did not always contain information about the third party material. In our previous report we recommended 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. In our current review, we found this rarely occurred. The CPS will wish to take this forward with the police at a local level.

RECOMMENDATION 15

CPS Business Development Directorate, in conjunction with the Association of Chief Police Officers, considers amending the form MG3 to include a prompt for prosecutors to confirm that the possible existence of third party material and any appropriate action in relation to it has been considered and discussed with the officer.

Third party material and public interest immunity applications

- 10.10 Where a third party does not allow the prosecution access to material, the prosecution or defence may apply to the court for a witness summons. This procedure requires the third party to attend court to produce the material to the court. Where an individual - usually the subject of the information held by the third party - has an interest in that material, then the court has a discretion to require notice to be served upon the individual in writing of the time and place of any application. This is because the individual concerned, as well as the third party, may have a right to make representations to the court that the material ought not to be disclosed.² A typical example of this could be a victim of an alleged assault who may also chance to have a record of confidential treatment retained by the local health authority. Whilst those records are in the possession of the local authority (the third party), not only can the local authority request that they not be disclosed, but also the victim may request non-disclosure. This may be on the basis that the material has no bearing on the case, or that PII applies.
- 10.11 It is apparent that there is a lack of understanding in the difference between third party and PII applications. They were often referred to as being the same thing by different members of the CJS. We were given examples of instances where local authority staff had been witness summonsed by the CPS in order to reveal the third party material and for the judge to decide what was to be disclosed applying the statutory test. These hearings were referred to as PII applications, despite no PII being claimed. It is only where that material satisfies the disclosure test that a PII application needs to be considered to prevent disclosure to the defence if there is a real risk of prejudice to an important public interest. Although third party applications can evolve into PII applications, it is important to distinguish between them from the outset in order to identify the different issues involved.
- 10.12 We found that requests to local authorities for third party material were often made late by both the police and CPS. The result of this is that the local authority does not have sufficient time to deal with the request and examine the relevant material. They therefore claim PII, even though this may not necessarily be applicable, and are subsequently witness summonsed to appear at court in order to reveal the third party material. This places a financial burden upon the local authority since they invariably have to instruct their own separate counsel to look at the material and represent them at the court hearing. It is important that the CPS and the police are aware of the burden it places on the local authority when making requests and ensure that requests for third party material are as timely as possible, following any agreed local protocol where applicable. The Crown Court Protocol specifically provides that such requests shall be made at an early stage of the proceedings. We also consider it to be inherently unsatisfactory that the third party or interested individual drawn into the criminal court process must bear the costs themselves and cannot be awarded costs out of central funds, when their position or objections were entirely reasonable.

RECOMMENDATION 16

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

² The law in this area has been developed in the light of *R v (TB) Stafford Combined Court* 2006 2 Cr App R 34 and part 28 of the Criminal Procedure Rules 2005 which came into force on 2 April 2007.

Third party material in fraud cases

- 10.13 The prosecution need to have a degree of foresight in dealing with third party material pre-empting any defence requests, particularly in relation to fraud cases. It is not necessary to make speculative enquiries, but frequently the existence of the material will be known or can be deduced from the circumstances of the case. It is also in fraud cases where the defence shopping list can amount to an extensive amount of material and the temptation to allow access to the material is very high. In one fraud case that we examined the defence requested third party material in the form of old accounts, which were not relevant to the prosecution's case and it was not apparent that they would assist the defence or be immediately admissible in evidence. The prosecution obtained this material in order to avoid their witnesses being cross-examined by the defence using documents they had not themselves seen. The statutory disclosure test was not strictly adhered to in this case. It would have been more appropriate for the defence to have argued their application formally before the trial judge.

Protocols

- 10.14 In most of the Areas that we visited protocols exist between the CPS, police and local authority regarding the exchange of information in the investigation and prosecution of child abuse cases. In some Areas, however, local protocols have not been agreed and some local authorities will not agree to enter into a protocol in any event. In addition, some of the protocols are no more than informal agreements; some need updating or are not in line with the national model protocol that was developed by the CPS, ACPO, Local Government Association of England and Association of Directors of Social Services in October 2003. CPS Areas have been encouraged to adopt this model, tailored as necessary, to suit local circumstances.
- 10.15 We also found that the CPS, police and local authority staff were not always familiar with the contents of their local protocols. This means that the system does not always work effectively and can lead to delays.
- 10.16 In our review of March 2000 we suggested that CCPs consult with local organisations which commonly hold third party material in order to develop protocols on its handling. This material included CCTV recordings (these are currently subject to consultation by the Information Commissioner) and medical records, both of which are not readily accessible to the prosecution. CCTV footage is not always retained, whether it is potential evidence or unused material, and medical records are frequently not released to the prosecution as a result of concerns about their confidentiality. This can lead to delays to criminal trials and, on occasions, abuse of process arguments.
- 10.17 We found protocols were not being entered into to deal with these different types of third party material. The CPS will wish to consider whether CCTV material is suitable to be included in any protocols with local agencies/organisations (in the light of the Information Commissioner's views). The CPS may also wish to consider with the police the effectiveness of the framework agreement for the revealing of medical notes to the prosecution.

RECOMMENDATION 17

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

The use of experts

10.18 The Disclosure: Experts' Evidence and Unused Material Guidance Booklet for Experts is a joint CPS and ACPO guidance document which was published in March 2006 under cover of a policy circular. It was designed to provide a practical guide to disclosure obligations for expert witnesses instructed by the prosecution, in order to assist experts, investigators and prosecutors in their execution of disclosure obligations. A number of the files we examined contained evidence from expert witnesses, however, many of the more serious and complex cases had commenced prior to the publication of the booklet. We found limited evidence of usage of the booklet on files we examined. More worrying was the lack of knowledge amongst prosecutors and investigators of the existence of the guidance. Any training, especially joint training with the police, should include a session on the guidance and its practical application.

11 THE GENERAL APPROACH TRIAL ADVOCATES TAKE TO DISCLOSURE

Trial advocates appearing for the prosecution in the magistrates' courts

- 11.1 In the magistrates' courts cases are prosecuted by in-house CPS prosecutors or by agents instructed by the CPS. These agents are usually junior members of the local Bar, local defence solicitors or former prosecutors. Many of the magistrates' courts' trials we observed were prosecuted by agents who received the file between a few days before the hearing up to the morning of the trial. It is only in exceptional circumstances that an agent would be instructed to advise early on in magistrates' courts' cases; this would generally only be done in unusually large cases where there were a significant number of defendants, for example. As most serious cases would be dealt with in the Crown Court, it would be rare to find an agent advising on disclosure in the magistrates' courts. All necessary decisions should have been taken and implemented by the time the case is passed to the agent.
- 11.2 Although the use of agents to prosecute on behalf of the CPS is reducing, we observed a number of trials conducted by them. Agents in the magistrates' courts are expected to prosecute using the CPS file and do not receive any case-specific written instructions as in the Crown Court (where they are contained in the brief to counsel). There were no instructions to agents in relation to handling unused material on any of the files we examined at court, even when issues were likely to arise, for example when initial disclosure had only been served the day before trial.
- 11.3 We observed two cases where agents showed material to the defence without any consideration as to whether it passed the disclosure test or referral to the CPS for instructions. In one a large bundle of unused material was delivered to the prosecutor at court, which included sensitive items. The agent examined all the material in tandem with the defence advocate. In the other case, unused material was handed over despite a completed and properly endorsed schedule stating that there was no material to undermine the prosecution case. In neither was the file endorsed by the agent to show what material had been disclosed to the defence. In two ineffective cases assurances were made in court that material would be supplied to the defence.

Trial advocates appearing for the prosecution in the Crown Court

- 11.4 In the Crown Court, as we have previously mentioned, cases are prosecuted by counsel from the independent Bar and by in-house HCAs. Area systems for allocation of work vary, although it is now increasingly more common for HCAs to undertake preliminary court hearings and PCMHs. As the role of HCAs develops to cover more trial work, it becomes more likely that they will have conduct of the case throughout. This can benefit the handling of disclosure by increasing the likelihood that the reviewing lawyer will be the trial advocate and that effective systems of feedback can be developed between the HCAs and the reviewing lawyers, so there can be continued improvement.

GOOD PRACTICE

Feedback sessions by Higher Court Advocates to other CPS staff on all aspects of Crown Court work, including the handling of unused material.

- 11.5 Early involvement of counsel in large and complex cases is identified at paragraph 15.9 as good practice. Wherever possible it is important that there is continuity of counsel (or HCA), particularly where there are complex issues which have been advised upon. The return of work, whether from HCAs to the Bar, or from one counsel to another, does not promote good working. This leads, at best, to wasted and duplicated effort and, at worst, to a lack of preparation time increasing the potential for delay or errors. The frequency of cases being returned is a disincentive to the selected counsel putting their mind to issues of disclosure (or indeed the case as a whole) until close to the trial itself. Whilst issues of disclosure should have been dealt with at an early stage, this can result in a lack of compliance with CPIA and extra disclosure beyond the statutory test being provided on the morning of the trial in an attempt to smooth over difficulties or to avoid legal arguments.
- 11.6 Counsel in the Crown Court has no *statutory* role to play in the disclosure process under the CPIA until they have 'conduct of the case'. The Act imposes a continuing duty of disclosure which means counsel must be aware of the effect of changes to the evidence or other circumstances and the impact of the unused material at all times. The task of assessing the material is a legal duty on the CPS at both initial and continuing disclosure stages. In the absence of a change of circumstances counsel is not expected to re-assess material that, in theory, has already been scrutinised and the graduated fee scheme makes no specific allowance for reading any unused material on the basis that the overall fee will cover the duty to read or view normal amounts of unused material as an integral part of the case preparation. Counsel is sent a copy of both schedules with the instructions and provided with copies of material that has been disclosed. We found that in most cases counsel had been provided, sooner or later, with sufficient detail about the unused material to enable them to conduct the trial. This was in the form of copies of some of the material itself and the schedules which had been served on the defence. In very few cases were counsel given specific instruction on what had been disclosed or withheld and the reviewing prosecutor's reasoning.
- 11.7 In six cases in our sample the police by-passed the CPS and went directly to counsel. In the majority of those this appeared to occur because the disclosure officer and counsel sorted out disclosure problems in the absence of the CPS lawyer at court on the morning of the trial.
- 11.8 In cases of complexity counsel may be instructed specifically to consider some aspect of disclosure, particularly in relation to material deemed to be sensitive. For example, in one file we examined leading counsel was asked to advise on recordings of conversations between the defendant and another obtained by means of an eavesdropping device and he advised that they did not undermine or assist. Counsel may, in addition, volunteer advice on disclosure issues or ask to inspect the material. We were informed that they frequently do so.

- 11.9 Prosecuting counsel are expected to read any unused material sent to them in accordance with their professional duty, but they do not usually receive specific payment for this. If there is abnormally voluminous material there are provisions in the graduated fee scheme for a fee to be agreed for this. However, it is clear that the Criminal Bar Association is strongly of the view that the situation is not satisfactory and will remain a real potential problem. In the light of our comments in paragraphs 11.10 and 11.15 that prosecuting counsel is undertaking an active role in disclosure, there is a need for the CPS and the Criminal Bar Association to reach a consensus on this issue of payment for work actually done.
- 11.10 The MG6 scheduling system and the current endorsements are predicated upon the assumption that the police scheduling has been done properly. Disclosure to the defence is predicated upon the assumption that the process has been carried out properly by the CPS lawyer. That assumption is not always warranted. As things stand the question arises as to what role counsel consider they should actually play, that is, should they adopt a passive role relying on the CPS to discharge its statutory duty or should theirs be more proactive role, as at present.
- 11.11 The perspective that counsel brings to disclosure is based on trial experience, including the impact that particular items of evidence - or absence of evidence - can have on a Crown Court trial, especially on the minds of a jury. Many counsel both prosecute and defend; all consider themselves independent of the CPS and of the police. With this in mind, their assessment of what might undermine the prosecution or assist the defence may differ from the police disclosure officer and the CPS lawyer. It must be borne in mind that the application of the disclosure tests is not a question of irrefutable logic, but involves questions of judgement, a judgment based on experience. Experience differs and different 'experienced' views are possible. Police case officers (especially uniformed officers) may have little or no experience of the Crown Court and, even where they have appeared as witnesses, their experience is not comprehensive. The CPS lawyer might also have only limited Crown Court trial experience, if any.
- 11.12 Some counsel we spoke to thought that blanket disclosure, subject only to sensitivity (as happened pre-CPIA), was preferable to the current regime. Most, however, thought that the present system was theoretically workable, but only if the CPS were able to demonstrate consistently that they had played their own role thoroughly and conscientiously and, in addition, could guarantee police performance. We found examples of senior counsel influencing the provision of blanket disclosure of all non-sensitive material in serious cases, for instance homicide, rather than applying the disclosure test (see also paragraph 15.9). We were told of this being done in certain large fraud cases with consequent expenditure of public resources by the defence, and sometimes delay of the trial.
- 11.13 No system of disclosure, including the present one, is proof against a police officer deliberately omitting relevant material from the schedules altogether or seeking to conceal it under a misleading description. We should stress that we found *no evidence* that this was done on any of the cases we looked at. However, we pointed out in paragraphs 9.9-9.11 the frequent inclusion of items in the sensitive material schedule which were not necessarily sensitive and the inadequate descriptions of items. By placing the items on the MG6D schedule, the defence would not become aware of them. Frequently the CPS lawyer would not call for the item to inspect it and material would not be subject to appropriate scrutiny. When schedules were not returned to police for amendment the defence could not challenge any decision if they were not made aware of the existence of the item (paragraphs 9.12 and 9.13).

11.14 No interviewee we spoke to doubted the independence of the CPS, or provided us with any examples of deliberate non-disclosure by them of items which passed the CPIA tests. We have been given examples by judges in other inspections about instances of inappropriate non-disclosure, through lack of experience, care or detailed knowledge of the issues in the cases. In counsel's view the CPS lawyers were, in general, failing to carry out disclosure properly through lack of time, compounded by a lack of experience. From our observations, whilst the duties of disclosure were handled properly in the majority of cases it was often not easy to appreciate this in the absence of clear endorsements, or a disclosure record sheet, or specific instructions. It was difficult in the majority of cases for counsel to defend CPS decisions not to disclose and resist pressure from the defence and judges. This substantially explains the high incidence of informal disclosure or court orders made on mentions.

11.15 Until and unless the handling of disclosure by the CPS is more assured, based on informed decisions and the subject of clear reasoning, counsel will continue to compensate and inexorably the answer to the question posed at paragraph 11.10 is that their role in disclosure must be a proactive one. Inevitably, disclosure will often be broader and later than the CPIA envisages with consequent delays, duplication of effort and expense.

Activity at court

11.16 Significant aspects of the non compliance were only seen by inspectors due to the methodology of seeing live contested cases as opposed to the more usual practice of examination of finalised files, as the actions were not recorded.

11.17 In eight out of 152 (5.3%) of the cases we examined or observed, some of the non compliance resulted in adjournments and ineffective trials, whilst disclosure issues were resolved. We also saw significant delays on the morning of trials whilst the trial advocates sorted out disclosure issues. We were informed that these delays, often lasting for two to four hours or more, were not uncommon. This clearly has a detrimental impact on court listing practices and on the progress of other cases listed for trial subsequently. It contributes to a lack of public confidence in the trial process; juries inevitably are forced to wait for significant periods of time before their trials can commence, and victims, witnesses and defendants are inconvenienced.

11.18 Some of the disclosure made on the morning of the trial related to non compliance with CPIA earlier in the life of the case, but in other cases this disclosure at court was wider than necessary under CPIA. It often resulted from a combination of a need for expediency or a general lack of confidence by the trial advocate in the way the prosecution had discharged its duty of disclosure on the file up to that point. A key contributing factor for this was the lack of information and limited endorsements on the file, combined with the inadequate instructions provided to the trial advocate. In many cases there was no evidence of cohesive prosecution team working. This lack of information can result in the trial advocate almost working in a vacuum and there was often no CPS involvement at all in the decisions taken by the trial advocate whether to disclose material or otherwise. When the trial advocate made disclosure at court to the defence, there was generally no record made on the file that this had taken place, and no record of what material had been disclosed. This further reduced the audit trail of what had and had not been disclosed.

11.19 We saw a number of examples (and were told of others) of cases listed for trial in which wide disclosure of unused material was undertaken on the morning of the trial, following which the defendant pleaded guilty. It was generally impossible to say that this disclosure was the only factor in the change of plea as it often depended on additional factors, such as the presence or otherwise of prosecution witnesses. However, the handing over of (or provision of access to) material on the morning of the trial gives the defence the opportunity, whether this is the reason for the change of plea or not, to claim what may be an inappropriate discount for the guilty plea. Since the disclosure of material is new information the defence have not previously had sight of, it can be asserted that the plea was entered at the earliest opportunity thereafter. If the disclosure fell outside that required under the CPIA disclosure test, as often seems to be the case, this would be an inappropriate discount. Additionally, the impact of late guilty pleas is to waste resources on preparation of cases for trial, and it contributes to unnecessary activity relating to disclosure duties. The fact that there was a 'successful' outcome to the case (the conviction on a guilty plea) means that in a significant number of cases where this occurs there is no scrutiny or analysis of, on the one hand, whether there was any disclosure failure or, on the other any non compliance with CPIA through unnecessary disclosure. The issues are therefore not addressed at any level.

12 CASE MANAGEMENT AND THE COURTS' APPROACH TO DISCLOSURE

Case management

- 12.1 A key aim of the Criminal Procedure Rules 2005 (as amended) supported by the Criminal Case Management Framework is to reduce the number of ineffective trials by improving case preparation from the point of charge to trial. Courts now have a duty to manage cases effectively, with an overriding objective that criminal cases are dealt with justly.
- 12.2 Once a not guilty plea is entered magistrates will make directions for the progress of the case, including a timetable for service of unused material. The timetable will include a target date by which both prosecution and defence are obliged to certify to the court that the case is ready for trial. In some places this is dealt with administratively by lodging a certificate of readiness on the other party and on the court. In other courts formal case progression hearings take place. It is, of course, open to either party to seek to list the case at any time if there has been non compliance with directions or there are issues outstanding that require a court hearing.
- 12.3 We observed five trials in the magistrates' courts which did not proceed for reasons due to unused material. In two of the cases initial disclosure had been served in a timely manner and pre-trial reviews has been held, but disclosure issues were still not raised by the defence until the trial. In the remaining three, initial disclosure had been served very late and as a result the cases could not proceed. As they were listed in courts with other cases that were effective, there was an acceptance by all parties that they would be adjourned and the failure by the prosecution to deal with disclosure was not explored in court. Furthermore, the reason given in court for the adjournments was lack of court time and the cracked and ineffective trial analysis forms themselves were not given to the prosecution or defence to agree.
- 12.4 In the Crown Court the judge will make directions for the progress of the case once it has been committed or sent to the Crown Court.
- 12.5 Disclosure frequently arises as a topic at case progression hearings or meetings, often in response to correspondence from defence solicitors who may not be present at the hearing itself. For each case an up-to-date disclosure record sheet should be available to the CPS representative to enable them to assure the court that disclosure responsibilities have been complied with and the dates of all relevant actions and, when there are matters outstanding, to explain why and the steps being taken. There is nothing more likely to undermine confidence than if the prosecution advocate is unable to deal fully with the issues which arise.

The role of the judiciary

- 12.6 The role of the judiciary is crucial. Whilst some Resident Judges are fully aware and supportive of the Court of Appeal Protocol, we did not find knowledge of it to be universal and there was also some concern over its precise status. One judge we spoke to was critical of it and intended to write to the DPP with his criticisms. Some considered that the prosecution should disclose items if they did no harm, and ordered disclosure of items sought by the defence without inviting argument. One judge told us that he "could usually persuade the prosecution to hand them over", also that

he had two forthcoming section 8 applications and that “if the items are not controversial I shall be cross that they have not been disclosed”. In one Area we were told by practitioners that judges did not want to be troubled with disclosure issues and expected them to be sorted out between counsel. In another we were told that judges regularly ordered disclosure across the board despite being assured that the items in question did not meet the disclosure tests.

- 12.7 Formal applications to the court made under section 8 of the CPIA are a rarity for the reasons outlined above and in the previous chapter. Where the judiciary (and prosecution counsel) are reluctant to adopt the protocol, the CPS can hardly be expected to achieve adherence to it themselves. The CPS cannot perform its function properly without judicial support.
- 12.8 On the other hand in one Area we visited the Resident Judge, having satisfied himself that the CPS were in general applying the tests properly and could demonstrate this, was supportive of their decisions on disclosure and applied the protocol strictly. In another Area the Resident Judge had challenged a less than robust prosecution counsel who was about to disclose unused material to the defence without any consideration as to whether it satisfied the test for disclosure. These examples illustrate in clear form the point that the CPIA and the protocols can only be made to work when all parties adhere to them; that the CPS cannot perform their role properly without judicial support, but equally that judicial (and prosecution counsel) support cannot be expected to be forthcoming unless the CPS can demonstrate scrupulous discharge their own obligations. We found, however, that awareness of and compliance with the CPIA and the protocols, albeit patchy, is slowly improving in most Areas.

13 ENSURING EFFECTIVE DISCLOSURE – THE MANAGEMENT ROLE

The structure of the CPS

- 13.1 The structure of the CPS varies from Area to Area. In some work is divided on functional lines between the magistrates' courts and Crown Court. Others have adopted a combined unit structure where lawyers have a mixed caseload of both magistrates' and Crown Court casework. All Areas have at least one lawyer who is responsible for the most serious, complex and sensitive casework. The CPS is currently setting up complex case units within groups of its Areas. CPS London has established two discrete units which deal with serious and complex cases and fraud cases, respectively.

National champion

- 13.2 The CPS has appointed a CCP as a national Disclosure Champion. He has an overarching role in respect of unused material but does not have any specific responsibilities. Each Area now has at least one Disclosure Champion but, as yet, the role has not been uniformly defined.

Area champions

- 13.3 Until recently there has been only limited guidance and support provided to Area Disclosure Champions. A conference was held in March 2007 for all Disclosure Champions and there was positive feedback from those who attended. The Business Development Directorate now proposes that this will be a bi-annual event and there are plans to strengthen the support provided by creating a communication network and bulletin board on the CPS electronic infontet. We welcome this as a forum for exchange of information and sharing good practices. It is acknowledged, however, that there is presently no uniform job profile for Disclosure Champions. They are often lawyers without any managerial responsibility, which provides both benefits and challenges if they are required to provide mentoring and guidance, undertake performance assessment and provide feedback to colleagues. We are advised that consideration is being given to producing a standard job profile for all champions with performance management as a key task.
- 13.4 A standard job profile should be developed for Area Disclosure Champions which should include providing a mentoring and guidance role to lawyers, analysis of adverse outcomes and cracked and ineffective trials wherever these relate to disclosure issues, and involvement in file examination exercises. The role should also include regular liaison with the police and feedback to the Area management team.

Training

- 13.5 The level of training provided to prosecutors across the Areas is inconsistent. Two courses exist: foundation (an e-learning module) and advanced training. All prosecutors are expected to undertake the foundation course, but it remains the decision of Area managers as to who will do the advanced course. Some Areas have set themselves a target that all lawyers should take the e-learning course, but in others training is patchy. Many prosecutors felt that there would be considerable benefits from a programme of joint training with the police. A major joint training programme was undertaken when the CPIA was first implemented but this was not replicated after its revision. It is the approach of the CPS locally and the appetite of the corresponding police force which determines extent of joint training at local level.

- 13.6 In the light of continuous changes of personnel and recruitment (especially that of the police) we recognise that keeping knowledge and training up-to-date is problematic. Our experience shows that investment in joint training to keep police and staff up-to-date is a sound investment. We also consider that the foundation course for prosecutors should be a mandatory part of induction and the advanced course should be undertaken as part of continuing development at an appropriate time.

Performance management

- 13.7 Without adequate performance management it is not possible to achieve a uniform satisfactory result in the handling of unused material. There is currently only limited effective management of disclosure performance on an individual, Area or joint basis with the police. The cracked and ineffective trial data collected by the Courts Service provides an indication of the extent to which disclosure issues cause cases listed for trial not to go ahead, but individual case analysis is needed to appreciate the reasons and to capture trials in which commencement is delayed.
- 13.8 A recurrent theme throughout recent inspections has been the lack of realistic Casework Quality Assurance (CQA) analysis submitted by managers. CQA assessments are based on examination of one file per lawyer and designated caseworker per month in each Area. For disclosure handling managers are asked to assess overall handling of primary/initial disclosure, secondary/continuing disclosure and the handling of any sensitive material. These statistics are currently supplied to CPS Headquarters on a quarterly basis and performance discussed with selected Areas as part of their performance review.
- 13.9 CQA is not providing an accurate assessment of the CPS as a whole, or for some specific Areas. Some Area managers are not consistently completing CQA forms for all their prosecutors and some are completing more. (Areas may examine as many as they wish but should not send the extra data to Headquarters.) On an individual Area and national basis the assessments have been, and remain, significantly higher than the performance found by inspectors. (We have discussed previous inspection performance in Chapter 4).
- 13.10 The CQA scheme should be used to address individual performance on disclosure handling. Some examples were given to us of repeated efforts to address performance on a team and Area level through training sessions and regular reminders as to the use of disclosure record sheets. Many lawyers, however, reported that they were not given any feedback on disclosure performance at all.
- 13.11 Essentially, we found that CQA was being used to only a limited extent and effect to assess and improve individual performance on disclosure issues and the overall assessments were often not sufficiently objective. The emphasis needs to change from a formal requirement to report to Headquarters (which may act as a disincentive to robust self-analysis), to a genuine attempt to ensure compliance on a difficult aspect of casework. This should flow from our Recommendation 18 below.

GOOD PRACTICE

Focussed and systematic examination of a sample of files in order to benchmark disclosure performance. Thereafter, monitoring to be repeated quarterly and a report prepared for the consideration of the Area management team.

RECOMMENDATION 18

CPS Business Development Directorate considers establishing uniform performance targets for disclosure against agreed criteria; and

Chief Crown Prosecutors ensure their Area's performance is monitored and achieves the agreed target.

- 13.12 Due to the extent of the non compliance we have found throughout this review management of individual lawyers is not sufficient, on its own, to produce the change which is needed. In interviews we were told by some lawyers that they had made efforts to return schedules which were incorrectly completed to the disclosure officer, but had given up the attempt to effect an improvement. There needs to be effective liaison at a senior level between the CPS and the police service within each Area. This is a subject for considerable tension between the CPS and police service because the police are looking for ways to reduce the impact of the disclosure regime on their resources, such as the proposals currently being considered by the Office for Criminal Justice Reform relating to the CPIA in summary cases.

GOOD PRACTICE

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

14 THE COST TO THE CPS OF DISCLOSURE HANDLING

Overview

- 14.1 We conducted a survey of prosecutors to assess the resource demands of disclosure in cases of different categories of complexity. We then considered whether the CPS system of resource allocation met the needs of these cases. In essence, specific disclosure activities are not a separate resource component, but are considered to be about 25% of review and consideration time for magistrates' courts' cases and 20% for Crown Court cases. For volume cases, Area prosecutors are spending considerably less time on disclosure than either inspectors estimated was required, or that average activity based costing (ABC) timings provide. However, for large cases in the magistrates' courts and very large and complex cases in the Crown Court much larger periods of time were being expended. Whilst the average ABC timings might adequately compensate for other differences, the large amount of prosecutors' time expended on these big cases was likely to require subsidising from the less serious cases, so that time would always be inadequate for the middle-to-large category of cases. Inspectors' findings that there was a variation in quality of input to cases stemming from either lack of care or lack of time, together with inefficiencies in the process, meant that the need for extra resources is unclear. Nevertheless, our final view that prosecutors should examine more material in order to make informed decisions means that, in fact, more time should be expended on the more straightforward cases if the regime is to operate properly.
- 14.2 Overall, we consider that research is needed to determine more accurately the complexity profile of cases and to ensure there is a proper balance of resources given to disclosure issues in the various categories of cases.

Methodology

- 14.3 The complexity of a case, either through its own nature or the number of defendants involved, increases the amount of unused material that has to be considered. Complexity therefore is an important consideration when distributing resources. In the absence of nationally accepted figures prosecutors in the selected Areas were requested to profile the trial cases they handled during the period February 2006-January 2007 in terms of complexity in order to inform this review.
- 14.4 The complexity criteria used was:
- Simple motoring.
 - Straightforward case with no sensitive material.
 - Straightforward case with sensitive material.
 - Large case could include sensitive material.
 - Very large and complex case e.g. fraud or extensive police operation.
- 14.5 In total 437 prosecutors from the Areas we visited were sent a questionnaire and the detailed analysis is set out at Annex E. We received 178 responses and, of these, 152 completed the case distribution question. This information was used to apportion case complexity and thus to determine the likely complexity profile of the national caseload. Information from CPS case

outcomes shows that during the period April 2006-March 2007 the number of defendants proceeded with in which disclosure issues would need to be dealt with amounted to 65,999 (109,817 if late guilty pleas in which disclosure should have been undertaken are included) in the magistrates' courts and to 89,408 in the Crown Court. We have used these figures to scale the proportions.

- 14.6 Responses from the prosecutors were divided by their own assessment of those who had a predominantly magistrates' courts' caseload and those with predominantly Crown Court and an initial distribution was calculated. Perhaps not surprisingly, there was a high proportion of responses from lawyers who had dealt with the more serious and complex cases. Analysis showed there was a significant (and over-represented) minority who had high proportions of large and very large cases in their profile. To estimate the nature of a normalised caseload distribution, the case profile of these responses was removed from the aggregate profile. They were, however, included in our assessment of time taken to handle disclosure, as indicated below.
- 14.7 As cases in the very large and complex category can run over several years, some further adjustment was required. For example in one fraud case in our file sample the investigation commenced in 1998 and was completed in 2006. To compensate for this we assumed that very large and complex cases ran over a period of three years and therefore the number of cases in this category was reduced by two thirds and the other categories normalised in proportion so that the total number of trial cases for the year remained the same. The estimated distribution of trial cases in the Crown Court and magistrates' courts is shown below.

Category	Case distribution	
	Number of defendants	%
Magistrates' courts' defendants (contested trials)		
<i>The CPS may have had to undertake disclosure in relation to a further 43,818 defendants who entered late guilty pleas. The total relation figures are shown in brackets.</i>		
Simple motoring	7,491 (12,080)	11
Straightforward no sensitive material	39,705 (65,890)	60
Straightforward with sensitive material	13,846 (23,062)	21
Large case could include sensitive material	4,957 (8,785)	8
Very large and complex case e.g. fraud, police operation	0	0
Total	65,999 (109,817)	100
Crown Court defendants (committals and sent cases)		
Simple motoring	0	0
Straightforward no sensitive material	40,080	45
Straightforward with sensitive material	24,325	27
Large case could include sensitive material	22,355	25
Very large and complex case e.g. fraud, police operation	2,648	3
Total	89,408	100

CPS activity based costing system

- 14.8 Activity based costing is an internationally recognised method for calculating and costing the amount of resources required to complete work processes. It relies on breaking down each process into individual steps and then costing the activity by establishing the amount of time consumed multiplied by the number of times the process occurs and the cost of the staff involved. In a commercial environment ABC is applied to the whole of an organisation's product set to ensure that high costs associated with a complex product are reflected in its pricing and to eliminate the risk of other products subsidising the more costly production. ABC is often used in industry and commerce to support contractual negotiations to agree a price for volume activities.
- 14.9 In large organisations such as the CPS sampling methods are used to determine average activity times, which are then applied to total activity volumes. The CPS uses an activity based costing system to provide a more scientific basis for the allocation of finite funds to Areas.
- 14.10 The ABC system uses a small number of case volume measures based on the different case outcomes to cost out Area allocations. In the Crown Court eight measures are used and in the magistrates' courts' nine for post-charge casework. These include case outcome measures such as dropped proceedings, guilty pleas and trials for either way and summary offences and, in the Crown Court, additional case types of committals for sentence and appeals. The ABC system is based around averages or 'typical' cases and thus timings do not specifically reflect large and very large or complex trials.
- 14.11 The ABC Area allocations are recalculated each year, but to avoid undue distortions arising from sporadic changes in caseload (or delays by Areas in updating finalisations) the allocation is based on the average caseload of the last three years. ABC timings cover all grades of staff engaged in core prosecution activity for those case types assessed; this covers the majority of casework activity involved from charge to disposal.
- 14.12 The ABC methodology of multiplying activity timings by caseload volumes is applied to each of the 42 Areas to produce a "should take" staff profile. Application of average salary costs for each Area produces a should take cost. Each Area's cost is aggregated to form a national ABC should take cost and this determines each Area's ABC percentage share. This percentage share is then applied to the actual available funding to determine each Area's non ring-fenced budget. Therefore, if an Area's ABC should take costs amount to 5% of the national ABC should take it receives 5% of the available national budget assigned to Areas. The CPS never intended the ABC system to measure all work in an Area. Some overheads such as the Area Secretariat are expected to be covered by the resource allocation while some other activities including, for example support for Local Criminal Justice Boards, are separately funded.
- 14.13 ABC was introduced into magistrates' courts' casework in 1997 and for the Crown Court in 1998. As statutory disclosure responsibilities were not introduced until 1998, specific disclosure activity costs were not a separate component within ABC timings. On the introduction of statutory disclosure timings for this activity were subsumed into the general review and consideration time element within ABC timings. Later work (see paragraph 14.17) by the ABC team, based on prosecutor estimates, showed that this element amounted to about 25% of review and consideration time for magistrates' courts' cases and 20% for Crown Court work. This essentially was a desegregation of disclosure resources from an existing financial resource, although some adjustments were made.

- 14.14 Whilst it can be argued that disclosure activities have not been specifically funded through the ABC allocation system, this is not a legitimate conclusion. It is clearly part of the review and consideration activity on the file, and is an integral part of the review function. The disclosure obligation has always existed and arguably took a less certain and more onerous form in the years prior to the CPS development of ABC costing – following the decisions in *R v Ward* and *R v Keane*. Areas have also been allocated significant additional lawyer resources during the period, for example between April 1996-March 2007 Area lawyer staffing increased by 37%. Information provided by CPS Headquarters indicates that this equates to 700 lawyers. Whilst this is the case, approximately 500 of those posts were allocated to the pre-charge decision (PCD) initiative. Leading up to the Spending Review 2002 the CPS argued for additional funding for disclosure and other work that it had taken on. It received some 25% of its bid. It was unclear from the settlement how much of this additional funding was for work associated with disclosure.
- 14.15 More significant, however, is the fact that the ABC system provides only standard ‘earnings’ for large and very large and complex cases. Where these cases are reviewed and managed by Areas, the work is funded from the budget allocation informed by their routine ABC share.
- 14.16 For all Areas the impact of handling a number of large and very large and complex cases can be significant, however the impact of one or more large cases on a small Area can be very detrimental in terms of resources. In certain circumstances CPS Headquarters will consider a business case from the Area and, if warranted, will allocate additional resources on a case-by-case basis. The number of cases being funded, however, is small: four in the 2006-07 financial year and two in the current year-to-date. The money allocated is to assist with all aspects of the case, of which disclosure is just part. In addition, short-term resources do not always compensate effectively for the loss of an experienced lawyer. Larger Areas are expected to accommodate large and complex cases from their existing budget allocation.
- 14.17 With the introduction of PCD (where the CPS became responsible for determining the charges to be brought) the ABC team were asked to review its impact on the prosecution process and the costing of disclosure handling formed part of this work. The team examined 1,766 cases across a range of finalisation outcomes. To provide further precision, they organised a more in-depth analysis of trial cases by a team of Area prosecutors. They examined 505 cases, of which 125 were contested, and estimated how long the disclosure activity would have taken based on the material on file and related correspondence.
- 14.18 These findings were then scaled up to cover the total national caseload. Proportions of time were included for all grades of staff to accommodate supervision time and associated administrative activities.

Comparison of time spent on disclosure

- 14.19 To complement the casework findings of this review we also set out to gather information so that disclosure resource estimates could be compared, i.e. the indicative ABC activity timings, actual time Area prosecutors thought they spent on cases of differing complexity and how much time our legal inspectors thought such cases should take based on the average time for similar cases in their file sample.

- 14.20 Care is required in interpreting the information from the data sources because in all complexity categories case numbers are relatively small and the methods used are different. Nevertheless, it is important to try to account for what inspectors found in terms of casework quality in their file sample with the different views of time spent on disclosure.
- 14.21 In making this comparison we have included only the ABC time associated with the prosecutor handling of the case and this is made up of the disclosure review and considerations element plus the ABC time estimate factored in for administration. We do this because much of this administrative time is to do with core disclosure activities such as endorsing undermining items on the appropriate schedule and so on. (It does not include any time spent by counsel.)
- 14.22 Timings are based on the majority opinion of staff who responded to this question in the questionnaire, of which there were 46 from Crown Court and 82 from magistrates' courts' prosecutors.
- 14.23 The time estimates from inspectors are based on the average of those trial cases falling into the complexity criteria in their file sample. Inspectors reviewed 80 Crown Court and 72 magistrates' courts' trial cases (including one youth court case).

Case complexity	Time spent		
	ABC	Area prosecutors	Inspectors
Magistrates' courts' cases			
Simple motoring	73 mins*	0-5 mins	15 mins
Straightforward no sensitive material	77 mins*	21-30 mins	40 mins
Straightforward with sensitive material	77 mins*	30 mins	45 mins (only 2 in sample)
Large case could include sensitive material	77 mins*	181 mins- 6.5 hrs	None in sample
Crown Court cases			
Straightforward no sensitive material	179 mins**	11-20 mins	83 mins
Straightforward with sensitive material	179 mins**	31-60 mins	130 mins***
Large case could include sensitive material	179 mins**	61-180 mins	177 mins
Very large and complex case e.g. fraud, police operation	179 mins**	1-5 days	9 days

* ABC timings for a summary trial were used as a comparator for a motoring trial and an either way trial for the other complex case types.

** ABC timings used were those for an 'all not guilty' contest in the Crown Court (as ABC indicates this is the most common of the contested case types).

*** We adjusted the figure from 191 minutes to 130 because there were only 12 cases of this category in the sample. The 130 minutes was arrived at by interpolating between the category below (at 83 minutes) and the category above (at 177 minutes) both of which had much larger sample sizes.

- 14.24 ABC timings do not distinguish between case complexity as the system relies on outcome types for typical cases, therefore in our comparisons the same ABC figure is used for several case complexity types.
- 14.25 Generally for both the magistrates' and Crown Court cases the amount of time being spent by prosecutors is a fraction of the ABC calculation and less than inspectors' average estimates for the case types with the largest volumes. Time pressures are most apparent in the Crown Court, with prosecutors only devoting 9% and 34% of the ABC time calculation for case complexity types straightforward no sensitive material and straightforward with sensitive material respectively; this is also much less than inspectors' estimates. For the more complex cases in the Crown Court there is a reasonable correlation for large case could include sensitive material with ABC at 179 minutes, Area prosecutors 61-180 minutes and the inspectors' average estimate of 177 minutes. In our visits to Areas we noted that for the more complex cases prosecutors were 'ring-fenced' to these cases to ensure the work was conducted thoroughly.
- 14.26 The most striking contrast is for case type very large and complex case in the Crown Court. ABC calculations are 179 minutes (0.4 day), Area prosecutors estimate one-five days and the inspector's average for this case type in their file sample was nine days.
- 14.27 Further insight to the actual situation is shown in the questionnaire response to the proposition "I have sufficient time to discharge my disclosure responsibilities". 172 responded giving a very mixed picture. Overall for both courts there were 38% positive responses and 39% negative, but interestingly 23% were neutral. The Crown Court situation was worse with 34% being positive, 45% negative and 21% remaining neutral. The proposition also had a free text commentary field and we received 27 specific comments, of which 19 related to time pressures. Summarising these comments and placing them in the order of frequency of concern shows:

Comments	Responses
1 Find fulfilling duties thoroughly very difficult	7
2 Very time consuming in volume/complex cases	6
3 Increases in court sessions results in less time for disclosure	3
4 Do the best I can in limited time	3

- 14.28 In addition prosecutors reported that significant time was wasted in both courts owing to disclosure problems, either through adjournments or delays. In the magistrates' courts most of the wasted time could be usefully reused because of the dynamic nature of the courts, but in the Crown Court this was not possible with only 50% of prosecutors stating that the time could be beneficially re-deployed to other work.

Conclusion

- 14.29 HMCPSI has been reporting on disclosure for some time. It has not been handled consistently well, although there has been some improvement. This and previous reports have recommended primarily process improvements in the belief that these will secure consistent good disclosure practice. However, this assumes that there is no significant resource implication related to CPIA.
- 14.30 Whilst ABC calculations indicate that there should be sufficient time to complete disclosure activity this time is not apparently actually available to front line prosecutors at the lower levels of case complexity. The analysis suggests that resource allocation for less serious cases is subsidising the most serious cases and, whilst this may be preferable than the other way round, it would indicate that no amount of improvement activity would permit the CPIA to operate as intended. (our findings at paragraphs 7.24-7.31 and elsewhere indicate a variation in quality of input in mid-range cases and this can stem from lack of time or purely lack of care). Our findings that prosecutors ought to be examining more material in order to make informed, secure decisions means that more time needs to be expended on a significant proportion of cases if the regime is to operate properly.
- 14.31 In some of the most serious and complex cases we found that sufficient resources are being devoted through the ring-fencing of prosecutors and other staff. As these types of cases are not specifically recognised through the ABC system the effect is to abstract resources from less serious cases. This accords with inspectors' findings of casework quality which has shown that it is often incomplete, done late and not to the required standard and we had similar feedback from defence counsel.
- 14.32 On the other hand the data also suggests that the lowest tier of simple motoring offences in the magistrates' courts has a comparatively generous amount of time under the ABC calculation which is not required in the view of inspectors and so this is, in fact, subsidising the most serious level of cases.
- 14.33 However our findings in paragraphs 14.23 and 7.31 about Crown Court cases indicate that even where the appropriate time is being devoted to disclosure issues, it is not used to include careful recording of decisions or reasons for them, and it is this that undermines confidence in the prosecutions' role in the disclosure regime.
- 14.34 More knowledge of the national case complexity profile and the effect on disclosure work at local level would permit resources to be better targeted than the broad approach using ABC calculations.

RECOMMENDATION 19

CPS Headquarters undertakes the necessary research to determine accurately the complexity profile of trial cases in the Crown Court and magistrates' courts, and clarifies if large and more serious cases are causing disclosure resource issues for the less serious cases.

14.35 Ring-fencing of resources is an appropriate action for the prosecution but that resource does not have to be a crown prosecutor; it may be better value for this to be done by external disclosure counsel on a fixed fee basis as provided for by CPS policy. This could be effective in the individual case and efficient as it would free up Area prosecutor resources enabling better handling of the less serious cases. This would reduce waste due to delays and improve throughput in the individual cases in which it is done, and also enable the less complex cases to be prepared better and so proceed speedily. There is existing guidance on the management of large scale cases in the Disclosure Manual.

RECOMMENDATION 20

Chief Crown Prosecutors should consider in those cases where examination of unused material represents a significant burden on the prosecution, whether the detailed work should be done by a specially instructed external disclosure counsel on a fixed fee basis attributed to the prosecution costs budget, and ensure that the guidance on the management of large scale cases is followed.

14.36 The inspection also shows that there is a great deal of time wasted owing to a generally inefficient disclosure process across the criminal justice partners. The duplication of work by prosecutors, slow means of communication between prosecutor and disclosure officer, and delay or non responses to multiple requests from defence solicitors which can lead to hearings or mentions at court, contribute to this. Furthermore, there is a substantial burden on the prosecution team dealing with disclosure issues to some degree unnecessarily in the cases in the magistrates' courts in which the defendant pleads guilty at a late stage or on the day of trial. In accordance with the CPIA the prosecution undertake disclosure in relation to the 80% of defendants in the Crown Court who plead guilty, disclosure having been triggered by the committal or service of the prosecution case, and in wider criminal justice terms some of this effort could be better used.

15 PARTICULAR FINDINGS IN SERIOUS AND COMPLEX CASES

Overview

- 15.1 A small number of serious or complex cases have, historically, created the most disclosure problems including miscarriages of justice, successful abuse of process arguments and general delay, not to mention the additional expense both to the Legal Aid fund and the CPS. The sheer volume of unused material generated in some cases makes the task of rigorously analysing the material a daunting one. It has, in the past, created the temptation to give blanket disclosure or 'the keys to the warehouse' to the defence. The Jubilee Line case which brought to attention the vast sums of public money that may be spent paying defence lawyers to examine large quantities of documentation was, in part, responsible for some recent steps aimed at more efficient and effective procedures, including the promulgation of two Court of Appeal protocols and the revision of the CPS/ACPO Disclosure Manual.
- 15.2 Technology can assist and the Serious Fraud Office is piloting the use of a computerised evidence database with an electronic disclosure suite. Documents are catalogued and cross-referenced and key words can facilitate searches. Nevertheless, the resource costs for the prosecution are huge in undertaking the examination and description of the documents to input them on the database, and it takes a significant length of time.
- 15.3 This highlights the point that where there is a large amount of material which is potentially relevant, expense will always be incurred because someone has to examine it if disclosure is to be done properly. The only question is where that responsibility and corresponding expense should rest. It must also be remembered that in fraud cases the way the prosecution puts their case, and the relationship between conspiracy and substantive offences of fraud, can have a significant influence on the amount of relevant unused material.

The cases examined

- 15.4 In this category we examined a murder case from each of our sample Areas and several at the Central Criminal Court, and also fraud cases from each of the Areas, including some being prosecuted by the CPS Fraud Prosecution Service in London. We did not examine any comparable in size to the Jubilee Line case, nor did we look at any terrorist cases.

The size and complexity of the task

- 15.5 The size and complexity of the disclosure task in these cases, both for the police and the CPS, must not be underestimated. There may be multiple MG6 schedules as the investigation proceeds, of both sensitive and non-sensitive material. Each may run into hundreds of pages and contain thousands of items. The use of the HOLMES computer in murder cases generates a great number of police actions and documents which can grow exponentially during an enquiry. In one murder case the CPS lawyer estimated that he had spent some three months in aggregate on disclosure issues. An experienced caseworker had spent a similar amount of time. To this must be added comparable amounts of police effort. In large-scale fraud cases there may be voluminous third party material comprising invoices, accounts and so on. If the police are granted access to this (and the disclosure regime encourages them to seek access to all potentially relevant material) the task becomes even greater.

Resources devoted to disclosure in serious and complex cases

- 15.6 There were substantial disparities between Areas in the amount and nature of CPS resources devoted to this category of case. The quality of disclosure differed accordingly. In one Area, both the murder and the fraud cases had a lawyer assigned to them from the beginning, largely working full-time on the cases for weeks at a stretch, including periods at the police station going through the actual material. To bring into focus the volume of unused material in these cases we estimate that for the murder case there were approximately 6,500 A4 pages which is the equivalent of a 1.3 meter column of paper and in the fraud case about 54,000 pages equivalent to an 11 meter column. In addition other material, such as CCTV and computer drives, need to be considered. The practice of dedicated lawyers being assigned to such cases was replicated.
- 15.7 On the other hand in another Area a fraud case had a succession of different lawyers assigned to it and, for a significant period, had not had an allocated lawyer at all. The work had been effectively devolved on to a caseworker who was forced to ask for guidance from counsel. None of the lawyers who had dealt with the case would, individually, have had sufficient knowledge of its complexity to be able to take disclosure decisions required to comply with the duty of continuing review. In another example a lawyer in a fraud case was the head of the Trial Unit and had significant other management and casework responsibilities. The case was in reality run by the caseworker and the lawyer only brought in where there was a formal necessity, such as signing letters. In a case handled by a different Area, it was plain that the lawyer had not had sufficient time to deal with initial disclosure properly. Junior counsel was instructed specifically to examine third party material - she was additionally asked to attend at the police station to examine the original police unused material and "flag up any material that the Crown should have disclosed at the beginning".
- 15.8 Compliance with the CPIA and protocols was broadly commensurate with the quality and amount of resources devoted to it. In one Area the allocated lawyer in a homicide case had sufficient time to carry out disclosure with great care and diligence, adhering to the CPIA and protocols. By contrast in an Area which had a number of homicide cases to deal with all at the same time, a process more akin to a blanket disclosure of all non-sensitive items operated, because of pressure of work and as a "safety measure". In another the lawyer in one complex case was not permitted by his line manager to spend the two days necessary to examine the material at the police station until counsel advised that it needed to be done.
- 15.9 Each Area will endeavour to assign resources to a case for disclosure dependent upon the crime and case profile of the particular Area. However, the examples reveal an inconsistency of approach. This makes it difficult to determine (as we concluded in the previous chapters) whether resources is the key issue in securing compliance with the duties of disclosure, or whether better case planning and management is required. This will include making the best use of available resources in the circumstances of the individual case. This may involve instructing the lead prosecuting counsel and a disclosure junior at an early stage so the initial and continuing disclosure can be undertaken properly. The CPS lawyer would retain responsibility for the case, but rely on the systematic sifting and analysis of material and advice provided by prosecuting counsel.

GOOD PRACTICE

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

- 15.10 We found that in some cases the practice persisted of giving near blanket disclosure on the specific advice of counsel because it would “do no harm” and demonstrated that the prosecution “had nothing to hide”. We found this type of approach particularly in, but by no means confined to, fraud cases. The purpose of disclosure being not to serve relevant material, but to prove that none existed. In fraud cases this approach appears to be taken for tactical reasons and because of the tendency of the defence to launch abuse of process applications at the start of the trial on the grounds that the prosecution had not carried out their duties of disclosure properly. Defendants in fraud cases, more than any other type of case, participate in the trial and are often more intimately acquainted with documentation or material that they know exists (or does not exist) and can exploit any ‘limitation’ on disclosure to their own advantage. Blanket disclosure is a way of heading off such applications and a view prevails that judges will be less likely to countenance abuse arguments if they can be told that the defence have had access to everything.
- 15.11 We have some sympathy with this approach on a tactical basis. However, this implies scant confidence by counsel or judges in the ability of the CPS or the prosecution as a whole to apply the tests or demonstrate convincingly that they have done so. Additionally it means that the defence may spend a considerable amount of time examining the material, perhaps delaying the trial and of course charging for this, often at the expense of the public through the Legal Aid fund. The Senior Presiding Judge for England and Wales has pointed out that 1% of cases take up 50% of the Crown Court Legal Aid budget, and that it is in everyone’s interest to simplify the procedures in such cases.

16 ACCESSING THE LAW AND GUIDANCE IN RELATION TO DISCLOSURE

- 16.1 In undertaking this review it was apparent at an early stage that the relevant law and guidance was not necessarily easily traceable by practitioners. In relation to certain items this is inevitable, in that for instance the Criminal Procedure Rules apply to the conduct of criminal cases generally, and not only to disclosure issues. The amendments to the primary legislation, the Code of Practice, and the Criminal Procedure Rules means that practitioners must look to updated text books (or electronic material) to ensure that they are using the current and definitive law and even then it is necessary to cross-check between the current year's version of the text book and any supplements issued during the year. Furthermore it was difficult to identify when protocols issued by the Court of Appeal found their way into the text books, and then not necessarily in the main chapter but in an appendix.
- 16.2 We have identified the following as the key items needed by prosecutors to deal fully with disclosure issues.
- The Criminal Procedure and Investigations Act 1996 (as amended by the Criminal Justice Act 2003).
 - The Code of Practice issued under section 23 of the Criminal Procedure and Investigations Act 1996 (the revised Code came into force on 4 April 2005).
 - The Attorney General's Guidelines on the disclosure of unused material and criminal proceedings (new Guidelines were issued in April 2005).
 - The CPS/ACPO Disclosure Manual.
 - The CPS/ACPO Manual of Guidance (which contains the MG forms).
 - The DPP's Guidance on Charging.
 - The Protocol for the Control and Management of Unused Material in the Crown Court dated 20 February 2006.
 - The Disclosure: Experts' Evidence and Unused Material Guidance Booklet for Experts.
 - The Protocol for the Control and Management of Heavy Fraud and other Complex Criminal Cases dated 22 March 2005.
 - The Criminal Procedure Rules 2005 (as amended).
 - The Criminal Procedure and Investigations Act 1996 (Defence Disclosure Time Limits) regulations 1997 issued under section 12 of the Act.
- 16.3 We are concerned that this key legislation and guidance is not collated by the CPS, either in hard copy or through electronic links, with the Disclosure Manual. Whilst it may be envisaged that the Disclosure Manual and an up-to-date copy of Archbold Criminal Pleading, Evidence and Practice (Thomson: Sweet and Maxwell) is sufficient, we consider that the lack of drawing together of these key documents has had an adverse impact on the secure and confident handling of the duties of disclosure by prosecutors. It is also vital to ensure the Disclosure Manual is up-to-date in all respects.

- 16.4 In addition this lack of collation of the law and guidance must have an adverse impact on other criminal practitioners and the judiciary. Whilst it is unlikely that any form of full codification is feasible, a centrally-led drive to ensure ease of access to up-to-date law and guidance would be a significant step towards a consistent approach across the CJS. The Disclosure Manual is accessible to defence solicitors and advocates, courts and others (save for the restricted sections) and so the points in paragraph 16.3 are of importance in supporting the consistent application of the whole regime.

RECOMMENDATION 21

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

ANNEX A: BRIEF LEGISLATIVE HISTORY/PROCEDURAL EVOLUTION AND DESCRIPTION OF CURRENT REGIME

- 1 Unused material is material that ‘which may be relevant to an investigation and which does not form part of the prosecution case.’³ Until 25 years ago⁴ there was little formal regulation of this subject but, since the enactment of the Criminal Procedure and Investigations Act 1996, disclosure has become the ‘battleground of the modern criminal justice system.’⁵ This annex offers a brief description of the development of the disclosure rules and the academic analyses of the subject.
- 2 Opponents of complete disclosure argue that time and money is wasted by defendants conducting ‘fishing expeditions’ hoping to find a bogus but plausible defence, a discrepancy in the material with which to impugn the prosecution’s case, or information so sensitive that the prosecution will drop the case rather than disclose it.⁶ The factually guilty may escape conviction by such tactics and the process may cause unnecessary distress to witnesses.
- 3 Those in favour of allowing the defence free access to the unused material argue that the principle of ‘equality of arms’⁷ requires that suspects be able to select from the same material as the prosecution in preparing their defence. They object in principle to making access to unused material contingent upon advance disclosure of the defence case, arguing that this is inappropriate in an adversarial system and that it undermines both the presumption of innocence and the privilege against self-incrimination.⁸ Criticisms are made in practical or cultural terms that police officers and prosecutors cannot be expected to identify potentially relevant material for the defence. Although the demands made by searching unused material in major cases may be onerous, non-disclosure has been a significant cause of several high-profile miscarriages of justice.⁹
- 4 Adaptations have been made to the CPIA and the associated non-statutory guidance. The CPS and ACPO issued guidance in March 1997 to assist prosecutors and the police with their disclosure responsibilities; this was updated in mid-2003.¹⁰ The Attorney General issued Guidelines in 2000 which were revised in April 2005.¹¹ The CPIA was then amended by the Criminal Justice Act 2003, and the Crown Court protocol¹² was issued in 2006.

3 Attorney General’s Guidelines 2005 (para 3) Archbold A 242.

4 See J. Niblett, *Disclosure in Criminal Proceedings* (Blackstone Press Ltd: London, 1997) for a full history.

5 D. Phillips, ‘The Inquisitorial Aspects of an Adversarial System’ (2002) *Med Sci Law* 98 at 103.

6 C. Pollard, ‘A case for disclosure’ [1994] *Criminal Law Review* 42; D. Rose, *In the Name of the Law: The Collapse of Criminal Justice* (London: Jonathan Cape, 1996).

7 *Foucher v France* (1998) 25 EHRR 234; *Jasper v UK* (2000) 30 EHRR 441.

8 See M. Redmayne (1997) ‘Process Gains and Process Values: The Criminal Procedure and Investigations Act 1996’ *The Modern Law Review* 60, January, 79-93; J. Sprack (1998) ‘Will defence disclosure snap the Golden Thread?’ *The International Journal of Evidence and Proof* 2:4. 224-231.

9 *R v Maguire and Others* (1992) 94 Cr App R 133; *R v Kiszko* (1992) *The Times* 18 February; *R v Ward* (1993) 96 Cr App R 1; and *R v Taylor (Michelle Ann) and Taylor (Lisa Jane)* (1994) 98 Cr App R 361.

10 Joint Operation Instructions – Disclosure of Unused Material (JOPI), available at <http://www.cps.gov.uk/legal/section20/JOPI.pdf>, last accessed 14 October 2007.

11 Disclosure of Information in Criminal Proceedings, 2000, available at http://www.cps.gov.uk/legal/section20/chapter_c.html last accessed 14 October 2007.

12 Disclosure: A Protocol for the Control and Management of Unused Material in the Crown Court 20 February 2006.

The common law

- 5 Disclosure requirements were first formalised by the non-statutory Attorney General's Guidelines in 1982.¹³ These required the prosecution to disclose unused material to the defence if 'it has some bearing on the offence or offences charged and the surrounding circumstances of the case.' Some discretion was reserved for withholding sensitive information. The courts developed the Guidelines: relevance was defined very broadly¹⁴ and the evidential value of material became for the defence, rather than the prosecution, to determine.¹⁵ *Ward* was the acme of open disclosure, in which the Court held:

*We would emphasise that 'all relevant evidence of help to the accused' is not limited to evidence which will obviously advance the accused's case. It is of help to the accused to have the opportunity of considering all the material evidence which the prosecution have gathered, and from which the prosecution have made their own selection of evidence to be led.*¹⁶

- 6 This position was soon modified. Judges were encouraged to take a 'robust' approach to applications seeking disclosure about informants unless they were essential to the running of the defence.¹⁷ It was held in *Keane*¹⁸ that material must be disclosed if, on a sensible appraisal, it was judged:

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

(2) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution propose to use; or

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

- 7 There was criticism of this approach: the police made representations to the Royal Commission on Criminal Justice (RCCJ) about the onerous burden disclosure placed upon them. The DPP referred to these 'anarchical days' of complete disclosure and described the resentment of the Legal Aid Board at the additional expenditure such practices incurred.¹⁹ The Lord Chief Justice complained about the amount of judicial time consumed by decisions about disclosure and the 'grave difficulties' caused to the CPS and the courts by 'the one-way traffic of disclosure by the prosecution to the defence.'²⁰ The Home Office Working Group on the Right to Silence²¹ and the RCCJ²² suggested that defendants should be required to outline their case in advance of trial in order to facilitate more limited disclosure.

13 (1982) 74 Cr App R 302.

14 *R v Brown (Winston)* [1995] 1 Cr App R 191.

15 *R v Saunders and Others* (1989) 29 September, unreported.

16 *R v Ward*, n 7 above, per Glidewell L.J. at p25.

17 *R v Turner* (1995) 2 Cr App R 94.

18 *R v Keane* [1994] 1 WLR 746.

19 D. Calvert-Smith, JUSTICE Seminar on Disclosure, 12 June 2000.

20 Taylor LCJ (1994) 'The Tom Sergeant Memorial Lecture', *New Law Journal*, 141.

21 Home Office, Report of the Working Group on the Right to Silence (London: HMSO, 1989).

22 Royal Commission on Criminal Justice, (Chair: Viscount Runciman of Doxford) (1993) Report Cm 2263. London: HMSO.

- 8 No research was conducted on this issue but a Law Society study found that the vast majority of cases generate fewer than 125 pages of unused material.²³ The contemporary literature criticising the working practices of defence representatives and their lack of adversarialism²⁴ did not accord with claims about defence solicitors abusing the disclosure provisions either. Academic criticism focused upon the impact that the Act would have on the fairness and values of the criminal justice system.²⁵

The statutory framework

- 9 The CPIA introduced the first statutory regime governing the disclosure of unused material and requiring disclosure of the defence case in advance of trial, by means of a defence statement that is compulsory in the Crown Court and voluntary in the magistrates' courts.
- 10 The CPIA and its Code of Practice established a two-stage procedure for the prosecution to disclose unused material to the defence. Initially, any material that might undermine the prosecution case was served as Primary Prosecution Disclosure: a copy of the schedule of non-sensitive material and, either any previously undisclosed material that might undermine the prosecution case, or a statement that no such material existed.²⁶ The accused was then required (in the Crown Court) to submit a defence statement to the court and the prosecutor within 14 days. Following receipt of a defence statement Secondary Prosecution Disclosure had to be made of any material which might have supported the defence outlined in the defence statement, or a statement confirming that no such material existed.
- 11 The Attorney General's Guidelines (2000) provided that the prosecution should supply the defence with all the evidence upon which it proposes to rely in summary trials; give open access to all material seized but not examined by investigators and automatic disclosure of certain categories of material following receipt of an appropriate defence statement. Investigators should err on the side of recording and retaining material and any doubts should be resolved in favour of disclosure.
- 12 The CJA created a single objective test of the disclosure of any unused material 'which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused.'²⁷ This is a continuing duty that should be re-appraised following receipt of the defence statement.

23 Law Society, *Disclosure: Law Society Response* (London: The Law Society, 1995). A subsequent study, examining only Crown Court cases, found that the median number of pages in prosecution bundles was 75; 90% of files contained 225 pages or fewer suggesting that the unused material was likely to be slight (P. Pleasence and H. Quirk (2002) *Criminal Case Profiling Study: Final Report*. LSRC Research Paper (Criminal) No.1, available at www.lsrc.org.uk).

24 J. Baldwin, *The Role of Legal Representatives at the Police Station*, Royal Commission on Criminal Justice Research Study No. 3, (London: HMSO, 1993); M. McConville, J. Hodgson, L. Bridges and A. Pavlovic (1994) *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain*, Oxford: Clarendon Press.

25 Above n. 6; R. Leng, (1995) 'Losing Sight of the Defendant: The Government's Proposals on Pre-Trial Disclosure', *Criminal Law Review*, 704-11; R. Leng, (1997) 'Defence strategies for Information Deficit: Negotiating the CPIA', 1 *International Journal of Evidence and Proof* 4, 215-231.

26 s. 3(1)

27 CPIA s (3)(1)(a) as amended by CJA s32.

- 13 The CJA requires more specific defence statements setting out the nature of the defence, including any particular defences on which it is intended to rely; indicating the matters of fact on which issue is taken with the prosecution and why; any points of law and authorities on which it is intended to rely; and full details of any alibi evidence. The accused must also give notification to the court and prosecutor of any witnesses it is intended to call and give details of any expert instructed.
- 14 In the Crown Court if a defendant fails to provide a statement, submits it late, sets out a defence at trial that is inconsistent with it, or calls alibi or witness evidence that was not detailed in the statement, then the court or any other party may make such comment as appears appropriate.²⁸ The court or jury may draw such inferences as appear proper when considering their verdict, having regard to (a) the extent of the differences in the defences and (b) to whether there is any justification for it.²⁹
- 15 Notwithstanding the CPIA regime the defence is entitled to copies of: the custody record,³⁰ first descriptions before an identity parade,³¹ interview tapes,³² stop and search records,³³ and documents to be used to refresh the memory in the witness box.³⁴
- 16 Other material is exempt from the regime, including that intercepted under the Regulation of Investigatory Powers Act 2000³⁵ and the Sexual Offences (Protected Material) Act 1997.³⁶ The CPIA also preserves ‘the rules of common law as to whether disclosure is in the public interest’.³⁷ The prosecution can apply to the court to have material attracting claims of PII made exempt from the disclosure regime. The court must address a series of questions before allowing any derogation from ‘the golden rule of full disclosure’ if ‘there a real risk of serious prejudice to an important public interest’. Special counsel may be appointed to ensure that the contentions of the prosecution are tested and the interests of the defendant protected. If limited disclosure may render the trial process, viewed as a whole, unfair to the defendant, then fuller disclosure should be ordered even if this may lead the prosecution being discontinued. Such decisions can be subject to challenge and must be kept under review by the courts.³⁸
- 17 The CPIA and the Code of Practice do not address the duties of third parties in relation to unused material; items only become material for the purposes of the Act once held by the investigator or disclosure officer.³⁹ The existing mechanisms for eliciting disclosure from reluctant third parties require that such material is admissible and relevant⁴⁰ so are inappropriate for unused material. The defence can apply to the court to order disclosure but must be able to show that the material is relevant. This is obviously difficult in cases where the defence suspects that a type of material

28 s 11(2) (as amended).

29 s 11(2)-(4) (as amended).

30 Police and Criminal Evidence Act 1984 Code C, para 2.4a; Code H para 2.6.

31 PACE Code D, para 3.1.

32 PACE Code E 4. 4.19.

33 PACE Code A, para 4.2; 4.12; 4.19.

34 *R v Sekhon*, 85 Cr App R 19, CA.

35 s 8(6) CPIA.

36 s 3(1) and s.9(2) Sexual Offences (Protected Material) Act 1997.

37 s 21(1) CPIA. See the Criminal Procedure Rules 2005 (S.I. 2005 No 384).

38 *R v H & C* [2004] UKHL 3; Attorney-General’s Guidelines on disclosure; *R v West (Ricky)*, 69 J.C.L. 309, CA ([2005] EWCA Crim. 517)

39 *DPP v Wood* and *DPP v McGillicuddy* [2006] EWHC 32.

40 *R v Reading Magistrates, ex parte Berkshire County Council* [1996] 1 Cr App R 239; *R v Derby Magistrates’ Court, ex parte B* [1996] 1 Cr App 285; *R v Alibhai* [2004] EWCA Crim 681.

might exist but is unable to give details, for example in cases of historical sexual abuse the defence is unlikely to know if previous allegations of abuse have been made against others but such material, were it to be found, might be very useful.

- 18 Following *R (on the application of B) v Stafford Combined Court*,⁴¹ in considering applications for the disclosure of medical records the court must now also ensure that interference with the patient's right of confidentiality is proportionate and strikes a balance between the rights of the complainant and the defendant.

Reaction to the CPIA

- 19 The CPIA has 'rather oddly, [been] challenged as dangerous from both crime control and a due process lobbies'.⁴² Both sides agree that failures in disclosure may cause miscarriages of justice and the practical problems caused by the CPIA were troubling to all. When David Calvert-Smith became Director of Public Prosecutions in 1998 he expressed concerns that:

*Innocent people will be convicted. Guilty people will be acquitted by juries or judges, or have their convictions quashed on appeal because of late disclosure which turned the jury or judge against the prosecution.*⁴³

- 20 The CPIA attracted immediate concern and criticism. A survey conducted by the Criminal Bar Association and British Academy of Forensic Sciences found that 84% of barristers were dissatisfied with how the provisions were working, citing numerous examples of bad practice and potential injustice.⁴⁴
- 21 The CPS Inspectorate found that criminal practitioners outside the CPS had an 'almost universal lack of faith'⁴⁵ that the system was working satisfactorily.
- 22 Home Office commissioned research found that the Act had not achieved its aims and that the vast majority of practitioners was dissatisfied with the operation of the Act (88% of barristers, 87% of defence solicitors and 61% of judges).⁴⁶
- 23 Prosecutors complained that schedules were incomplete, material was not sent to them, disclosure officers were difficult to contact and defence statements were cursory.⁴⁷ The police considered that attempts to encourage them to be objective and fair were undermined by the partisan conduct of defence teams.⁴⁸ Many expressed frustration that applying the provisions had become futile because of open disclosure between counsel at court and judges failing to enforce the provisions.⁴⁹

41 [2006] 2 Cr App R 34.

42 D. Ormerod, 'Improving the disclosure regime' (2003), 7 *The International Journal of Evidence and Proof* 102, at 103.

43 CPS press release 118/99.

44 British Academy of Forensic Sciences/Criminal Bar Association (1999) *Survey of the Practising Independent Bar into the Operation in Practice of the Criminal Procedure and Investigations Act 1996 Disclosure Provisions*, London: BAFS.

45 Crown Prosecution Service Inspectorate, *The Inspectorate's Report on the Thematic Review of the Disclosure of Unused Material*, Thematic Report 2/2000, (London: Crown Prosecution Service, 2000) para. 3.38.

46 J. Plotnikoff and R. Woolfson, (2001) 'A Fair Balance?' *Evaluation of the Operation of Disclosure Law RDS Occasional Paper No. 76*, London: Home Office.

47 Above at 55.

48 Phillips, above n. 3.

49 C. Taylor, *Criminal Investigation and Pre-Trial Disclosure in the United Kingdom: How Detectives Put Together A Case*, (Lampeter: The Edwin Mellen Press, 2006 at 226-227).

24 Since the law changed in 2003 there have been no empirical studies conducted of the disclosure system, but academic concerns about the interaction between the disclosure regime and the occupational practices of criminal justice actors have been developed.⁵⁰

25 Most scholarly opinion tends to the view that ‘the problems that afflict prosecution disclosure are too deep-rooted to be cured by legislative tweaking’.⁵¹ It is argued that the Act makes demands of individuals in the criminal justice system that they are ill-equipped to meet, or that it re-inforces poor occupational practice:

*The culture of each of the players... is fundamentally out of tune with the disclosure rules. The police don't want to disclose, the prosecution lawyers have not got the raw material or the time to check closely what they get from the police, and the defendant has no interest in being helpful either to the prosecution or to the smooth running of the system.*⁵²

26 Undertaking the full range of responsibilities and actions required under the disclosure regime is a difficult task for police officers to perform. It requires more than the simple cataloguing of material; the officer is expected to make detailed judgments about the legal significance of evidence collected and the ways in which it might undermine the case against the accused. It has been argued that this is not a job for which the police are trained or qualified.⁵³ Crown prosecutors are not police officers so cannot be expected to know what material exists. Neither can they always be expected to know what material might assist the case for the defence.

27 It is difficult for somebody involved in the case, or who works closely with the investigating officers, to analyse evidence impartially. Previous research has shown that police investigations may be structured in order to construct cases against those whom officers consider to be guilty;⁵⁴ non-disclosure can form part of this process.⁵⁵

28 The complex and bureaucratic requirements of the Act have caused confusion and accountability vacuums and ignore the generally linear progression of cases through the system. The CPIA created an ‘awkward split of responsibilities’⁵⁶ between the CPS and the police. The legislation makes the prosecutor responsible for disclosure when, in reality, ‘lawyers are only as good as the material given to them’.⁵⁷

29 Despite the concern expressed by many prosecutors that the schedules were incomplete or insufficiently described, it is rare for prosecutors to examine material that the disclosure officer has not identified as potentially undermining the prosecution case.⁵⁸

50 H. Quirk, (2006) ‘The significance of culture in criminal procedure reform: Why the revised disclosure scheme cannot work’, *The International Journal of Evidence and Proof* 10: 42-59; C. Taylor *ibid*.

51 M. Redmayne, ‘Criminal Justice Act 2003: Disclosure and its Discontents’ [2004] *Crim LR* 441 at 445.

52 M. Zander, [2006] *Mission Impossible* 156 *NLJ* 618.

53 Quirk above n. 48

54 M. McConville, A. Sanders and R. Leng (The Case for the Prosecution. London: Routledge, 1991).

55 A. Sanders and R. Young, *Criminal Justice* (Oxford: OUP, 2006:340).

56 CPSI, above n. 43, para. 13.2.

57 M.E. Pater, (1999) ‘Exposed Weakness?’ *Police Review* 23.

58 CPSI, above n. 43, para. 4.102.

- 30 Although the prosecution has a continuing duty to review the unused material, it is possible that no member of the prosecution team in court has personal knowledge of the contents of all the unused material. Prosecuting counsel are rarely requested formally to advise on the unused material; CPS caseworkers sometimes have to cover more than one court and the disclosure officer might not be there to advise.
- 31 Some commentators have taken a more positive view of disclosure and have sought to make the regime work by closer procedural compliance, of the type set out subsequently in the Crown Court Protocol. Epp suggested better training, review and scrutiny of police officers, including the holding of 'filter hearings' at which officers from an 'Investigation Review Department' would give evidence to demonstrate compliance with the CPIA Code. He also suggested the possibility of adverse inferences being drawn against the prosecution for non compliance with its disclosure obligations.⁵⁹
- 32 There has been little case law around the working of the CPIA. Whilst there are limited sanctions that can be applied for failure to comply with the regime, there are signs that the courts are taking an increasingly strict approach to case management⁶⁰ and the interpretation of the provisions.
- 33 The Crown Court Protocol,⁶¹ issued in 2006, responds to continuing criticisms about insufficient adherence to the legislative regime. It calls for a 'sea-change' in the approach to unused material, declaring that:
- The overarching principle is therefore that unused prosecution material will fall to be disclosed if, and only if, it satisfies the test for disclosure applicable to the proceedings in question, subject to any overriding public interest considerations.*⁶²
- 34 Anthony Edwards has made the point that more robust judgments must also be made against the Crown for failure to comply with its disclosure responsibilities 'if the system is to regain credibility'.⁶³

59 J. A. Epp, (2001) 'Achieving the aims of the disclosure scheme in England and Wales', 5 *The International Journal of Evidence and Proof* 188 at 198.

60 *R v Chaaban* [2003] EWCA Crim 1012; *R v Jisl* [2004] EWCA Crim 696; *R v Lee* [2007] EWCA Crim 764.

61 Disclosure: A Protocol for the Control and Management of Unused Material in the Crown Court 20 February 2006.

62 Endorsed in *R v K* [2006] All ER 552, CA.

63 A. Edwards, [2007] 'Case management, compliance and resources', *Crim LR* 665 at 666.

ANNEX B: KEY PERFORMANCE RESULTS TABLE – THEMATIC REVIEW 2007

	Finalised cases	Live cases	Total cases
Initial (or primary) disclosure dealt with properly in all cases	72.1% (44 out of 61 cases)	46.2% (42 out of 91 cases)	56.6% (86 out of 152 cases)
Continuing (or secondary) disclosure dealt with properly in all cases	84.4% (27 out of 32 cases)	63.6% (35 out of 55 cases)	71.3% (62 out of 87 cases)
Disclosure of sensitive material dealt with properly in all cases	46.7% (14 out of 30 cases)	48.3% (14 out of 29 cases)	47.5% (28 out of 59 cases)
Initial (or primary) disclosure dealt with properly in magistrates' courts' cases	80.0% (24 out of 30 cases)	38.1% (16 out of 42 cases)	55.6% (40 out of 72 cases)
Continuing (or secondary) disclosure dealt with properly in magistrates' courts' cases	75.0% (3 out of 4 cases)	85.7% (6 out of 7 cases)	81.8% (9 out of 11 cases)
Disclosure of sensitive material dealt with properly in magistrates' courts' cases	28.6% (2 out of 7 cases)	25.0% (2 out of 8 cases)	26.7% (4 out of 15 cases)
Initial (or primary) disclosure dealt with properly in Crown Court cases	64.5% (20 out of 31 cases)	53.1% (26 out of 49 cases)	57.5% (46 out of 80 cases)
Continuing (or secondary) disclosure dealt with properly in Crown Court cases	85.7% (24 out of 28 cases)	60.4% (29 out of 48 cases)	69.7% (53 out of 76 cases)
Disclosure of sensitive material dealt with properly in Crown Court cases	52.2% (12 out of 23 cases)	57.1% (12 out of 21 cases)	54.5% (24 out of 44 cases)

ANNEX C: IMPLEMENTATION (AS AT JULY 2007) OF RECOMMENDATIONS FROM HMCPSI'S REPORT ON THE DISCLOSURE OF UNUSED MATERIAL PUBLISHED IN MARCH 2000

Primary disclosure

- 1 Prosecutors always request unused material schedules where they are missing before proceeding to trial.
Substantial progress - in our file sample we found only one case, a traffic file, where an MG6C schedule had not been provided by the police or requested by the prosecutor.

- 2 Prosecutors examine the MG6C schedule carefully, in the light of the evidence in the case, and if omissions are apparent they send the schedule back to the disclosure officer for rectification.
Limited progress - we found evidence of MG6C schedules being incomplete, containing irrelevant items and of items on the schedules being inadequately described. Such schedules were often not sent back to the disclosure officer for amendment.

- 3 The CPS examines, with ACPO, means of reducing the proportion of defective MG6C schedules submitted to the CPS. This should include the settings of targets using our findings as an initial benchmark.
Limited progress - many Areas have worked with local police forces to improve the quality of the submission of MG6C schedules to the CPS, and the Disclosure Manual has assisted, but the quality remains variable.

- 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.
Limited progress - a wallchart was devised by the CPS and ACPO for use by both police and CPS. However, it was not updated to deal with the changes made by the Criminal Justice Act 2003.

- 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.
Substantial progress - in that agreed standards are set out in the Disclosure Manual. However, in our file sample the use of inadequate descriptions on the schedules of unused material was widespread. In only 75 out of 152 files that we looked at (49.7%) was there a sufficiently detailed explanation of the unused material recorded on the MG6C schedule.

- 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.
Limited progress - the Disclosure Manual, at paragraph 10.6 and onwards, states that routine revelation of key documents should be made to prosecutors as part of the disclosure process. These documents are generally the contemporaneous ones, the crime report and the log of

messages. Compliance with this requirement varied from Area to Area. Many police forces do now routinely reveal this material to the prosecutor. However where there were failures, they tended to be widespread across the Area and the lack of this material clearly hampered the prosecutor's ability to deal with disclosure in a timely and effective manner. Where this occurred, there was little evidence of remedial action by senior managers to rectify the situation. That there should be automatic routine revelation to the CPS of all of contemporaneous material to the investigation on all contested cases is one of our recommendations at paragraph 7.23.

- 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.
Limited progress – the quality of endorsements on schedules and disclosure record sheets remains variable (see paragraphs 7.13 and 7.28).
- 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.
Limited progress – we found examples of prosecutors not being proactive in scrutinising MG6C schedules. Those that were incomplete, contained inadequate descriptions and/or irrelevant items were often not sent back to the disclosure officer for rectification. Requests for copies of any unused material from the police not already provided were also rare. On the whole completion of the MG6E was perfunctory, and it was seldom that case officers drew attention to undermining or assisting material even where it was present. The CPS often rely on these at least in part for their disclosure decisions but in reality most do not provide any reliable indication as to whether the unused material does, in fact, contain potentially undermining or assisting items.
- 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.
No longer applicable.
- 10 In all cases letters are correctly dated when sent and files contain a record of the date on which primary disclosure is made.
Substantial progress – in the majority of files that we examined CPIA letters were correctly dated when sent and files contained a record of the date on which initial disclosure had been served, in the form of a copy of the CPIA letter itself. However, we generally found very limited use of the disclosure record sheet and often poor or non-existent file endorsements, which meant that it was difficult to navigate a precise disclosure trail and made the auditing of what exactly had been disclosed when, why and by whom, an impossible task.
- 11 CCPs should consult with the police to ensure that a timely CRO check is made on the antecedent history of all prosecution witnesses.
Substantial progress – in our file examination, the police routinely supplied details of any antecedent history of prosecution witnesses where appropriate.

- 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.

No longer applicable. Guidance on the disclosure of previous convictions and cautions of prosecution witnesses was issued on 30 March 2007.

- 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 is the situation).

Limited progress – MG6Bs were submitted in all appropriate cases in our file sample. However, we saw limited evidence of MG6s containing statements that there were no disciplinary findings or convictions against all police witnesses in the case, where appropriate.

- 14 The Trials Issues Group develops arrangements for monitoring the quality and timeliness of disclosure schedules.

Limited progress – throughout this inspection we found limited evidence of individual performance management on disclosure handling, although some Areas use CQA to good effect. That there is systematic dip-sampling against nationally agreed criteria for disclosure performance management forms one of our recommendations (see paragraph 13.11).

- 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.

No progress – in our file examination of magistrates’ courts’ cases there were no instructions to agents in relation to handling unused material on any of the files we examined at court, even when issues were likely to arise, for example when initial disclosure had only been served the day before trial. We saw very few Crown Court cases where counsel had been given specific instruction on disclosure issues, namely on what had been disclosed or withheld and why. We found that in most cases counsel was provided with sufficient detail about the unused material to enable them to conduct the trial. This was, however, in the form of copies of the material itself and the schedules which had been served on the defence.

Secondary disclosure

- 16 Prosecutors should give guidance to the disclosure officer on any key issues raised by the defence.

Limited progress – we found a few examples of evidence of prosecutors advising the disclosure officer on issues raised in defence statements or otherwise. With the exception of a few complex and larger cases, we found limited evidence of prosecutors clearly re-appraising the unused material in the light of the defence case statements.

- 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.
Limited progress - in only 27.5% of cases in our file sample where the defence statement had been sent to the police had a response been received from them in the form of a second MG6E.
- 18 Prosecutors should be more proactive in scrutinising the MG6C to identify any material which, in 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.
Limited progress - in a substantial number of cases there was no evidence on the file which demonstrated that the unused material had been re-examined by a lawyer in the light of the defence statement to see if, now that the defence had been formally spelt out, there were any items that might assist it, but whose relevance had not previously been apparent.
- 19 CCPs take steps to ensure that defence statements are sent to disclosure officers expeditiously.
Substantial progress - however, we found a number of instances where defence statements were not sent onto the police or were sent late, giving the officer no opportunity to respond to the statement prior to the morning of the trial.
- 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.
- No progress - in our file examination of magistrates' courts' cases there were no instructions to agents in relation to handling unused material on any of the files we examined at court, even when issues were likely to arise, for example when initial disclosure had only been served the day before trial. We saw very few Crown Court cases where counsel had been given specific instruction on disclosure issues, namely on what had been disclosed or withheld and why. We found that in most cases counsel was provided with sufficient detail about the unused material to enable them to conduct the trial. This was, however, in the form of copies of the material itself and the schedules which had been served on the defence.*
- 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.
Limited progress - continuing disclosure was provided to the defence in ten cases in our file sample, and was sometimes difficult to identify as the file was filed with other correspondence in the case, rather than by using the correct CPIA letters and filing in the disclosure folder. There was a record kept of continuing disclosure in three out of ten cases (30%).

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. *Limited progress - our examination of files showed that MG6D schedules were present on 142 out of 153 files (93.4%), which is a weakening of the proportion from our last thematic review when it was 99.3%.*
- 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. *Limited progress - out of a sample of 77 cases containing material believed by the disclosure officer to be sensitive only 19.5% fulfilled the real risk test in R v H & C. We make the recommendation that the CPS work with ACPO to reduce the quantity of material assessed as sensitive by the disclosure officer in compliance with paragraph 8.13 of the Disclosure Manual.*
- 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. *No longer applicable - since our last thematic review the MG6D schedule has been re-drafted.*
- 25 The DPP should issue guidelines requiring that the conduct of cases involving applications for PII be supervised by prosecutors of suitable seniority who have received appropriate training. No application of Type III (i.e. without notice to the accused) should be made, save on the authority of the relevant CCP (or Director of Casework where appropriate). *Limited progress - guidance has been provided, but lack of records make it difficult to assess the quality and appropriations of such applications.*
- 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.
- Limited progress - from our enquiries, it would appear that this recommendation is not widely adhered to. We therefore make a recommendation that Areas are required to maintain a log of all applications for PII.*
- 27 Prosecutors should inspect all sensitive material, or be fully informed about it by a senior police officer. *Limited progress - in interview prosecutors readily accepted that they did tend to rely on the disclosure officer and did not often examine all the sensitive material.*

The duty of continuing review

- 28 CCPs discuss with the police ways of ensuring that all relevant unused material, in particular negative fingerprint and forensic evidence, created after primary disclosure is submitted on the appropriate schedule. *Limited progress - in many cases in our file sample additional material provided by the police after the submission of the full file and service of initial disclosure was provided under cover of an internal memorandum, rather than itemised on a revised schedule. Requests for a revised schedule by the prosecutor were rare.*

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.

No progress – we found very little evidence of this being done in our file sample.

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

Limited progress - whilst we found that protocols exist regarding the exchange of information in the investigation and prosecution of child abuse cases in most Areas - albeit that some are informal agreements, need updating and are not in line with the national model protocol - we found no evidence of protocols being entered into that deal with different types of third party material, such as CCTV recordings and medical records. We recommend that the CPS consult with the police and third parties such as local authorities to ensure that protocols dealing with third party material are implemented, up-to-date and adhered to.

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.

Limited progress – evidence of this varied considerably both between and within Areas. Completion of the disclosure record sheet is inconsistent and in some Areas is not being used at all.

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 the disclosure working group identifies and promulgates good practice in relation to varying types of files, from simple to complex.

Substantial progress - in most Areas disclosure documents are now kept in a separate folder within the file. In our sample disclosure documents were filed separately in 121 out of 152 cases (79.6%). However, we did see files with several MG6Cs in different places within the file, where it was difficult to ascertain which was the most up-to-date version.

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.

Achieved – Disclosure Manual complied.

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, representing 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.

Achieved - but this is not being done effectively to learn lessons or to realistically collate instances of failure.

ANNEX D: PERFORMANCE RESULTS WITH REGARDS TO THE DISCLOSURE OF UNUSED MATERIAL IN AREA INSPECTIONS AND ASSESSMENTS AND CHECKLIST OF PROBLEM POINTS

Thematic review 2000

- 1 Our last thematic review of the disclosure of unused material in March 2000 included the scrutiny of 631 files, relating to contested cases drawn from 13 different CPS Areas. Inspectors visited six sites and interviewed CPS staff, representatives of other criminal justice agencies, members of the judiciary and criminal practitioners.
- 2 That review found that the statutory regime was not operating as Parliament had envisaged and criminal practitioners lacked confidence in the disclosure process, suggesting the need for a greater degree of transparency. In a significant proportion of contested cases CPS compliance with the CPIA procedures was found to be defective. Examples included where the MG6C contained no description of the items, the prosecutor failed to request any; where material was omitted from the MG6C schedule the prosecutor failed to ask for amendment of the schedule to include it; and material that might undermine the prosecution case or assist the defence not being identified.
- 3 Prosecutors were uncertain about what was expected of them to ensure that they complied scrupulously with their duties of disclosure. Some took a restrictive view by disclosing only that material which actually undermined the prosecution case or assisted the defence, while others applied a more liberal test considering whether, in fairness to the defence, the item should be disclosed. In many Areas extensive informal disclosure was found to be taking place, often quite late in proceedings. This was said to be a result of recognition of the limitations on the disclosure decisions made by prosecutors because of their heavy dependence on schedules of varying reliability and the need for the disclosure process to have greater transparency.

First cycle of Area inspections 2000-02

- 4 In response to the thematic review the CPS embarked on a major national project to review its processes associated with disclosure. As a result an increase in compliance with the prosecution's obligations of disclosure was apparent in the first cycle of inspections of the 42 Areas and two Headquarters Directorates carried out from 1 October 2000-30 September 2002.
- 5 A total of 3,168 files were assessed in relation to primary disclosure and 1,246 of those in relation to secondary disclosure. By the end of the cycle our file samples showed a compliance rate of 80.4% in primary disclosure compared with 72.3% at 30 September 2000. The outcome for secondary disclosure was 75.3% compared with 62.2%. The majority of cases containing sensitive unused material were also apparently being handled appropriately by prosecutors (73.9% compliance in Crown Court cases). Inspectors observed some variability in the policies and practices adopted by and within Areas as to the extent to which the materiality test required by the CPIA was applied. A generous interpretation of the provisions was apparent, something which was seen as necessary by the thematic review pending improvement in schedules, descriptions and examination by lawyers, but with a caveat not to drift to a complete departure from the statutory tests.

Second cycle of Area inspections 2002-05

- 6 Between 1 October 2002-31 March 2005 HMCPSI carried out its second cycle of inspections. Improvements in CPS performance relating to disclosure were still evident since the first cycle, although a lack of consistency across the Areas was apparent. Comparisons with the first and second cycle data must also be treated with caution since the introduction of new joint operational instructions and revised guidance during the second cycle imposed stricter obligations on the CPS and police for most of that cycle, and performance was measured against these.
- 7 A total of 2,351 files were examined which dealt with primary disclosure and 846 of those also dealt with secondary disclosure. Our findings suggested that the handling of primary disclosure was getting better with compliance with the statutory duty of primary disclosure taking place in 76.4% of cases, compared with an average of 75.0% throughout the first cycle.
- 8 Compliance with the statutory duty of secondary disclosure, however, was lower in the second cycle than the first, particularly in Crown Court cases. The CPS complied fully with its statutory duty in 60.6% of cases compared with an average of 64.9% in the first cycle. As noted above, the fact that the CPS was measured against the new procedures may have been contributed to the result.
- 9 A lack of consistency across Areas in executing their prosecutorial duties in relation to disclosure was apparent during the second cycle. Many differing local practices were identified and in some Areas all non-sensitive material was being disclosed to the defence automatically at court without proper application of the statutory tests. Prosecutors were therefore taking a less than rigorous approach to disclosure and not considering the unused material fully. This also affected CPS performance in terms of secondary disclosure, in that the defence statement was frequently only given cursory attention because the defence had been given access to all unused material to find out for themselves whether it may assist their case.
- 10 In May 2003 HMCPSI compiled a checklist of pitfalls or problems most frequently encountered on disclosure. These problems were compiled from inspectors' general experience of disclosure and were not universal. No Area was likely to have all these problems, they simply were the things to look out for when trying to improve compliance.
- 11 The following issues were felt worthy of mention:
 - Lack of adequate training for those acting as disclosure officers.
 - Communication – officers are not alert to the possibility of unused material within other investigations/prosecutions, particularly where the investigation is by another force or police unit e.g. NCIS.
 - Some police officers have the attitude that it is not their job to 'help' the defence.
 - Inadequate descriptions of items on disclosure schedules. This seems a common problem where the disclosure officer does not describe items in sufficient detail e.g. 'ten letters', or by reference only to an internal police form number. The defence are entitled to know where the items were found and their relevance by way of an adequate description in order to decide whether to challenge non-disclosure. Prosecutors do not seek better descriptions/copies of items.

- Prosecutors should be less ready to accept schedules at face value and question disclosure officers when there appear to be gaps, e.g. where routine documents are omitted, or if 'acting on information' appears in a statement there may be informant information which should be on a sensitive schedule.
- Some documents are placed on both sensitive and non-sensitive schedules. A proper decision is not made by police as to whether a document could be edited suitably to enable its inclusion on the non-sensitive schedule.
- Timeliness – primary disclosure is often served too late for the defence to serve a defence statement before the plea and directions hearing. This is especially prevalent when the material relates to CCTV tapes.
- Inadequate defence statements are not challenged.
- Defence statements are often sent to the police but not chased.
- There are Areas where the caseworker does everything post-committal, with the result that prosecutors are not actually involved in decision-making, especially at the secondary disclosure stage.
- Disclosure should be an ongoing process. If material comes to light after primary or secondary disclosure it should still be considered, but at times is ignored.
- Prosecutors fail to challenge the absence of sensitive material or do not obtain confirmation that none exists.
- There is a passive approach to sensitive material disclosure – let counsel and the police sort it out.
- Poor recording of reasons for the decision to withhold sensitive material. It can be impossible to see if there has been a PII application.
- PII applications are sometimes made unnecessarily and are often not made until the day of trial. The trial judge should make earlier rulings. This relates to the more general issue of the early identification and appointment of the trial judge.
- There is inconsistency of application of CPIA in court. Some members of the Bar and the judiciary take an extremely liberal view of disclosure; others go by the letter of the law.

Overall performance assessment 2005

- 12 During the period April-December 2005 HMCSI carried out its programme of OPAs and follow-up visits in relation to inspections undertaken during the second cycle where that had not been done by 31 March 2005. During the OPA process all 42 Areas and the four London Sectors were visited and assessed as either Excellent, Good, Fair or Poor overall and also in relation to individual aspects of performance. This was based on a combination of self-assessment by each Area, management data and professional judgement by inspectors. With regard to the specific aspect of disclosure performance, inspectors found substantial variations between Areas - five were rated as Excellent, 19 Good, 13 Fair and five Poor. In a number poor standards of file housekeeping made it difficult to determine whether prosecution duties in relation to disclosure had been met. As in the first two cycles of inspection, it was found that in some Areas all non-sensitive material was being disclosed to the defence without proper application of the statutory tests by prosecutors.

Area effectiveness inspections 2006-07

- 13 From October 2006-May 2007, HMCPSI undertook AEIs of 11 Areas that were rated as Poor or Fair (with some Poor aspects) overall and examined 1,007 case files, in which disclosure was assessed. Care must be exercised in drawing overall comparisons with other inspection cycles, in that the inspections in the AEI programme related to Areas which were rated as Poor in the OPAs and those rated Fair, but with the inspections tailored by a risk assessment to be focussed on the poor or less good aspects. Some findings from the 2002-05 cycle are now four years old and some performance measures are not precisely the same as those used in the last cycle. There have also been changes to methodology and data collection.
- 14 CPS performance in dealing with initial/primary disclosure was not as good as in the 2002-05 cycle. It was dealt with properly in 65.2% of magistrates' courts' cases compared with 71.6% in the last cycle, and in 79.4% of Crown Court cases compared with 79.9%. Continuing/secondary disclosure was dealt with properly in 56.9% of magistrates' courts' cases compared with 59.5%, but in the Crown Court it improved from 59.6% to 70.1%. Sensitive material was dealt with properly in 69.9% of Crown Court cases compared with 73.9%.
- 15 Our findings from the AEIs showed that the picture continues to be very mixed in certain aspects regarding disclosure and it was sometimes difficult to discern exactly why. Endorsements by lawyers on the disclosure schedules were often poor, with the reasons for decisions not being recorded. The requirement in the Disclosure Manual to use and maintain disclosure record sheets was not followed consistently and, in some Areas, was ignored altogether. Instructions to agents in the magistrates' courts or to counsel in the Crown Court provide little or no guidance to the advocate on disclosure made in that case to indicate that the CPIA tests had been applied properly. Audit trails recording how continuing disclosure and sensitive material had been dealt with by advocates at court were frequently lacking, including any detailed record of PII applications. Inspectors also found poor file housekeeping in a number of Areas and limited joint disclosure training with the police.

ANNEX E: PROSECUTOR QUESTIONNAIRE ANALYSIS AND CASE STUDIES

Methodology

To inform the study a questionnaire was sent to prosecutors in the selected Areas and to Serious Casework lawyers in London. In total 437 prosecutors were polled and we received 178 replies, a 40% response rate. The questionnaire had a mix of factual questions, positively framed propositions relating to aspect of disclosure work, quantitative resource questions and wider CJS issues. Free text fields were included to solicit comments and prosecutors were asked to name three main improvements they would like to see.

In those instances where prosecutors were asked to give an opinion a five point relative strength of agreement score was used. Respondents could choose strongly agree/disagree, tend to agree/disagree or neutral. For evaluation and presentation purposes we have combined strongly agree and tend to agree to arrive at an overall positive response and similarly for an overall negative response.

To permit some separation of responses prosecutors were asked which court they participated in most. The options were 100% magistrates' courts, 70/30% magistrates to Crown, 70/30% Crown to magistrates and 100% Crown Court. Where appropriate these four categories were filtered to show responses from predominately magistrates' courts or Crown Court prosecutors. Where this was applied the responses yielded 109 responses from magistrates' courts' prosecutors and 69 from the Crown Court.

Some respondents did not answer all questions.

Disclosure understanding and training

	% Positive	% Neutral	% Negative
In my role I regularly perform disclosure duties associated with the use of unused material	96	2	2
I have sufficient procedural understanding to discharge my disclosure duties effectively	92	6	2
I am confident I discharge my initial disclosure obligations fully			
<i>All</i>	85	10	5
<i>Predominantly magistrates' courts responses</i>	84	13	3
<i>Predominantly Crown Court responses</i>	86	6	8
I am confident continuing disclosure is timely			
<i>All</i>	54	25	21
<i>Predominantly magistrates' courts responses</i>	50	29	21
<i>Predominantly Crown Court responses</i>	61	20	19
	% None	% Basic/ update/ e-learning module	% Advanced
I have completed the following disclosure training	0	64	36

Commentary

Of those responding, 96% were actively engaged in disclosure functions. Of the negative respondents, these staff did not carry a regular personal caseload.

All staff responding had undergone some form of training with 64% having completed only basic/ update training and 6% had done this purely through the electronic learning module; 36% had completed advanced training.

Respondents were confident that initial disclosure obligations were discharged fully with a similar positive response of approximately 85% for both groups.

Respondents were overall positive that continuing disclosure was timely with 50% of magistrates' courts' prosecutors being positive against a 61% positive from those in the Crown Court. The negative responses were similar at 21% and 19% respectively.

Caseload profile

What proportion of your work is split between the magistrates' courts and the Crown Court?

100% Magistrates	70% Magistrates 30% Crown Court	70% Crown Court 30% magistrates	100% Crown Court
34	26	15	25

What percentage of your trial caseload for last year fell into the following categories?

Case complexity	% Magistrates' courts	% Crown Court
Simple motoring	11	0
Straightforward no sensitive material	60	45
Straightforward with sensitive material	21	27
Large case could include sensitive material	8	25
Very large and complex case e.g. fraud or police operation	0	3

I have sufficient time to discharge my disclosure responsibilities.

	% Positive	% Neutral	% Negative
All	38	23	39
Predominantly magistrates' courts' responses	40	25	35
Predominantly Crown Court responses	34	21	45

Commentary

This proposition also solicited for comments and 27 prosecutors responded. The main comments were:

- Find fulfilling duties thoroughly very difficult (7).
- Very time consuming in volume/complex cases (6).
- Increase in court sessions results in less time for disclosure concerns (3).
- Do the best I can do in limited time (3).

Time spent on disclosure activities*Prosecutor time estimates*

How long does it take you to discharge your initial disclosure responsibilities for each case?

Not all prosecutors made an estimate for each complexity category and some answers were vague, in which case the response was not scored. The tables below show the number of responses for each complexity category and the percentage this represents against the total number of responses for the category.

Magistrates' courts							
Case complexity	1-5 mins	6-10 mins	11-20 mins	21-30 mins	31-60 mins	61-180 mins	181mins -6.5hrs
Simple motoring (70)	46%	27%	20%	6%	1%	0%	0%
Straightforward no sensitive material (80)	6%	16%	33%	35%	8%	2%	0%
Straightforward with sensitive material (74)	1%	4%	20%	29%	29%	16%	1%
Large case could include sensitive material (50)	0%	0%	0%	8%	26%	32%	34%

Crown Court									
	1-5 mins	6-10 mins	11-20 mins	21-30 mins	31-60 mins	61-180 mins	181mins -6.5hrs	1-5 days	+5 days
Straightforward no sensitive material (41)	12%	24.5%	32%	24.5%	5%	2%	0%	0%	0%
Straightforward with sensitive material (40)	0%	10%	13%	17%	38%	17%	5%	0%	0%
Large case could include sensitive material (39)	0%	0%	5%	0%	15%	31%	28%	21%	0%
Very large and complex case e.g. fraud or police operation (28)	0%	0%	0%	0%	7%	14%	22%	43%	14%

Estimated time from inspectors' file sample

Inspectors were asked to categorise each case in their file sample according to the criteria and estimate from the information on file how much time they thought a prosecutor should have taken to complete the disclosure activity. In total there were 105 magistrates' courts' cases and 72 from the Crown Court.

Magistrates' courts			
Case complexity	No. in sample	Total time mins	Average time per case
Simple motoring	14	215	15 mins
Straightforward no sensitive material	50	2,020	40 mins
Straightforward with sensitive material	2	90	45 mins
Large case could include sensitive material	0	0	0 mins
Crown Court			
Straightforward no sensitive material	25	2,065	83 mins
Straightforward with sensitive material	12	2,295	191 mins
Large case could include sensitive material	21	3,720	177 mins
Very large and complex case e.g. fraud or police operation	14	49,050	3,504 mins (about 9 days)

Commentary

The trial caseload complexity profile was estimated by analysing information provided by those prosecutors who predominately worked in the magistrates or Crown Court and coupling this with CPS defendant case outcome data for the total number of defendant cases in which disclosure would have been undertaken by the prosecution during April 2006-March 2007.

In both the magistrates and Crown Court the largest volume of cases fell in the straightforward no sensitive material category, which accords with inspectors' experience. In the magistrates' courts 81% of cases are covered by the categories straightforward no sensitive material and straightforward with sensitive material. In the Crown Court these categories make up 72% of caseload and the remaining 28% relates to large case could include sensitive material and very large and complex cases.

Prosecutors were asked if they had sufficient time to discharge their disclosure responsibilities. Magistrates' courts' prosecutors were marginally more positive at 38% against a negative response of 35%. Those in the Crown Court were markedly more negative at 34% positive, but 45% negative.

Prosecutors were asked to estimate the amount of time spent on disclosure and the sample was split according to predominantly magistrates or Crown Court work. We analysed responses only where it was clear the respondent was able to provide a reasoned estimate. In some cases the question was not answered and in others the answers were too vague. Respondents were more confident in the magistrates' courts with a high proportion answering the questions, 73%, and 58% in the Crown Court.

Time spent - magistrates' courts' cases

Simple motoring. The dominant answer was 46% for one-five minutes and 93% felt it took less than 20 minutes. Inspectors assessed the average time needed as 15 minutes.

Straightforward no sensitive material. The dominant answer was 35% for 11-20 minutes and 82% felt it took between six-30 minutes. Inspectors assessed the time needed as 40 minutes.

Straightforward with sensitive material. There were two dominant answers: 29% each for 21-30 minutes and 31-60 minutes and 78% felt it took between 11-60 minutes. Inspectors assessed the average time needed as 45 minutes.

Large case could include sensitive material. The dominant answer of 32% was 61-180 minutes but 34% of respondents reported it took between three and six and a half hours. There were none of these cases in the inspectorate file sample.

Time spent - Crown Court cases

Straightforward no sensitive material. The dominant answer of 32% was 11-20 minutes and 82% felt it took between six-30 minutes. Inspectors assessed the average time needed as 83 minutes.

Straightforward with sensitive material. The dominant answer of 38% was 31-60 minutes and 72% felt it took between 21-180 minutes. Inspectors assessed the average time needed as 191 minutes.

Large case could include sensitive material. The dominant answer of 31% was 61-181 minutes with 80% of respondents reporting it took between 61 minutes and one-five days. Inspectors assessed the average time needed as 177 minutes.

Very large and complex case. The dominant answer of 43% was one-five days. Some respondents indicated it took weeks and months and we found examples of these cases in our file sample (see the case studies at the end of this annex). Inspectors assessed the average time needed as nine days.

Wasted effort

For the court you work in mostly, typically how much elapsed court time is wasted on the day when a trial becomes ineffective owing to a disclosure problem?

	None	1-60 mins	+1-3 hrs	+3-6 hrs	>6 hrs
Predominantly magistrates' courts' responses	31%	30%	18%	19%	2%
Predominantly Crown Court responses	22%	14%	14%	14%	36%

When this occurs can you reuse the remaining scheduled time at court?

	% Yes	% No
All responses	75	25
Predominantly magistrates' courts' responses	88	12
Predominantly Crown Court responses	50	50

If not, on average how much of your remaining scheduled time is wasted?

	None	1-60 mins	+1-3 hrs	+3-6 hrs	>6 hrs
Predominantly magistrates' courts' responses	38%	14%	19%	19%	10%
Predominantly Crown Court responses	27%	9%	9%	9%	44%

For the court you work in mostly, when re-listing a disclosure ineffective trial how long does it take you to prepare?

	None	1-60 mins	+1-3 hrs	+3-6 hrs	>6 hrs
Magistrates' courts	2%	35%	35%	26%	2%
Crown Court	10%	30%	10%	40%	10%

Commentary

Prosecutors were asked a series of question to try and quantify how much wasted time occurs owing to ineffective handling of disclosure issues.

They were asked how much elapsed court time was wasted when a trial becomes ineffective owing to a disclosure problem. In the magistrates' courts 31% stated none and in the Crown Court the figure was 22%.

Of those experiencing wastage, the dominant answer in the magistrates' courts was one-60 minutes (30%) and 37% experienced more than one but less than six hours of lost time.

In the Crown Court, of those experiencing wasted effort the dominant answer was greater than six hours (36%) with 14% falling in each of the one-60 minutes, one-three hours and three-six hours periods.

Prosecutors who experienced wastage were then asked to indicate if they could reuse the remaining scheduled time; 88% of those in the magistrates' courts could, but only 50% in the Crown Court.

Those who were unable to reuse scheduled time at court were asked what remaining time was wasted. 38% in the magistrates' courts were able to commit to other work with a lower percentage, 27%, in the Crown Court. Of those subject to wasted time the dominant answers in the magistrates' courts was one-three hours and three-six hours at 19% each. In the Crown Court the dominant response, 44%, was greater than six hours. Working through the product of these sums, in the magistrates' courts 1.5% of prosecutors waste one-three hours and 1.5% waste three-six hours. In the Crown Court the figures are more significant with a net 16% experiencing wastage of greater than six hours.

In the magistrates' courts work flow is very dynamic and, given the daily volume, prosecutors are able to reuse freed up time efficiently. However this is more difficult in the Crown Court as trials are fixed for longer periods and there is less flexibility. Given the high percentage of prosecutors experiencing wastage in the Crown Court, the inability to reuse scheduled time indicates there is significant loss of quality time for prosecutors owing to disclosure issues.

Prosecutors were then asked how long it took to re-prepare for a case when it was re-listed. Those in the magistrates' courts indicated 35% each for one-60 minutes and one-three hours. A further 26% indicated three-six hours.

In the Crown Court the dominant answer was three-six hours (40%) but one-60 minutes also accounted for 30%.

Perceptions about others in the criminal justice process re: disclosure issues

CJS partners are effective in carrying out their disclosure duties.

Partner	% Positive	% Neutral	% Negative
Police	28	24	48
Magistrates	13	59	28
District judge	40	44	16
Crown Court judge	40	34	26
Defence solicitor/counsel	16	28	56
Prosecuting counsel	56	31	13

Commentary

We requested relevant comments and 37 prosecutors responded. The main ones were:

- Courts do not follow guidelines or take a strong line with inappropriate defence requests. 'Carte blanche' disclosure often ordered (19).
- Defence have least understanding of CPIA and are disinterested in providing defence statement (7).
- Police are not well trained in disclosure issues (5).
- Police are very good in big cases but not in less serious matters (4).

Prosecutors were asked how effective they thought other CJS partners were in carrying out their disclosure duties. There was a negative view of police efforts with 28% positive and 48% negative.

The view of magistrates was overall negative, with 13% positive and 28% negative, and there was a very high neutral rate of 59%.

Overall, prosecutors had a positive view of the judiciary with a 40% positive score for district and Crown Court judges and negative scores being 16% and 26% respectively. However, there was a 44% neutral response for district judges. Also, of those prosecutors making comments the majority stated that the courts do not follow the guidelines and instruct disclosure to be made.

Prosecutors were very negative regarding defence solicitors and defence counsel with 16% positive and 56% negative.

There were good opinions about prosecution counsel: 56% positive and 13% negative.

Prosecutors' views on disclosure and criminal justice

I am confident that disclosure is assisting the criminal justice system in regards to:

	% Positive	% Neutral	% Negative
Reducing cracked and ineffective trials	40	41	19
Ensuring defendant's Article 6 rights to a fair trial	70	24	6
Preventing the prosecution from being disadvantaged	33	39	28
Minimising the chances for a miscarriage of justice	69	26	5
Improving public confidence in the CJS	36	45	19

Commentary

Prosecutors were most positive that disclosure was assisting in ensuring the defendant's Article 6 rights to a fair trial with 70% positive and 6% negative and there was a similar response regarding minimising the chances of a miscarriage of justice. They were uncertain if the disclosure regime prevented the prosecution from being disadvantaged with 33% positive and 28% negative and the largest proportion, 39%, remaining neutral.

They were also uncertain as to whether disclosure assisted in reducing cracked and ineffective trials and improving public confidence. Although there were more positives than negatives, the dominant response was neutral.

This statement solicited for comments with a free field. Of the 174 questionnaires returned, 13 respondents made comments concerning this question. The main responses are as follows:

- Not confident that the purpose of CPIA is working or having any effect (5).
- Until defence disclose, the system will remain imbalanced (3).
- CPIA raises public confidence and promotes fair trials (1).
- Perceptions of fairness are different therefore CPIA may actually undermine public confidence (1)

Overall I think the disclosure process is effective.

% Positive	% Neutral	% Negative
57	29	14

Commentary

All prosecutors responded to this proposition and, despite reservations expressed in other responses, 57% were positive against 14% negative. However 29% remained neutral to the position.

Prosecutors' suggested improvements

Prosecutors were asked to name three improvements they would like to see to the effectiveness of the handling of unused material.

Of the 173 questionnaires returned, 131 respondents made comments. Excluding minor or non-relevant comments a total of 291 were made concerning making disclosure more effective.

Fuller detail of these are found in the table below, however, it is clear that the main features for improvement include:

- Training and understanding for police officers.
- Better training and understanding for all those involved in the CJS, including the defence.
- Better descriptions and consistency of MG6 forms.
- More time for prosecuting lawyers to consider disclosure issues.
- Mandatory provision of a detailed defence statement.
- Courts to robustly enforce time limits and apply sanctions for non compliance.
- Timeliness of submissions.
- Sanctions against defence who make inappropriate requests.
- Open access or full disclosure to defence for all non-sensitive material.
- CPS lawyers and prosecuting counsel to be more proactive in challenging the defence.

Issues arising from Question 17		A	B	C	Total
1	Training for police concerning completion of MG6C, sensitive material, unused material and schedules and compliance issues	40	26	8	74
	Training for all parties in the CJS/joined-up training	3	9	6	18
	Training of judges and magistrates – particularly of defence obligations	3	4	8	15
	Training for CPS lawyers	0	1	1	2
2	Mandatory provision on defence to make a detailed meaningful defence statement	14	10	3	27
3	Better descriptions and consistency of MG6 C, D and E – to be filled in at the point of charge and provided with the initial file	10	7	10	27
4	More time for prosecutors to fully consider disclosure issues	8	8	11	27
5	Courts to robustly enforce and apply sanctions in respect of time limits, non compliance and prevent fishing expeditions by defence	8	9	9	26
6	Timeliness of files and early identification of issues	7	7	7	21
7	Sanctions against defence who make inappropriate requests	2	4	6	12
8	Full disclosure or open access to defence of all non-sensitive material	9	5	0	14
9	Proactive approach by CPS lawyers and counsel needed to challenge defence	1	3	2	6

The first four priorities relate to appropriate training for police staff. This is supported by priority three, which related to better descriptions and more consistency of the MG forms used by the police to execute the disclosure activity. Priority two is for there to be mandatory provisions on the defence to make a detailed meaningful defence statement. Priority four is for more time for prosecutors to consider disclosure issues. Priority five is for the courts to be more robust in applying the CPIA provisions so that parties comply with their obligations.

Conclusions

There are some contradictions arising from this survey in regard to the effectiveness of disclosure duties. Prosecutors responded very positively that they are discharging their disclosure obligations fully, but as the propositions become more focused uncertainty arises. They are far less positive when asked if continuing disclosure is timely and the response is mixed when asked if they have sufficient time to discharge their responsibilities, with those dealing with magistrates' courts' cases being marginally positive and those in the Crown Court distinctly negative. This suggests that the disclosure function is being made to fit the available time and, whilst the disclosure duties may have been considered, the degree of consideration may be insufficient for the task. This could lead to lack of confidence amongst other practitioners that prosecutors have undertaken their tasks fully, leading to unnecessary debates and demands, and this may explain why the CPIA guidance is not being applied by the practitioners.

The waste analysis shows that problems are occurring in both the magistrates and the Crown Court and although waste is low in the former it will contribute to inefficiency, while in the Crown Court wastage is significant. This needs to be contrasted with the overall positive prosecutors' response that the disclosure process is effective.

Case study 1

Facts

This was a long-running fraud case which involved the defendant and 13 other co-defendants who bought 800 properties using domestic mortgages and then sub-letting to tenants. One hundred of the properties were in the Town T area and 54 were cited in the prosecution case. There was a line of argument that this was a 'victimless' crime as mortgage monies were secure and repayments made via the rent paid by tenants. Originally the defendant used personal mortgages but later used buy-to-let commercial mortgages. Properties were registered in the names of family members. Financial institutions were happy to lend and three sets of solicitors continued to convey properties. Counter-arguments were that this was deception on a grand scale and the magnitude of the operation distorted the Town T property market and froze out first time buyers. The investigation began in 1998 and was completed in 2006 with the defendant pleading guilty and being sentenced to 15 months' imprisonment.

Given the protracted nature of the case several defence solicitors changed and the police informally invited all defence solicitors to view the unused material. Of the four sets of solicitors involved only one attended the police station and, once the volume of material to be viewed was known, the offer was declined.

No case management system was in use but the team used Excel to create a register of the material and this ran to 432 Excel pages.

Unused material

There were 56 large boxes of unused material at the police station and ten others containing evidential exhibits. Inspectors examined 20 boxes of unused material to estimate the total amount. The vast majority of the material was 80gm A4 paper which amounted to an estimated 11 metre column of paper. The material we saw was in folders and files. In addition there was a 23cm pile of thin invoice paper.

Police effort

From 2000-06 two police detective constables (DCs) were engaged in dealing with disclosure. This amounted to 3.5 full-time equivalent (FTE) DC years. Other DCs were involved in the case from 1998-2000. We assessed this time on a pro rata basis at $3.5 \text{ FTE DC} / 6 = 1.2 \text{ FTE DC}$. Therefore we estimate that in total 3.7 FTE DC years were spent by the police on disclosure work for the case.

In addition, during the last 12 months of the case three retired police officers worked on it putting in 7.5 days per week in total. This is the equivalent of 1.5 FTE years.

CPS effort

The CPS prosecutor spent one month full-time assessing the unused material and a similar amount of time was spent by the caseworker. This equates to 0.083 FTE years for the prosecutor and the same for the caseworker.

This means that the police expended 5.2 person years of time on disclosure and the CPS 0.17 person years.

Case study 2

Facts

This was a murder of a 13 month old baby. The single mother formed a relationship with a man who had no feeling for the child. While the mother was out shopping the baby received a severe blow to the head and, on seeing the baby's condition deteriorating, the male called a relative who summoned the emergency services. The baby died after admission to hospital. The mother was charged with allowing the death of a child in her care and pleaded guilty. The male pleaded not guilty but this was changed to a guilty plea once decisive evidence was presented by a medical expert witness which showed injury must have occurred when the baby was in the man's sole care.

This was a large case with sensitive material. There were some complexities as there were parallel cases involving multi-defendant witness intimidation. The male defendant had a previous relevant conviction and there was a bad character application.

It is a landmark case as this is the first time that a mother has been convicted of allowing the death of a child in her care.

The disclosure activity in this case was undertaken by a dedicated police disclosure officer and the work is considered by the police and CPS to have been done well, but both parties do not consider this to be typical. The police used the HOLMES 2 system to record and catalogue the investigative and unused material.

Unused material

There were 13 large boxes of unused material and five containing evidential exhibits. In total inspectors examined all 13 boxes of unused material to estimate the total amount. The vast majority of the material was 80gm A4 paper which amounted to a 1.3 metre column and we estimated this to equate to approximately 6,500 pages.

Other material included:

- 1,334 photographs.
- 12 x 30 minute videos.
- Five x seven minute audio tapes.

- A 4.5cms file of geometric drawings.
- 41 x interview tapes with an average duration of 37 minutes (25hrs 20 minutes in total).
- A 2cms file of charts.
- Two x CDs with 523 images.
- Four x ten minute audio tapes.
- Two x 120 minute audio tapes.

Typist effort in transcribing the audio tapes was not included in unused material costs as it is police practice to transcribe this information and essentially it forms part of the investigative effort.

Police effort

The investigation had an elapsed time of 18 months and during this time the police deployed a dedicated disclosure officer. He worked on the case initially part-time and then full-time for a short period. The police estimate that 6.5 FTE person months was spent on the case by the disclosure officer. In addition there was much overtime and the above figure need to be uplifted by 20% at plain time salary rates to account for all the disclosure officer costs. Active supervision was provided by a detective sergeant and this time amounted to approximately 0.7 person months.

The police resources spent on disclosure were assessed as 7.2 person months.

CPS effort

The CPS prosecutor in the case was ring-fenced to work on the case full-time, as was the caseworker. The prosecutor spent three FTE months considering the schedules and assessing the material and a similar time was spent by the caseworker assisting the police and marshalling the material so that it may be efficiently assessed by the prosecutor. There was some wasted effort by the prosecutor as the CPS custom and practice of using the annotation "ditto" was not accepted by the defence as a purposeful statement of the disclosable status of the item. Therefore where this applied the information had to be assessed again by the prosecutor.

The CPS resource spent on disclosure was assessed as 6.0 person months.

There were 11 hearings all of which were effective. One all day hearing considered disclosure matters and there were four half day PCMH hearings, of which 33% of the time was spent on disclosure matters. This court time was not included in the assessment.

ANNEX F: MG6C SCHEDULE AND GUIDANCE

RESTRICTED (when complete)

MG6C

Page No..... Of.....

POLICE SCHEDULE OF NON-SENSITIVE UNUSED MATERIAL

R v
 URN
 URN

The Disclosure Officer believes that the following material, which does not form part of the prosecution case, is NOT SENSITIVE.

Item No.	DESCRIPTION AND RELEVANCE Give sufficient detail for CPS to decide if material should be disclosed or requires more detailed examination (For further guidance refer to the Prosecution Team Disclosure Manual and Attorney General's Guidelines)	LOCATION State precisely where the item can be found / located	* COMMENT
Signature: Date:			Reviewing lawyer signature: Print name: Date:

FOR CPS USE:
 * Enter: D = Disclose to defence
 I = Defence may inspect
 CND = Clearly not disclosable

RESTRICTED (when complete)

2006/07/1

Excerpts from the Disclosure Manual

Scheduling

The disclosure officer is responsible for preparing the schedules and submitting them to the prosecutor. The schedules, signed and dated by the disclosure officer, should be submitted to the prosecutor with a full file.

Where the disclosure officer is unsure whether an item is relevant to the investigation and should therefore be described on a schedule, the prosecutor should be consulted as soon as practicable.

..... the disclosure officer must consolidate the items into two schedules for the prosecutor describing:

- any non-sensitive unused material (MG6C)
- any sensitive unused material (MG6D)

..... All items of material relevant to the investigation must be described on one of the above schedules for the prosecutor

The non-sensitive material schedule

Non-sensitive unused material should be described on the MG6C. This form will be disclosed to the defence.

In the description column of every schedule, each item should be individually described and consecutively numbered. Where continuation sheets are used or additional schedules sent in later submissions, item numbering must be consecutive to all items on earlier schedules.

Every description in non-sensitive schedules should be detailed, clear and accurate. Each should include a summary of the item's contents to allow the prosecutor to make an informed decision on whether it could satisfy the disclosure test. For example, it is not sufficient merely to refer to a document by way of a form number or function which may be meaningless outside the Police Service.

In cases where there are many items of a similar or repetitive nature (messages for example) it is permissible to describe them by quantity and generic title. However, inappropriate use of generic listing is likely to lead to requests from the prosecutor and the defence to see the items. This may result in wasted resources and unnecessary delay. The preparation of properly detailed schedules at this stage will save time and resources throughout the disclosure process, and will promote confidence in its integrity.

When items are described by generic titles or quantities, the disclosure officer must ensure that items which might meet the disclosure test are also described individually

ANNEX G: PROTOCOL FOR THE CONTROL AND MANAGEMENT OF UNUSED MATERIAL IN THE CROWN COURT



DISCLOSURE: A PROTOCOL FOR THE CONTROL AND MANAGEMENT OF UNUSED MATERIAL IN THE CROWN COURT

Introduction

1. Disclosure is one of the most important – as well as one of the most abused – of the procedures relating to criminal trials. There needs to be a sea-change in the approach of both judges and the parties to all aspects of the handling of the material which the prosecution do not intend to use in support of their case. For too long, a wide range of serious misunderstandings has existed, both as to the exact ambit of the unused material to which the defence is entitled, and the role to be played by the judge in ensuring that the law is properly applied. All too frequently applications by the parties and decisions by the judges in this area have been made based either on misconceptions as to the true nature of the law or a general laxity of approach (however well-intentioned). This failure properly to apply the binding provisions as regards disclosure has proved extremely and unnecessarily costly and has obstructed justice. It is, therefore, essential that disclosure obligations are properly discharged – by both the prosecution and the defence – in all criminal proceedings, and the court’s careful oversight of this process is an important safeguard against the possibility of miscarriages of justice.

2. The House of Lords stated in R v H and C [2004] 2 AC 134, at 147:

Fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed to the defence. Bitter experience has shown that miscarriages of justice may occur where such material is withheld from disclosure. The golden rule is that full disclosure of such material should be made.

3. However, it is also essential that the trial process is not overburdened or diverted by erroneous and inappropriate disclosure of unused prosecution material, or by misconceived applications in relation to such material.
4. The overarching principle is therefore that unused prosecution material will fall to be disclosed if, and only if, it satisfies the test for disclosure applicable to the proceedings in question, subject to any overriding public interest considerations. The relevant test for disclosure will depend on the date the criminal investigation in question commenced (see the section on Sources below), as this will determine whether the common law disclosure regime applies, or either of the two disclosure regimes under the [Criminal Procedure and Investigations Act 1996 \(CPIA\)](#).
5. There is very clear evidence that, without active judicial oversight and management, the handling of disclosure issues in general, and the disclosure of unused prosecution material in particular, can cause delays and adjournments.
6. The failure to comply fully with disclosure obligations, whether by the prosecution or the defence, may disrupt and in some cases even frustrate the course of justice.
7. Consideration of irrelevant unused material may consume wholly unjustifiable and disproportionate amounts of time and public resources, undermining the overall performance and efficiency of the criminal justice system. The aim of this Protocol is therefore to assist and encourage judges when dealing with all disclosure issues, in the light of the overarching principle set out in paragraph 4 above. This guidance is intended to cover all Crown Court cases (including cases where relevant case management directions are made at the Magistrates' Court). It is not, therefore, confined to a very few high profile and high cost cases.
8. Unused material which has been gathered during the course of a criminal investigation and disclosed by the prosecution pursuant to their duties (as set out elsewhere in this Protocol) is received by the defence subject to a prohibition not to use or disclose the material for any purpose which is not

connected with the proceedings for whose purposes they were given it (s. 17 CPIA). The common law, which applies to all disclosure not made under the CPIA, achieves the same result by the creation of an implied undertaking not to use the material for any purposes other than the proper conduct of the particular case (see *Taylor v Director of the Serious Fraud Office* HL [1999] 2 A.C. 177). A breach of that undertaking would constitute a contempt of court. These provisions are designed to ensure that the privacy and confidentiality of those who provided the material to the investigation (as well as those who are mentioned in the material) is protected and is not invaded any more than is absolutely necessary. However, neither statute nor the common law prevents any one from using or disclosing such material if it has been displayed or communicated to the public in open court (unless the evidence is subject to continuing reporting restriction), and moreover, an application can be made to the court for permission to use or disclose the object or information.

Sources

9. It is not the purpose of this Protocol to rehearse the law in detail; however, some of the principal sources are set out here.
10. The correct test for disclosure will depend upon the date the relevant criminal investigation commenced:
 - a. In relation to offences in respect of which the criminal investigation began prior to 1 April 1997, the common law will apply, and the test for disclosure is that set out in *R v Keane* [1994] 1 W.L.R. 746; (1994) 99 Cr. App. R. 1.
 - b. If the criminal investigation commenced on or after 1 April 1997, but before 4 April 2005, then the CPIA in its original form will apply, with separate tests for disclosure of unused prosecution material at the primary and secondary disclosure stages (the latter following service of a defence statement by the accused). The disclosure provisions of the Act are supported by the 1997 edition of the Code of Practice issued under section 23(1) of the CPIA ([Statutory Instrument 1997 No. 1033](#))

- c. Where the criminal investigation has commenced on or after 4 April 2005, the law is set out in the CPIA as amended by Part V of the Criminal Justice Act 2003. There is then a single test for disclosure of unused prosecution material and the April 2005 edition of the Code of Practice under section 23(1) of the CPIA will apply ([see SI 2005 No. 985](#)).

The CPIA also identifies the stage(s) at which the prosecution is required to disclose material, and the formalities relating to defence statements. The default time limit for prosecution disclosure is set out in [section 13](#) of the Act (see further at paragraph 13 below). The time limits applicable to defence disclosure are set out in the Criminal Procedure and Investigations Act 1996 (Defence Disclosure Regulations) 1997 ([S.I. 1997 No. 684](#)).

10. Regard must be had to the Attorney General's Guidelines on Disclosure (April 2005). Although these do not have the force of law ([R v Winston Brown \[1995\] 1 Cr. App. R. 191; \[1994\] 1 WLR 1599](#)) they should be given due weight.
11. Part 25 of the Criminal Procedure Rules 2005 ([see SI 2005 No. 384](#)) sets out the procedures to be followed for applications to the court concerning both sensitive and non-sensitive unused material. Part 3 of the Rules is also relevant in respect of the court's general case management powers, and parties should also have regard to the Consolidated Criminal Practice Direction.
12. Parts 22 and 23 of the Criminal Procedure Rules are set aside to make provision for other rules concerning disclosure by the prosecution and the defence, although at the date of this Protocol there are no rules under those Parts.

The duty to gather and record unused material

13. For the statutory scheme to work properly, investigators and disclosure officers responsible for the gathering, inspection, retention and recording of relevant unused prosecution material must perform their tasks thoroughly, scrupulously and fairly. In this, they must adhere to the appropriate provisions of the CPIA Code of Practice.

14. It is crucial that the police (and indeed all investigative bodies) implement appropriate training regimes and appoint competent disclosure officers, who have sufficient knowledge of the issues in the case. This will enable them to make a proper assessment of the unused prosecution material in the light of the test for relevance under paragraph 2.1 of the CPIA Code of Practice, with a view to preparing full and accurate schedules of the retained material. In any criminal investigation, the disclosure officer must retain material that may be relevant to an investigation. This material must be listed on a schedule. Each item listed on the schedule should contain sufficient detail to enable the prosecutor to decide whether or not the material falls to be disclosed. The schedules must be sent to the prosecutor. Wherever possible this should be at the same time as the file containing the material for the prosecution case but the duty to disclose does not end at this point and must continue while relevant material is received even after conviction.
15. Furthermore, the scheduling of the relevant material must be completed expeditiously, so as to enable the prosecution to comply promptly with the duty to provide primary (or, when the amended CPIA regime applies) initial disclosure as soon as practicable after:
- the case has been committed for trial under section 6(1) or 6(2) of the Magistrates' Courts Act 1980; or
 - the case has been transferred to the Crown Court under section 4 of the Criminal Justice Act 1987, or [section 53 of the Criminal Justice Act 1991](#); or
 - copies of documents containing the evidence are served on the accused in accordance with the Crime and Disorder Act 1998 (Service of Prosecution Evidence) Regulations 2005 ([S.I. 2005 No. 902](#)), where the matter has been sent to the Crown Court pursuant to [section 51 or 51A of the Crime and Disorder Act 1998](#); or
 - a matter has been added to an indictment in accordance with [section 40 of the Criminal Justice Act 1988](#); or

- a bill of indictment has been preferred under section 2(2)(b) of the Administration of Justice (Miscellaneous Provisions) Act 1933 or section 22B(3)(a) of the Prosecution of Offences Act 1985.
16. Investigators, disclosure officers and prosecutors must promptly and properly discharge their responsibilities under the Act and statutory Code, in order to ensure that justice is not delayed, denied or frustrated. In this context, under paragraph 3.5 of the Code of Practice, it is provided “an investigator should pursue all reasonable lines of inquiry, whether these point towards or away from the suspect”.
 17. CPS lawyers advising the police pre-charge at police stations should consider conducting a preliminary review of the unused material generated by the investigation, where this is practicable, so as to give early advice on disclosure issues. Otherwise, prosecutors should conduct a preliminary review of disclosure at the same time as the initial review of the evidence. It is critical that the important distinction between the evidence in the case, on the one hand, and any unused material, on the other, is not blurred. Items such as exhibits should be treated as such and the obligation to serve them is not affected by the disclosure regime.
 18. Where the single test for disclosure applies under the amended CPIA disclosure regime, the prosecutor is under a duty to consider, at an early stage of proceedings, whether there is any unused prosecution material which is reasonably capable of assisting the case for the accused. What a defendant has said by way of defence or explanation either in interview or by way of a prepared statement can be a useful guide to making an objective assessment of the material which would satisfy this test.
 19. There may be some occasions when the prosecution, pursuant to surviving common law rules of disclosure, ought to disclose an item or items of unused prosecution material, even in advance of primary or initial disclosure under [section 3 of the CPIA](#). This may apply, for instance, where there is information which might affect a decision as to bail; where an abuse of process is alleged; where there is material which might assist the defence to make submissions as to the particular charge or charges, if any, the defendant should face at the

Crown Court; and when it is necessary to enable particular preparation to be undertaken at an early stage by the defence. Guidance as to occasions where such disclosure may be appropriate is provided in R v DPP ex parte Lee (1999) 2 Cr App R 304. However, once the CPIA is triggered (for instance, by committal, or service of case papers following a section 51 sending) it is the CPIA which determines what material should be disclosed.

The judge's duty to enforce the statutory scheme

20. When cases are sent to the Crown Court under section 51 of the Crime and Disorder Act 1998, the [Crime and Disorder Act 1998](#) (Service of Prosecution Evidence) Regulations 2005 allow the prosecution 70 days from the date the matter was sent (50 days, where the accused is in custody) within which to serve on the defence and the court copies of the documents containing the evidence upon which the charge or charges are based (in effect, sufficient evidence to amount to a prima facie case). These time limits may be extended and varied at the court's direction. Directions for service of these case papers may be given at the Magistrates' Court.
21. While it is important to note that this time limit applies to the service of evidence, rather than unused prosecution material, the court will need to consider at the Magistrates' Court or preliminary hearing whether it is practicable for the prosecution to comply with primary or initial disclosure at the same time as service of such papers, or whether disclosure ought to take place after a certain interval, but before the matter is listed for a PCMH.
22. If the nature of the case does not allow service of the evidence and initial or primary disclosure within the 70, or if applicable 50, days (or such other period as directed by the Magistrates' Court), the investigator should ensure that the prosecution advocate at the Magistrates' Court, preliminary Crown Court hearing, or further hearing prior to the PCMH, is aware of the problems, knows why and how the position has arisen and can assist the court as to what revised time limits are realistic.
23. It would be helpful if the prosecution advocate could make any foreseeable difficulties clear as soon as possible, whether this is at the Magistrates' Court or in the Crown Court at the preliminary hearing (where there is one).

24. Failing this, where such difficulties arise or have come to light after directions for service of case papers and disclosure have been made, the prosecution should notify the court and the defence promptly. This should be done in advance of the PCMH date, and prior to the date set by the court for the service of this material.
25. It is important that this is done in order that the listing for the PCMH is an effective one, as the defence must have a proper opportunity to read the case papers and to consider the initial or primary disclosure, with a view to timely drafting of a defence case statement (where the matter is to be contested), prior to the PCMH.
26. In order to ensure that the listing of the PCMH is appropriate, Judges should not impose time limits for service of case papers or initial/primary disclosure unless and until they are confident that the prosecution advocate has taken the requisite instructions from those who are actually going to do the work specified. It is better to impose a realistic timetable from the outset than to set unachievable limits. Reference should be made to Part 3 of the Criminal Procedure Rules and the Consolidated Practice Direction in this respect.
27. This is likewise appropriate where directions, or further directions, are made in relation to prosecution or defence disclosure at the PCMH. Failure to consider whether the timetable is practicable may dislocate the court timetable and can even imperil trial dates. At the PCMH, therefore, all the advocates – prosecution and defence – must be fully instructed about any difficulties the parties may have in complying with their respective disclosure obligations, and must be in a position to put forward a reasonable timetable for resolution of them.
28. Where directions are given by the court in the light of such inquiry, extensions of time should not be given lightly or as a matter of course. If extensions are sought, then an appropriately detailed explanation must be given. For the avoidance of doubt, it is not sufficient merely for the CPS (or other prosecutor) to say that the papers have been delivered late by the police (or other investigator): the court will need to know why they have been delivered late. Likewise, where the accused has been dilatory in serving a defence

statement (where the prosecution has complied with the duty to make primary or initial disclosure of unused material, or has purported to do so), it is not sufficient for the defence to say that insufficient instructions have been taken for service of this within the 14-day time limit: the court will need to know why sufficient instructions have not been taken, and what arrangements have been made for the taking of such instructions.

29. Delays and failures by the defence are as damaging to the timely, fair and efficient hearing of the case as delays and failures by the prosecution, and judges should identify and deal with all such failures firmly and fairly.
30. Judges should not allow the prosecution to abdicate their statutory responsibility for reviewing the unused material by the expedient of allowing the defence to inspect (or providing the defence with copies of) everything on the schedules of non-sensitive unused prosecution material, irrespective of whether that material, or all of that material, satisfies the relevant test for disclosure. Where that test is satisfied it is for the prosecutor to decide the form in which disclosure is made. Disclosure need not be in the same form as that in which the information was recorded. Guidance on case management issues relating to this point was given by Rose LJ in R v CPS (Interlocutory Application under sections 35/36 CPIA) [2005] EWCA Crim 2342.
31. Indeed, the larger and more complex the case, the more important it is for the prosecution to adhere to the overarching principle in paragraph 4 and ensure that sufficient prosecution resources are allocated to the task. Handing the defence the “keys to the warehouse” has been the cause of many gross abuses in the past, resulting in huge sums being run up by the defence without any proportionate benefit to the course of justice. These abuses must end.

The defence case statement

32. Reference has been made above to defence disclosure obligations. After the provision of primary or initial disclosure by the prosecution, the next really critical step in the preparation for trial is the service of the defence statement. It is a mandatory requirement for a defence statement to be served, where [section 5\(5\) of the CPIA](#) applies to the proceedings. This is due within 14

days of the date upon which the prosecution has complied with, or purported to comply with, the duty of primary or initial disclosure. Service of the defence statement is a critical stage in the disclosure process, and timely service of the statement will allow for the proper consideration of disclosure issues well in advance of the trial date.

33. There may be some cases where it is simply not possible to serve a proper defence case statement within the 14-day time limit; well founded defence applications for an extension of time under paragraph (2) of regulation 3 of the [Criminal Procedure and Investigations Act 1996 \(Defence Disclosure Time Limits\) Regulations 1997](#) may therefore be granted. In a proper case, it may be appropriate to put the PCMH back by a week or so, to enable a sufficient defence case statement to be filed and considered by the prosecution.
34. In the past, the prosecution and the court have too often been faced with a defence case statement that is little more than an assertion that the Defendant is not guilty. As was stated by the Court of Appeal in [R v Patrick Bryant \[2005\] EWCA Crim 2079](#) (per Judge LJ, paragraph 12), such a reiteration of the defendant's plea is not the purpose of a defence statement. Defence statements must comply with the requisite formalities set out in [section 5\(6\) and \(7\)](#), or [section 6A](#), of the CPIA, as applicable.
35. Where the enhanced requirements for defence disclosure apply under section 6A of the CPIA (namely, where the case involves a criminal investigation commencing on or after 4 April 2005) the defence statement must spell out, in detail, the nature of the defence, and particular defences relied upon; it must identify the matters of fact upon which the accused takes issue with the prosecution, and the reason why, in relation to each disputed matter of fact. It must further identify any point of law (including points as to the admissibility of evidence, or abuse of process) which the accused proposes to take, and identify authorities relied on in relation to each point of law. Where an alibi defence is relied upon, the particulars given must comply with [section 6\(2\)\(a\) and \(b\) of the CPIA](#). Judges will expect to see defence case statements that contain a clear and detailed exposition of the issues of fact and law in the case.

36. Where the pre-4 April 2005 CPIA disclosure regime applies, the accused must, in the defence statement, set out the nature of the defence in general terms, indicate the matters upon which the defendant takes issue with the prosecution and set out (in relation to each such matter) why issue is taken. Any alibi defence relied upon should comply with the formalities in [section 5\(7\)\(a\) and \(b\)](#) of the Act.
37. There must be a complete change in the culture. The defence must serve the defence case statement by the due date. Judges should then examine the defence case statement with care to ensure that it complies with the formalities required by the CPIA. As was stated in paragraph 35 of [R v H and C \[2004\]](#):
- If material does not weaken the prosecution case or strengthen that of the defendant, there is no requirement to disclose it. For this purpose the parties' respective cases should not be restrictively analysed. But they must be carefully analysed, to ascertain the specific facts the prosecution seek to establish and the specific grounds on which the charges are resisted. The trial process is not well served if the defence are permitted to make general and unspecified allegations and then seek far-reaching disclosure in the hope that material may turn up to make them good. Neutral material or material damaging to the defendant need not be disclosed and should not be brought to the attention of the court.
38. If no defence case statement – or no sufficient case statement – has been served by the PCMH, the judge should make a full investigation of the reasons for this failure to comply with the mandatory obligation of the accused, under [section 5\(5\) of the CPIA](#).
39. If there is no – or no sufficient – defence statement by the date of PCMH, or any pre-trial hearing where the matter falls to be considered, the judge must consider whether the defence should be warned, pursuant to [section 6E\(2\) of the CPIA](#), that an adverse inference may be drawn at the trial. In the usual case, where section 6E(2) applies and there is no justification for the deficiency, such a warning should be given.

40. Judges must, of course, be alert to ensure that defendants do not suffer because of the faults and failings of their lawyers, but there must be a clear indication to the professions that if justice is to be done, and if disclosure to be dealt with fairly in accordance with the law, a full and careful defence case statement is essential.
41. Where there are failings by either the defence or the prosecution, judges should, in exercising appropriate oversight of disclosure, pose searching questions to the parties and, having done this and explored the reasons for default, give clear directions to ensure that such failings are addressed and remedied well in advance of the trial date.
42. The ultimate sanction for a failure in disclosure by the accused is the drawing of an inference under [section 11 of the CPIA](#). Where the amended CPIA regime applies, the strict legal position allows the prosecution to comment upon any failure of defence disclosure, with a view to seeking such an inference (except where the failure relates to identifying a point of law), without leave of the court, but often it will be helpful to canvass the matter with the judge beforehand. In suitable cases, the prosecution should consider commenting upon failures in defence disclosure, with a view to such an inference, more readily than has been the practice under the old CPIA regime, subject to any views expressed by the judge.
43. It is vital to a fair trial that the prosecution are mindful of their continuing duty of disclosure, and they must particularly review disclosure in the light of the issues identified in the defence case statement. As part of the timetabling exercise, the judge should set a date by which any application under section 8 (if there is to be one) should be made. While the defence may indicate, in advance of the cut-off date, what items of unused material they are interested in and why, such requests must relate to matters raised in the accused's defence statement. The prosecution should only disclose material in response to such requests if the material meets the appropriate test for disclosure, and the matter must proceed to a formal section 8 hearing in the event that the prosecution declines to make disclosure of the items in question. Paragraphs 4(iv) - (vi)(a) of the Lord Chief Justice's March 2005 Protocol for the Control and Management of Heavy Fraud and Other Complex Criminal Cases should be construed accordingly.

44. If, after the prosecution have complied with, or purported to comply with, primary or initial disclosure, and after the service of the defence case statement and any further prosecution disclosure flowing there from, the defence have a reasonable basis to claim disclosure has been inadequate, they must make an application to the court under [section 8 of the CPIA](#). The procedure for the making of such an application is set out in the Criminal Procedure Rules, Part 25, r 25.6. This requires written notice to the prosecution in the form prescribed by r 25.6(2). The prosecution is then entitled (r 25.6(5)) to 14 days within which to agree to provide the specific disclosure requested or to request a hearing in order to make representations in relation to the defence application. As part of the timetabling exercise, the judge should set a date by which any applications under section 8 are to be made and should require the defence to indicate in advance of the cut-off date for specific disclosure applications what documents they are interested in and from what source; in appropriate cases, the judge should require justification of such requests.
45. The consideration of detailed defence requests for specific disclosure (so-called 'shopping lists') otherwise than in accordance with r 25.6, is wholly improper. Likewise, defence requests for specific disclosure of unused prosecution material in purported pursuance of [section 8 of the CPIA](#) and r 25.6, which are not referable to any issue in the case identified by the defence case statement, should be rejected. Judges should require an application to be made under section 8 and in compliance with r 25.6 before considering any order for further disclosure.
46. It follows that the practice of making blanket orders for disclosure in all cases should cease, since such orders are inconsistent with the statutory framework of disclosure laid down by the CPIA, and which was endorsed by the House of Lords in R v H and C (supra).

Listing

47. It will be clear that the conscientious discharge of a judge's duty at the PCMH requires a good deal more time than under the old PDH regime; furthermore a good deal more work is required of the advocate. The listing of PCMHs must take this into account. Unless the court can sit at 10am and finish the PCMH by 10.30am, it will not therefore usually be desirable for a judge who is part-heard on a trial to do a PCMH.
48. It follows that any case which raises difficult issues of disclosure should be referred to the Resident Judge for directions. Cases of real complexity should, if possible, be allocated to a specific trial judge at a very early stage, and usually before the PCMH.
49. Although this Protocol is addressed to the issues of disclosure, it cannot be seen in isolation; it must be seen in the context of general case management.

Public Interest Immunity

50. Recent authoritative guidance as to the proper approach to PII is provided by the House of Lords in R v H and C (supra). It is clearly appropriate for PII applications to be considered by the trial judge. No judge should embark upon a PII application without considering that case and addressing the questions set out in paragraph 36, which for ease of reference we reproduce here:

“36. When any issue of derogation from the golden rule of full disclosure comes before it, the court must address a series of questions:

(1) What is the material which the prosecution seek to withhold? This must be considered by the court in detail.

(2) Is the material such as may weaken the prosecution case or strengthen that of the defence? If No, disclosure should not be ordered. If Yes, full disclosure should (subject to (3), (4) and (5) below be ordered.

(3) Is there a real risk of serious prejudice to an important public interest (and, if so, what) if full disclosure of the material is ordered? If No, full disclosure should be ordered.

(4) If the answer to (2) and (3) is Yes, can the defendant's interest be protected without disclosure or disclosure be ordered to an extent or in a way which will give adequate protection to the public interest in question and also afford adequate protection to the interests of the defence?

This question requires the court to consider, with specific reference to the material which the prosecution seek to withhold and the facts of the case and the defence as disclosed, whether the prosecution should formally admit what the defence seek to establish or whether disclosure short of full disclosure may be ordered. This may be done in appropriate cases by the preparation of summaries or extracts of evidence, or the provision of documents in an edited or anonymised form, provided the documents supplied are in each instance approved by the judge. In appropriate cases the appointment of special counsel may be a necessary step to ensure that the contentions of the prosecution are tested and the interests of the defendant protected (see paragraph 22 above). In cases of exceptional difficulty the court may require the appointment of special counsel to ensure a correct answer to questions (2) and (3) as well as (4).

(5) Do the measures proposed in answer to (4) represent the minimum derogation necessary to protect the public interest in question? If No, the court should order such greater disclosure as will represent the minimum derogation from the golden rule of full disclosure.

(6) If limited disclosure is ordered pursuant to (4) or (5), may the effect be to render the trial process, viewed as a whole, unfair to the defendant? If Yes, then fuller disclosure should be ordered even if this leads or may lead the prosecution to discontinue the proceedings so as to avoid having to make disclosure.

(7) If the answer to (6) when first given is No, does that remain the correct answer as the trial unfolds, evidence is adduced and the defence advanced?

It is important that the answer to (6) should not be treated as a final, once-and-for-all, answer but as a provisional answer which the court must keep under review."

51. In this context, the following matters are emphasised:

- a. The procedure for making applications to the Court is as set out in the Criminal Procedure Rules 2005, Part 25 (r 25.1 – r 25.5);
- b. Where the PII application is a Type 1 or Type 2 application, proper notice to the defence is necessary to allow them to make focused submissions to the court before hearing an application to withhold

material; the notice should be as specific as the nature of the material allows. It is appreciated that in some cases only the generic nature of the material can properly be identified. In some wholly exceptional cases (Type 3 cases) it may even be justified to give no notice at all. The judge should always ask the prosecution to justify the form of notice given (or the decision to give no notice at all).

- c. The prosecution should be alert to the possibility of disclosing a statement in redacted form by, for example simply removing personal details. This may obviate the need for a PII application, unless the redacted material in itself would also satisfy the test for disclosure.
- d. Except where the material is very short (say a few sheets only), or where the material is of such sensitivity that do so would be inappropriate, the prosecution should have supplied securely sealed copies to the judge beforehand, together with a short statement of the reasons why each document is said to be relevant and fulfils the disclosure test and why it is said that its disclosure would cause a real risk of serious prejudice to an important public interest; in undertaking this task, the use of merely formulaic expressions is to be discouraged. In any case of complexity a schedule of the material should be provided showing the specific objection to disclosure in relation to each item, leaving a space for the decision.
- e. The application, even if held in private or in secret, should be recorded. The judge should give some short statement of reasons; this is often best done document by document as the hearing proceeds.
- f. The tape, copies of the judge's orders (and any copies of the material retained by the court) should be clearly identified, securely sealed and kept in the court building in a safe or stout lockable cabinet consistent with its security classification, and there should be a proper register of all such material kept. Some arrangement should be made between the court and the prosecution authority for the periodic removal of such material once the case is concluded and the time for an appeal has passed.

Third party disclosure

52. The disclosure of unused material that has been gathered or generated by a third party is an area of the law that has caused some difficulties: indeed, a Home Office Working Party has been asked to report on it. This is because there is no specific procedure for the disclosure of material held by third parties in criminal proceedings, although the procedure under section 2 of the Criminal Procedure (Attendance of Witnesses) Act 1965 or section 97 of the Magistrates' Courts Act 1980 is often used in order to effect such disclosure. It should, however, be noted that the test applied under both Acts is not the test to be applied under the CPIA, whether in the amended or unamended form. These two provisions require that the material in question is material evidence, ie, immediately admissible in evidence in the proceedings (see in this respect R v Reading Justices ex parte: Berkshire County Council [1996] 1 Cr. App. R. 239, R v Derby Magistrates' Court ex parte B [1996] AC 487; [1996] 1 Cr App R 385 and R v Alibhai and others [2004] EWCA Crim 681).
53. Material held by other government departments or other Crown agencies will not be prosecution material for the purposes of [section 3\(2\)](#) or [section 8\(4\)](#) of the CPIA, if it has not been inspected, recorded and retained during the course of the relevant criminal investigation. The Attorney General's Guidelines on Disclosure, however, impose a duty upon the investigators and the prosecution to consider whether such departments or bodies have material which may satisfy the test for disclosure under the Act. Where this is the case, they must seek appropriate disclosure from such bodies, who should themselves have an identified point for such enquiries (see paragraphs 47 to 51, Attorney General's Guidelines on Disclosure).
54. Where material is held by a third party such as a local authority, a social services department, hospital or business, the investigators and the prosecution may seek to make arrangements to inspect the material with a view to applying the relevant test for disclosure to it and determining whether any or all of the material should be retained, recorded and, in due course, disclosed to the accused. In considering the latter, the investigators and the prosecution will establish whether the holder of the material wishes to raise PII issues, as a result of which the material may have to be placed before the court. [Section 16](#) of the CPIA gives such a party a right to make representations to the court.

55. Where the third party in question declines to allow inspection of the material, or requires the prosecution to obtain an order before handing over copies of the material, the prosecutor will need to consider whether it is appropriate to obtain a witness summons under either section 2 of the Criminal Procedure (Attendance of Witnesses) Act 1965 or section 97 of the Magistrates' Court Act 1980. However, as stated above, this is only appropriate where the statutory requirements are satisfied, and where the prosecutor considers that the material may satisfy the test for disclosure. R v Alibhai and others supra makes it clear that the prosecutor has a "margin of consideration" in this regard.
56. It should be understood that the third party may have a duty to assert confidentiality, or the right to privacy under article 8 of the ECHR, where requests for disclosure are made by the prosecution, or anyone else. Where issues are raised in relation to allegedly relevant third party material, the judge must ascertain whether inquiries with the third party are likely to be appropriate, and, if so, identify who is going to make the request, what material is to be sought, from whom is the material to be sought and within what time scale must the matter be resolved.
57. The judge should consider what action would be appropriate in the light of the third party failing or refusing to comply with a request, including inviting the defence to make the request on its own behalf and, if necessary, to make an application for a witness summons. Any directions made (for instance, the date by which an application for a witness summons with supporting affidavit under section 2 of the 1965 should be served) should be put into writing at the time. Any failure to comply with the timetable must immediately be referred back to the court for further directions, although a hearing will not always be necessary.
58. Where the prosecution do not consider it appropriate to seek such a summons, the defence should consider doing so, where they are of the view (notwithstanding the prosecution assessment) that the third party may hold material which might undermine the prosecution case or assist that for the defendant, and the material would be likely to be 'material evidence' for the purposes of the 1965 Act. The defence must not sit back and expect the

prosecution to make the running. The judge at the PCMH should specifically enquire whether any such application is to be made by the defence and set out a clear timetable. The objectionable practice of defence applications being made in the few days before trial must end.

59. It should be made clear, though, that 'fishing' expeditions in relation to third party material – whether by the prosecution or the defence - must be discouraged, and that, in appropriate cases, the court will consider making an order for wasted costs where the application is clearly unmeritorious and ill-conceived.
60. Judges should recognise that a summons can only be issued where the document(s) sought would be admissible in evidence. While it may be that the material in question may be admissible in evidence as a result of the hearsay provisions of the [CJA \(sections 114 to 120\)](#), it is this that determines whether an order for production of the material is appropriate, rather than the wider considerations applicable to disclosure in criminal proceedings: see R v Reading Justices (supra), upheld by the House of Lords in R v Derby Magistrates' Court (supra).
61. A number of Crown Court centres have developed local protocols, usually in respect of sexual offences and material held by social services and health and education authorities. Where these protocols exist they often provide an excellent and sensible way to identify relevant material that might assist the defence or undermine the prosecution.
62. Any application for third party disclosure must identify what documents are sought and why they are said to be material evidence. This is particularly relevant where attempts are made to access the medical reports of those who allege that they are victims of crime. Victims do not waive the confidentiality of their medical records, or their right to privacy under article 8 of the ECHR, by the mere fact of making a complaint against the accused. Judges should be alert to balance the rights of victims against the real and proven needs of the defence. The court, as a public authority, must ensure that any interference with the article 8 rights of those entitled to privacy is in accordance with the law and necessary in pursuit of a legitimate public interest. General and

unspecified requests to trawl through such records should be refused. If material is held by any person in relation to family proceedings (eg, where there have been care proceedings in relation to a child, who has also complained to the police of sexual or other abuse) then an application has to be made by that person to the family court for leave to disclose that material to a third party, unless the third party, and the purpose for which disclosure is made, is approved by Rule 10.20A(3) of the Family Proceedings Rules 1991 ([SI 1991 No. 1247](#)). This would permit, for instance, a local authority, in receipt of such material, to disclose it to the police for the purpose of a criminal investigation, or to the CPS, in order for the latter to discharge any obligations under the CPIA.

Conclusion

63. The public rightly expects that the delays and failures which have been present in some cases in the past where there has been scant adherence to sound disclosure principles will be eradicated by observation of this Protocol. The new regime under the Criminal Justice Act and the Criminal Procedure Rules gives judges the power to change the culture in which such cases are tried. It is now the duty of every judge actively to manage disclosure issues in every case. The judge must seize the initiative and drive the case along towards an efficient, effective and timely resolution, having regard to the overriding objective of the Criminal Procedure Rules (Part 1). In this way the interests of justice will be better served and public confidence in the criminal justice system will be increased.

ANNEX H: DISCLOSURE REFERENCE GROUP

Stephen Wooler CB	HM Chief Inspector, HMCPSI
Jerry Hyde	HM Deputy Chief Inspector, HMCPSI
Jayne Wilkes	HM Inspector, HMCPSI
The Hon Mr Justice Openshaw	
Hannah Quirk	School of Law, University of Manchester
Michael Egan QC	Criminal Bar Association
David Wood	Office for Criminal Justice Reform
Nigel Gibbs	CPS
Jim Barker McCardle	Deputy Chief Constable, Kent Police
Peter Hall	ACPO/Criminal Justice Issues Group
Janet Arkinstall	Law Society, Legal Policy Directorate
Ian Kelcey	Solicitor, Law Society Criminal Law Committee
Paul Warner	Attorney General's Office

ANNEX I: GLOSSARY

Adverse case

A judge ordered acquittal (JOA), judge directed acquittal (JDA), no case to answer (NCTA) or one where magistrates decide there is insufficient evidence for an *either way* case to be committed to the Crown Court.

Agent

Solicitor or barrister not directly employed by the CPS who is instructed by them, usually on a sectional basis, to represent the prosecution in the magistrates' courts.

Area Management Team (AMT)

The senior legal and non-legal managers of an Area.

Casework Quality Assurance (CQA)

A CPS national scheme for managers to analyse the quality of one file per month for lawyers and designated caseworkers for individual feedback and national collation.

Caseworker

A member of CPS staff who deals with, or manages, day-to-day conduct of a prosecution case under the supervision of a crown prosecutor and, in the Crown Court, attends court to assist the advocate.

Charging scheme

The Criminal Justice Act 2003 took forward the recommendations of Lord Justice Auld in his Review of the Criminal Courts, so that the CPS will determine the decision to charge offenders in the more serious or contested cases. 'Shadow' charging arrangements were put in place and the statutory scheme had a phased roll-out across priority Areas and subsequently all 42 Areas, the last in April 2006.

Chief Crown Prosecutor (CCP)

One of 42 chief officers heading the local CPS in each Area, is a barrister or solicitor. Has a degree of autonomy but is accountable to the Director of Public Prosecutions (DPP) for the performance of the Area.

Code for Crown Prosecutors (the Code)

The public document that sets out the framework for prosecution decision-making. Crown prosecutors have the DPP's power to determine cases delegated, but must exercise them in accordance with the Code and its test – the evidential stage and the public interest stage. Cases should only proceed if, firstly, there is sufficient evidence to provide a realistic prospect of conviction and, secondly, if the prosecution is required in the public interest (see also *threshold test*).

Code of Practice

The framework for undertaking the duties of disclosure issued under section 23 Criminal Procedure and Investigations Act 1996.

Committal

Procedure whereby a defendant in an *either way* case is moved from the magistrates' courts to the Crown Court for trial, usually upon service of the prosecution evidence on the defence, but occasionally after consideration of the evidence by the magistrates.

Compass CMS

IT system for case tracking and case management used by the CPS. Compass is the new comprehensive system used in all Areas.

Court session

There are two sessions each day in the magistrates' courts, morning and afternoon.

CPS Direct

This is a scheme to supplement the advice given in Areas to the police and the decision-making as to charge under the charging scheme. Lawyers are available on a single national telephone number out of normal office hours so that advice can be obtained at any time. It is available to all Areas.

Cracked trial

A case listed for a contested trial which does not proceed, either because the defendant changes his plea to guilty, pleads to an alternative charge, or the prosecution offer no evidence.

Criminal Case Management Framework

The Framework provides practitioners with a consistent guide to their own, and their partners' roles and responsibilities, together with operational guidance on case management.

Designated caseworker (DCW)

A senior *caseworker* who is trained to present straightforward cases on pleas of guilty, or to prove them where the defendant does not attend the magistrates' court. Their remit is being expanded.

Disclosure, initial and continuing

The prosecution has a duty to disclose to the defence material gathered during the investigation of a criminal offence which is not intended to be used as evidence against the defendant, but which may be relevant to an issue in the case. Initial disclosure is given where an item may undermine the prosecution case or assist the defence case. In the magistrates' courts the defence may serve a defence statement and this must be done in the Crown Court. The prosecution has a continuing duty of disclosure in the light of this and developments in the cases and trials. (Duties of primary and secondary disclosure apply to cases investigated before 4 April 2005.)

Discontinuance

The dropping of a case by the CPS in the magistrates' courts whether by written notice, withdrawal, or offer of no evidence at court.

Either way offences

Those offences triable in either the magistrates' courts or the Crown Court, e.g. theft.

Evidential test

The initial stage under the test in *the Code for Crown Prosecutors* – is there sufficient evidence to provide a realistic prospect of conviction on the evidence?

Glidewell

A far-reaching review of CPS operations and policy dating from 1998 which made important restructuring recommendations e.g. the split into 42 local Areas and the further split into functional units - CJUs and TUs.

Good practice

An aspect of performance upon which the Inspectorate not only comments favourably, but considers that it reflects a manner of handling work developed by an Area which, with appropriate adaptations to local needs, might warrant being commended as national practice.

Higher Court Advocate (HCA)

In this context, a lawyer employed by the CPS who has a right of audience in the Crown Court.

Indictable only offences

Offences triable only in the Crown Court, e.g. murder, rape, robbery.

Ineffective trial

A case listed for a contested trial that is unable to proceed when it was scheduled to start, for a variety of possible reasons, and is adjourned to a later date.

Judge directed acquittal (JDA)

Where the judge directs a jury to find a defendant not guilty after the trial has started.

Judge ordered acquittal (JOA)

Where the judge dismisses a case as a result of the prosecution offering no evidence before a jury is empanelled.

Level A, B, C, D, E staff

CPS grades below the Senior Civil Service, from A (administrative staff) to E (senior lawyers or administrators).

Local Criminal Justice Board

The Chief Officers of police, probation, the courts and the CPS, a local prison governor and the Youth Offending Team manager in each criminal justice area who are accountable to the National Criminal Justice Board for the delivery of Public Service Agreement (PSA) targets.

MG3

Form used by the police and CPS in relation to advice and decisions as to charging an accused person.

MG6C, MG6D etc

A set of forms used by police and the CPS in relation to the disclosure of unused material.

MG6C

The form on which the disclosure officer lists and describes items of non-sensitive unused material.

MG6D

The form re: sensitive unused material.

MG6E

The disclosure officer's report which identifies material they consider may meet the disclosure test, and which contains a signed certification by the disclosure officer.

No case to answer (NCTA)

Where magistrates dismiss a case at the close of the prosecution evidence because they do not consider that the prosecution have made out a case for the defendant to answer.

Pre-trial review

A hearing in the magistrates' courts designed to define the issues for trial and deal with any other outstanding pre-trial issues.

Prosecution Team Performance Management

Joint analysis of performance by the CPS and police that has largely replaced the system of joint performance management.

Public interest test

The second stage under *the Code for Crown Prosecutors* test - is it in the public interest to prosecute this defendant on this charge?

Recommendation

This is normally directed towards an individual or body and sets out steps necessary to address either a significant weakness relevant to an important aspect of performance (i.e. an aspect for improvement) or a significant issue which would improve service delivery that, in the view of the Inspectorate, should attract highest priority.

Review: initial, continuing, summary trial etc

The process whereby a crown prosecutor determines that a case received from the police satisfies and continues to satisfy the test for prosecution in *the Code for Crown Prosecutors*. One of the most important functions of the CPS.

Section 51 Crime and Disorder Act 1998

A procedure for fast-tracking *indictable only* cases to the Crown Court, which now deals with such cases from a very early stage – the defendant is sent to the Crown Court by the magistrates.

Sensitive material

Any relevant material in a police investigation not forming part of the case against the defendant, the *disclosure* of which carries a real risk of serious prejudice to an important public interest.

Summary offences

Those triable only in the magistrates' courts, e.g. most motoring offences, common assault etc.

Threshold test

The Code for Crown Prosecutors provides that where it is not appropriate to release a defendant on bail after charge, but the evidence to apply the full *Code* test is not yet available, the threshold test should be applied. There must be at least a reasonable suspicion that the suspect has committed an offence, and it is in the public interest to charge the suspect, to meet the test. A number of factors, including the likelihood and nature of further evidence to be obtained, must be considered.

Trial Unit (TU)

Operational unit of the CPS which prepares cases for the Crown Court.

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