‘A fair balance’?
Evaluation of the operation of disclosure law

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Around 1,100 people from different parts of the criminal justice system, many with strongly held beliefs concerning disclosure law, contributed to the study. We have attempted in this report to represent their views as fully and fairly as possible.

We owe a great debt to our dear friend and colleague John Draffan, whose meticulous reading and processing of almost 1,000 questionnaires formed the basis of the data analysis. John died suddenly on 3 November 2000. This report would not have been possible without his major contribution.

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Introduction

This is the report of a study undertaken on behalf of the Home Office into the operation of the law relating to disclosure of unused prosecution material to the defence. The study arose out of concerns about the operation of the Criminal Procedure and Investigations Act 1996 (CPIA) since its implementation in April 1997. The purpose of the study was to establish whether the CPIA had met the government's stated objectives of effectiveness in bringing about the acquittal of the innocent and the conviction of the guilty, efficiency in focusing on the key issues at trial and fairness towards all those affected.

As well as the legislation itself, the study took into account guidance provided in the Code of Practice issued under Part II of the CPIA and in the Joint Operational Instructions – Disclosure of Unused Material, issued by ACPO and the CPS in March 1997. Note has also been made of further guidance on interpreting the Act's provisions issued since it came into force. This includes case law and the Guidelines published by the Attorney General on 29 November 2000.

Methodology

Information for the study was obtained through in-person and telephone interviews, questionnaire surveys and data collection from files. Telephone interviews on disclosure policy were conducted with senior members of the 43 regional police forces in England and Wales. A total of 975 questionnaires were completed by disclosure officers, prosecutors, justices' clerks, judges, barristers and defence solicitors. In addition, approximately 100 interviews were conducted with interested organisations and individuals in the course of the research.

Files relating to 193 prosecutions were examined in six fieldwork areas and at HM Customs and Excise and the DTI. The cases were chosen by each area in response to our request for completed cases in volume, major and serious crime which had been prepared for trial. These were to represent a range of disclosure problems and good practice. Some areas experienced problems in identifying cases which met our preferred selection criteria. Six pending cases, which were nearing completion, were included in the sample. Only 14 cases were flagged as examples of good practice. In 41, we could not detect why the cases had been selected for inclusion in the study. The sample included 33 summary cases and 12 in which the investigation began before 1 April 1997 and thus were governed by the common law regime that preceded the CPIA. An application for non-disclosure on the grounds of public interest immunity (PII) was made in 33 cases.

Study findings

Police organisational structures

- 23 per cent of police forces reported that practice for completion of schedules in volume cases varied among divisions

- in around 80 per cent of forces, the disclosure officer in volume crime was usually the OIC, and in major and serious crime was likely to be a member of the investigative team
- in 21 per cent of forces, responsibility for schedule completion in volume crime did not lie with the OIC and sometimes did not even rest with a single individual
- 65 per cent of forces had plans to change their arrangements for dealing with disclosure.

Scheduling and management of unused material

- the most prevalent problem with unused material according to the CPS, barristers, defence solicitors and justices' clerks was the failure by the police to include material on a schedule
- undated schedules were found in 37 per cent of post-CPIA cases containing an MG6C and in 40 per cent of those with an MG6D
- in eight per cent of cases with an MG6E, this schedule was undated and in eight per cent it was unsigned
- in volume crime, an MG6C was completed prior to the defendant's first appearance in court in 39 per cent of cases
- we classified descriptions of items on MG6Cs as 'poor' in 73 per cent of cases. We judged that good reasons for sensitivity were given on MG6Ds in 43 per cent of cases
- where the case contains no sensitive unused material, an MG6D is not required but this fact should be noted on the MG6. This was done in only two out of 44 cases
- only 14 per cent of forces had special arrangements for the scheduling of sensitive material
- practice varied in relation to cross-referencing Forensic Science Service schedules on the police MG6C and D. It was often hard to determine whether the Forensic Science Service non-sensitive unused material schedule was provided to the defence at primary disclosure
- separate schedules were prepared for each co-accused in only nine per cent of multi-defendant cases
- 63 per cent of forces conducted quality assurance checks on schedules but these were often limited to ensuring that schedules were present on the file and that the MG6E had been signed by the disclosure officer
- the benefits of software support for the scheduling and management of unused material had not been fully realised. Use of the HOLMES system was concentrated on major crime cases and only nine forces had developed in-house systems to assist with disclosure
- in free-form comments, 43 per cent of disclosure officers thought that better training would deliver the greatest improvement in performance. Twenty-eight per cent thought better guidance on categorising unused material was the most pressing need.

Adverse information about prosecution witnesses

- although the JOPI suggests that the disclosure officer is responsible for communication to the CPS of adverse information about prosecution witnesses, this duty was often carried out by other police personnel
- in some forces, checks on the prior records of non-police witnesses were the responsibility of the ASU; in others, of the OIC/disclosure officer; and in a third group, it could be done by either
- such checks were not done routinely. We found that all witness entries were endorsed on the MG9 in only 24 per cent of relevant cases
- over half of all forces said they revealed prosecution witness convictions, cautions and police disciplinary records to the CPS at the primary stage, though CPS respondents indicated this happened somewhat less frequently
- results of criminal record checks on prosecution witnesses were disclosed to the defence at the primary stage in four per cent of study cases
- most forces relied on the integrity of officers with disciplinary findings to communicate this to the CPS either directly or through the complaints and discipline department. Only four forces described a more systematic process
- only one of the 39 CPS areas that responded kept a record of adverse judicial comments relating to police officers.

Crown Prosecution Service and the prosecution advocate

- 66 per cent of CPS respondents said their lawyers could not review schedules adequately in the time available. Of these, 73 per cent blamed general pressure of work and 58 per cent said it was because schedules were received late
- across the six fieldwork areas, reviewing lawyers had not signed MG6Cs in between 30 and 52 per cent of cases. MG6Ds were unsigned in 43 per cent to 100 per cent of relevant cases
- the reviewing lawyer had commented on the sensitivity status of items listed on MG6Ds in 28 per cent of cases
- fewer than one in five disclosure officers said that consultation with the CPS about disclosure matters took place in most cases
- we assessed that 54 per cent of defence statements in CPS cases either contained a bare denial of guilt or did not meet the requirements of section 5 of the CPIA; however, the prosecution requested further details in response to the defence statement in only eight per cent of cases
- 65 per cent of prosecution barristers did not routinely advise on the compliance of defence statements and 90 per cent of CPS respondents said they would not ask counsel for such advice

- 74 per cent of CPS respondents said advocates were not briefed to raise the non-compliance of defence statements with the court; 78 per cent of prosecution barristers said that they did not do so and 77 per cent of judges agreed that this rarely happened
- the CPS decision concerning primary disclosure was included in 44 per cent of briefs but omitted from 35 per cent of briefs even though they were served after primary disclosure
- 75 per cent of prosecution barristers said their instructions rarely contained an adequate account of the reasons for primary disclosure decisions
- prosecution counsel's advice on disclosure was sought in 32 per cent of cases
- 74 per cent of prosecution counsel said they did not usually receive copies of unused material with the brief
- 72 per cent of defence barristers, but only 45 per cent of prosecution barristers, often discuss disclosure with those instructing them
- all CPS respondents, but only 62 per cent of barristers, said a CPS representative was usually present when disclosure was discussed with the police
- at meetings with the defence advocate, 26 per cent of CPS respondents but only eight per cent of barristers said that a CPS representative was present.

Routine revelation

- although no national consensus has yet been reached, an increasing number of forces and CPS areas, including London, reached agreement on routine revelation during the course of the research
- 47 per cent of forces indicated they were in favour of routine revelation
- 37 per cent of forces currently routinely reveal crime reports to the CPS; 30 per cent reveal logs of messages; 26 per cent reveal officers' notebooks; and 33 per cent reveal SOCO work records
- more than a third of CPS respondents said their area routinely disclosed crime reports, logs of messages and police officers' notebooks to the defence at primary disclosure
- more than two out of three of judges felt that routine disclosure should be practised more widely
- among forces that routinely reveal material to the CPS, 56 per cent edit crime reports before revelation; 44 per cent edit logs of messages; 64 per cent edit notebooks; and 50 per cent edit SOCO work records.

Cases tried summarily

- primary disclosure was served in 21 out of 33 cases; in ten cases no items were disclosed at the primary stage and in seven between one and 24 items were disclosed

- defence statements were served in two cases and secondary disclosure followed in one of these
- 94 per cent of CPS respondents, 84 per cent of justices' clerks and 66 per cent of defence solicitors agreed that defence statements were rarely served in summary cases
- 56 per cent of defence solicitors, 16 per cent of CPS respondents and 24 per cent of justices' clerks said the lack of defence statements was often due to service of primary disclosure less than 14 days before trial
- in 15 out of 18 cases, primary disclosure was served at least two weeks before trial
- 32 per cent of prosecutors and clerks said the prosecution often let the defence see unused material without the trigger of a defence statement; only 13 per cent of defence solicitors agreed that this often happened
- in six out of 25 summary cases, unscheduled items were disclosed
- around half of justices' clerks and CPS respondents said that the bench rarely enquired about the status of disclosure of unused material at a pre-trial review
- 41 per cent of justices' clerks said their court would make a costs order against the prosecution if it failed to disclose as required by the CPIA. However, 19 per cent would take no action in such a situation.

Cases tried on indictment

- over 90 per cent of CPS respondents but only 60 per cent of defence solicitors said primary disclosure was often served at or just after committal; in the case file analysis, primary disclosure was served by committal in 61 per cent of cases
- nearly 60 per cent of barristers (72% of defence barristers), 50 per cent of defence solicitors and 15 per cent of judges said that, in their opinion, non-sensitive unused material was often withheld from the defence when it should have been disclosed. It was not possible to check directly whether disclosable material was withheld in study cases
- items were disclosed with the primary disclosure letter in 32 per cent of post-CPIA cases. Disclosure was also made after the primary disclosure letter but prior to service of a defence statement in 22 per cent; in more than a third of these cases, material had already been disclosed at the primary stage
- one third of CPS respondents, 22 per cent of barristers and 15 per cent of the defence solicitors felt that defence statements were rarely served within 14 days of primary disclosure. Defence statements were served out of time in 65 per cent of cases in the case file analysis
- 32 per cent of CPS respondents said the defence often applied to extend the time for service of a defence statement. In the case file analysis, the defence applied for an extension in 20 per cent of cases in which a statement was served

- 52 per cent of cases with a defence statement either contained a bare denial of guilt or did not meet the requirements of section 5 of the CPIA
- 59 per cent of judges said they would order a non-compliant defence statement to be amended but only four per cent of CPS respondents and prosecution barristers thought that most judges did so
- 43 per cent of judges would initiate legal argument on whether an inference should be drawn where no defence statement is served or the defence at trial differs significantly from the defence statement. Among CPS respondents, 44 per cent would brief advocates to suggest to the court that an inference should be drawn
- defence statements were signed by the defendant in 14 per cent of cases with a statement on file
- 81 per cent of barristers, 70 per cent of judges and 62 per cent of CPS respondents thought that secondary disclosure was rarely served by the PDH. Secondary disclosure was served between committal and the PDH in only 19 per cent of cases
- 48 per cent of secondary disclosure letters identified material to be disclosed. This was followed by further voluntary disclosure in some of these cases as well as in some of the cases in which there was nothing to disclose according to the secondary disclosure letter
- further disclosure was made voluntarily after formal service of the secondary disclosure letter in 57 per cent of post-CPIA cases. Material was subsequently disclosed in at least 53 per cent of the cases in which nothing was disclosed at secondary and in 18 (58%) of the 31 cases where items were disclosed at the secondary stage
- the disclosure officer's listing of undermining or assisting material on an MG6E was not a good predictor of disclosure by the prosecutor. In at least half the cases with items listed on an MG6E, some of that material was not disclosed
- material which was scheduled but not listed on an MG6E was disclosed to the defence, other than by court order, in 74 per cent of cases
- unscheduled unused material was disclosed in 45 per cent of cases
- in 75 per cent of cases with nothing listed on an MG6E, some items were disclosed
- 72 per cent of cases with a defence statement contained or were accompanied by a request for specific unused material. In response to such requests, 56 per cent of judges said they would order disclosure if the material was not sensitive while 23 per cent would do so only if they considered that the material would assist the defence
- 78 per cent of prosecution barristers said they would allow the defence access to non-sensitive material, even if it fell outside the statutory criteria. Only four per cent said they would resist such a request

- in the case file analysis, the court ordered disclosure of unused material other than as a result of a section 8 or PII application in 37 per cent of Crown Court cases
- 53 per cent of judges said they would grant section 8 applications automatically provided the material in question was not sensitive; 36 per cent would refuse the application unless the material might assist the defence as set out in the defence statement
- 60 per cent of CPS respondents said section 8 applications were rare. In the case file analysis, the defence made such an application after the PDH in four per cent of cases
- 36 per cent of judges said that their court monitored compliance with orders relating to disclosure
- the most commonly used judicial sanction for failing to disclose as required by the CPIA was issuance of a further direction to disclose. If the prosecution failed to disclose when ordered by the court to do so, 46 per cent of judges said they would order costs against them
- in relation to disclosure, 82 per cent of judges had criticised police officers; 75 per cent had criticised CPS personnel and 22 per cent had criticised advocates.

Public Interest Immunity

- no national statistics are compiled on the number, type, basis or outcome of PII applications
- 26 per cent of the CPS areas responding to our survey and one casework directorate maintained a log of all PII applications
- most CPS respondents, barristers and judges felt that the number of PII applications had stayed the same or increased since the CPIA was introduced
- PII was seldom an issue in summary cases: 91 per cent of justices' clerks said that PII applications were rare
- respondents saw little difference between PII and other disclosure issues in terms of their impact on the case. PII was no more likely than other disclosure issues to be a factor in judge ordered or directed acquittals
- CPS respondents, barristers and judges confirmed that prosecution summaries formed the basis of most ex parte PII applications, rather than evidence on oath or affidavits
- the prosecutor's review of the MG6D was not a good indication that a PII application would be made. Prosecutors had marked items for court application in only one of the 17 cases with a PII application in which material was listed on a MG6D
- 36 per cent of the PII applications in the case file analysis were at least partially successful
- 40 per cent of forces had agreed protocols on the management of third party material with all local social services departments in their area.

Other prosecuting agencies (Customs and Excise, DTI and SFO)

- consultation between investigators and prosecutors in Customs and Excise was facilitated by the use of e-mail
- regionally based DTI disclosure officers are linked by e-mail with prosecuting lawyers in London. However, eight out of nine DTI disclosure officers said consultation with the prosecuting lawyer on unused material was rare
- around half of the disclosure officers in Customs and Excise and DTI said their schedules were reviewed as part of quality control
- the quality of descriptions of items on non-sensitive schedules was generally better than on police schedules
- only one out of ten Customs and Excise prosecutors said that investigators usually provided the previous convictions of prosecution witnesses with primary disclosure
- four out of ten Customs and Excise prosecutors, four out of seven DTI prosecutors and none of the three SFO prosecutors said that primary disclosure was often served at or just after committal
- practice varied, even within prosecuting agencies, on what was included in briefs to counsel and what instructions were given relating to disclosure
- routine revelation by the investigating officer to the prosecutor of key documents was apparently more common in Customs and Excise than in CPS prosecutions
- the SFO was the only organisation routinely scanning evidential and unused material and supplying material to the defence on a CD-ROM.

Cases resulting in a stay of the prosecution, judge ordered or judge directed acquittal

- the CPS does not include stays in its statistics on adverse findings
- in the past year, 41 CPS respondents reported a total of 93 stays of summary proceedings
- 111 defence solicitors reported a total of 238 cases stayed
- 37 CPS respondents reported a total of 180 stays in Crown Court trials
- 94 barristers reported a total of 115 stays
- case studies indicated that disclosure problems were seldom the only reason why cases failed at court. They were often symptomatic of poor management controls, giving rise to evidential and other problems.

Dissemination and training

- 70 per cent of forces had a central point within the force for reporting back cases that failed for reasons relating to disclosure
- 81 per cent had formal mechanisms for disseminating lessons learned relating to disclosure
- 88 per cent had routine policy level meetings with the CPS at which disclosure issues could be discussed
- only two forces described the training on disclosure provided by their force as adequate
- since the training provided at the time the CPIA was implemented, 74 per cent of forces had trained probationer officers and 67 per cent had trained other groups, although most acknowledged that the targeting of such training had been patchy
- the average length of training received by disclosure officers across volume, major and serious crime was less than a day. Fewer than half the disclosure officers in all three categories had been trained specifically for their role
- since implementation training, 66 per cent of CPS areas had trained CPS lawyers and 62 per cent had trained caseworkers.

Costs and resources

- estimates made prior to the introduction of the CPIA suggested that its effect would be broadly cost neutral: additional CPS costs of between £6.6 million and £7 million would be balanced by savings for the police put at £6.7 million
- the CPS estimates the cost to the CPS of compliance with current disclosure provisions to be £6 million per annum. Achieving the improvements recommended by the CPS Inspectorate would cost an additional £3.63 million per annum
- examination of all unused material by CPS lawyers could require in excess of £30 million of additional resources
- 77 per cent of police forces felt their costs in relation to disclosure had increased as a result of the CPIA
- police training costs were hard to quantify. One force reported that its new CPIA training programme would cost around half a million pounds
- using conservative assumptions, the cost of the time spent by disclosure officers was estimated at £5.8 million
- if practised by all forces, the annual cost of routine revelation to the police would be in the region of £2.76 million

- no data were available on the impact on the legal aid bill of work done on disclosure. Our estimates suggest a figure of at least £3.9 million per annum in respect of payments to solicitors. Payments to counsel are likely to be similar
- we were unable to identify or quantify significant costs or savings to magistrates' courts or the Crown Court as a result of the implementation of the CPIA.

Perceptions of the CPIA

- 88 per cent of barristers, 87 per cent of defence solicitors, 84 per cent of CPS respondents, 61 per cent of judges and 44 per cent of justices' clerks were dissatisfied with the way the CPIA was operating
- in free-form answers, revoking the Act and giving the defence access to most or all non-sensitive unused material was favoured by 12 per cent of CPS respondents, 35 per cent of barristers, 21 per cent of solicitors, 19 per cent of judges and seven per cent of justices' clerks
- 79 per cent of forces thought that the CPIA had increased the administrative burden on the police
- 82 per cent of judges, 38 per cent of CPS respondents, 30 per cent of senior police officers and 27 per cent of disclosure officers felt that it was unrealistic to expect police officers to identify undermining material
- many respondents with concerns about the inability or disinclination of police officers to discharge their disclosure responsibilities also had misgivings about the quality of CPS review of police disclosure decisions. They wanted more resources for the CPS and better co-ordination between the police and CPS. Some also wanted the Bar to be more involved in disclosure decisions
- most judges, barristers, CPS respondents, and defence solicitors agreed that defence statements had not narrowed the issues at trial. No judge commenting on defence statements found them useful in their current form
- around 80 per cent of barristers and defence lawyers, and around 40 per cent of judges and CPS respondents thought that the 14-day period for submission of defence statements was too short
- three-quarters or more of judges, barristers, defence solicitors and justices' clerks believed that statutory disclosure time limits should be imposed on the prosecution; however, only 36 per cent of CPS respondents agreed
- in free-form comments, nine per cent of judges and 21 per cent of justices' clerks said more effective sanctions were needed to deal with breaches relating to disclosure.

Conclusions

Our findings confirmed the conclusion of the CPS Inspectorate's Thematic Review that poor CPS and police practice in relation to disclosure was widespread. The study also revealed a lack of trust affecting all participants in the disclosure process and fundamental differences of approach to the principles that underpin the CPIA. There is enormous scope to improve and monitor the working practices of all those involved. Demonstrably better performance will do much to enhance confidence in the CPIA regime but cannot on its own meet all the concerns that exist.

It has been suggested that the solution to poor police performance in relation to disclosure is to take responsibility for applying the statutory tests away from the police altogether. We consider that this view is mistaken. The ability to identify what undermines the evidence against an accused is a crucial investigative skill. Removing this responsibility from the police would encourage a culture likely to produce more rather than fewer miscarriages of justice. The statutory tests are an important aspect of deciding which items are relevant to an investigation and should be retained and recorded. Whatever disclosure regime applies, this decision will fall initially to the police.

Instead of relieving the police of the responsibility to decide what undermines their case, we propose improving the checks and balances to ensure disclosure decisions are fully and competently reviewed. As part of that process, we suggest improvements to quality assurance and monitoring. We also support the recommendations made in the CPS Inspectorate's Thematic Review of Disclosure that crime reports and message logs be supplied to the CPS in all cases.

An injection of resources will be needed if CPS lawyers are to review police schedules and revealed material in the depth required. In order to obtain the full benefit of such investment, the results of this scrutiny must be monitored and feedback provided on problems that emerge. To this end, we also support the Inspectorate's recommendation that the Trials Issues Group develops arrangements for monitoring the quality and timeliness of disclosure schedules. In particular, this should include the quality of the police decision to include items on the MG6E.

The results of such monitoring may point to the need for the scope of routine revelation to be extended. We do not believe the costs of such an exercise can be justified without first knowing the impact of revelation on a limited scale. We also believe that revelation on a wider scale should not be undertaken before differences about the principles on which the legislation is based are resolved.

The need for practice guidance relating to disclosure is not confined to investigators and prosecutors. We found that judges differed about what action was appropriate in order to expedite the disclosure process. Many judges pointed to the need for a practice direction to clarify the matter.

We found little evidence that government objectives for improvements in efficiency had been achieved. Although it was expected that the financial impact of the CPIA regime would be broadly cost-neutral, we discovered that, in the views of most participants, costs associated with disclosure had risen. In the Crown Court, the average length of trials has not fallen as hoped. Moreover, to remedy the poor practice we encountered will involve significant further investment. On the other hand, it is unlikely that a return to a more open disclosure regime would result in lower costs overall. Costs attributable to proper retention and recording of unused material would continue to apply. Some costs currently incurred by the police and CPS would be transferred to the legal aid bill to cover scrutiny of large amounts of unused material by the defence.

We turn finally to the fairness of the CPIA regime. We found widespread dislike of the legislation and rejection of the idea that prosecution disclosure should be linked to a statement about the nature of the defence. This is often manifested in unwillingness of the defence to submit meaningful defence statements and judicial reluctance to deny defence applications to see unused material. Such practices make it impossible for the disclosure regime to operate as intended, irrespective of the quality of schedules and police and CPS decision-making. We therefore feel that the time has come for a debate on whether the principles upon which the Act is based remain valid. We hope that the outcome of such a debate will be the emergence of a shared view about the meaning of the disclosure tests and agreement on what it is reasonable to demand by way of defence disclosure. Without a working consensus, participants in the criminal justice system are unlikely to operate successfully the provisions of any disclosure regime.

1 Introduction

'The right of every accused person to a fair trial is a basic or fundamental right, and his right to fair disclosure is an inseparable part of his right to a fair trial.' (Lord Steyn in R v Brown (Winston) 1994)

'Disclosure has become a nightmare. The submission of a crime file used to be the end of an investigation. Because of the CPIA, it now begins a process which engulfs the officer. (Disclosure officer)

'In ordinary everyday cases, the CPIA leads to an "investigation of the investigation" which is time consuming in court and often irrelevant (I do my best to stop it). However I fear the genie is out of the bottle and much work is done for, usually, little effect.' (Judge)

The study

Material obtained in the course of a criminal investigation is commonly referred to as 'unused' where the prosecutor does not intend to rely on it at trial. Unused material may or may not have to be disclosed to the defence. Prior to the Criminal Procedure and Investigations Act 1996 (CPIA), the prosecutor's duty to disclose unused material had developed through guidelines and case law. Parts I and II of the CPIA, containing the first statutory requirements to control disclosure of unused prosecution material, came into force on 1 April 1997 and apply to cases where the investigation began after that date.

Concern about the operation of the CPIA surfaced soon after its implementation. David Calvert-Smith QC, Director of Public Prosecutions (DPP) went on record a number of times to acknowledge that 'the evidence – both anecdotal and provable – has been mounting that the Act is not in fact being applied correctly in all cases.'[1] The Criminal Bar Association and the British Academy of Forensic Sciences conducted a survey among barristers into the provisions of the Act, and the Law Society conducted a related exercise with solicitors. These produced a range of criticisms directed at the structure of the disclosure regime. The CPS Inspectorate's Thematic Review of the Disclosure of Unused Material, published in March 2000, concluded that the CPIA was not working as Parliament intended and that its operation did not command the confidence of criminal practitioners.[2]

Recognising these growing concerns, the Home Office commissioned this study which was carried out between January and December 2000. The project steering group consisted of representatives of the Home Office, LCD, Legal Secretariat to the Law Officers, CPS, ACPO, Trials Issues Group, Customs and Excise, SFO, DTI, Northern Ireland Office, the Law Society and the Criminal Bar Association.

The study aimed to examine whether the CPIA disclosure provisions had met the objectives of fairness towards all those affected, efficiency in focusing on the key issues at trial and effectiveness in bringing about the acquittal of the innocent and the conviction of the guilty.[3]

1 For example: The prosecuting authority's role; 'Disclosure under the CPIA 1996': British Academy of Forensic Sciences seminar, Gray's Inn, 1 December 1999.
2 Para. 1.6, CPS Inspectorate's Report on the Thematic Review of the Disclosure of Unused Material (2000) Thematic Report 2/2000.
3 Home Secretary's Second Reading speech, 27 February 1996.

Background to the CPIA

The effort to achieve a disclosure regime which represents 'a fair balance between the respective needs of the participants in the investigative and trial process'[4] is an ongoing struggle. The consequences of getting the balance wrong are extreme: conviction of the innocent; acquittal of the guilty; and the criminal justice system as a whole brought into disrepute. The Criminal Cases Review Commission has identified non-disclosure as the third most common reason why cases are referred to it,[5] though most referrals to the Commission thus far are likely to have involved pre-CPIA cases.

Law, policy and procedures concerning disclosure have been in a state of continuous development for more than 20 years. The process has been likened to a pendulum swinging periodically between more open and more controlled disclosure of unused material.[6] The CPIA was the first legislation directed at the issue. It was seen as 'an avowed attempt to reverse the balance of power in the criminal justice system in the area of disclosure away from the defence and in favour of the prosecution.'[7] The Court of Appeal has acknowledged that disclosure required by the CPIA 'is and is intended to be less extensive than would have been required prior to the Act at common law.'[8] Since the Act's implementation, it seems to us that the pendulum has shifted direction again and, as a result of pressures, it has continued to move during the course of our study. Disclosure has aptly been described as 'the battleground of the modern justice system.'[10]

The history of the turmoil begins in 1981, when the Attorney General issued Guidelines on prosecution disclosure which went beyond the minimum requirements laid down in case law at that time. The Guidelines required disclosure to the defence of all unused material which had 'some bearing on the offence(s) charged and the surrounding circumstances of the case' but did not contain an overall definition of unused material.

Evidence of defence dissatisfaction with the disclosure regime was obtained in 1992, when the Royal Commission on Criminal Justice commissioned a 'snapshot' survey of all completed Crown Court cases in a two-week period. Prosecution barristers and the CPS indicated that in over four-fifths of the cases in which disclosure of unused material was an issue, all of it was disclosed; some was disclosed in around a tenth of the cases and none was disclosed in five per cent. However, 23 per cent of defence barristers and 18 per cent of defence solicitors in contested cases expressed concern that the prosecution had not disclosed unused material. In more than half these cases, both the barristers and solicitors involved were not satisfied with the way the issue had been resolved.[11]

The Attorney General's Guidelines were subsequently overtaken by case law, first in R v Saunders (1991) and then in R v Ward (1993) 1 WLR 619. These cases further expanded prosecution disclosure responsibilities and the scope of what was to be regarded as unused material.[11] Ward made it clear that the Guidelines did not fully represent the obligation at common law and expressed the duty of disclosure in very wide terms. This case was said to have caused 'something akin to panic within the ranks' of the prosecution Bar and CPS[12]

4 Commentary to the Attorney General's Guidelines on Disclosure, 29 November 2000.
5 Para. 2.4, Criminal Cases Review Commission Annual Report 1999-2000.
6 David Calvert-Smith QC, The prosecuting authority's role; 'Disclosure under the CPIA 1996': British Academy of Forensic Sciences seminar, Gray's Inn, 1 December 1999.
7 David Corker, The CPIA disclosure regime: PII and 3rd party disclosure, the defence perspective; 'Disclosure under the CPIA 1996': British Academy of Forensic Sciences seminar, Gray's Inn, 1 December 1999.
8 R v DPP ex parte Lee (1999) 2 All E.R. 737.
9 Sir David Phillips, Vice-President of ACPO, letter to Chief Constables re Attorney General's Guidelines on Disclosure, 29 November 2000.
10 Section 4.3, Michael Zander and Paul Henderson (1993) Crown Court Study, Research Study No. 19, Royal Commission on Criminal Justice. HMSO.
11 In Ward, the Court of Appeal quashed a conviction because of the non-disclosure of material to which the court held the defendant would have been entitled in the interests of securing a fair trial.
12 David Calvert-Smith QC, The prosecuting authority's role; 'Disclosure under the CPIA 1996': British Academy of Forensic Sciences seminar, Gray's Inn, 1 December 1999.

and 'a defence feeding-frenzy in relation to unused material.[13] In R v Turner (1995) 2 Cr. App. R. 94, the Court of Appeal noted:

> *'Since Ward, there has been an increasing tendency for defendants to seek disclosure of informants' names and roles, alleging that those details are essential to the defence… We wish to alert judges to the need to scrutinise applications for disclosure of details about informants with very great care. They will need to be astute to see that the assertions of a need to know such details, because they are essential to the running of the defence, are justified. If they are not so justified, then the judge will need to adopt a robust approach in declining to order disclosure.'*

In its 1993 report, the Royal Commission on Criminal Justice expressed concern about the state of the law following Ward. It considered that such case law decisions on disclosure had created unreasonable burdens for the prosecution:

> *'The defence can require the police and the prosecution to comb through large masses of material in the hope either of causing delay or of chancing upon something that will induce the prosecution to drop the case rather than to disclose the material concerned. The defence may do this by successive requests for information, far beyond the stage at which it could be reasonably claimed that the information was likely to cast doubt on the prosecution case.'*[14]

The Royal Commission proposed that 'a reasonable balance between the duties of the prosecution and the rights of the defence' required a new two-stage regime consisting of automatic primary disclosure, followed by secondary disclosure if the defence could establish its relevance to the case.[15] While the Royal Commission sought to address the post-Ward liberal disclosure regime, the common law had already changed again as a result of the Court of Appeal judgment in R v Keane (1994) 1 WLR 746. This placed a duty on the prosecution to consider all items of unused material but these would ordinarily only be disclosable if they could be seen 'on a sensible appraisal:

1) to be relevant or possibly relevant to an issue in the case
2) to raise or possibly to raise a new issue whose existence is not apparent from the evidence the prosecution propose to use
3) to hold out a real (as opposed to a fanciful) prospect of providing a lead on evidence going to 1) or 2).'

Any material fulfilling these criteria and which the prosecution did not wish to disclose because of its sensitivity had to be placed before a judge. The Lord Chief Justice said that the more information the defence could give about the issues in a case, the more likely it would be that the prosecution and the judge, when considering sensitive material, would be able accurately to assess its importance to the defence.

The Royal Commission's proposals on disclosure were set out in a 1995 consultation paper[16] and formed the basis for the statutory regime embodied in the CPIA. The consultation paper noted:

> *'The practical effect of the disclosure requirements has been to place heavy burdens on the investigating and prosecuting authorities, with results which may not be in the interests of justice.'*

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13 P.4, Anthony Heaton-Armstrong and David Corker, Disclosure under the CPIA? Archbold News Issue 6, July 16 1999.
14 P. 93 (1993) Royal Commission on Criminal Justice: Report (Cm 2263).
15 Pp. 95-100.
16 Home Office. Disclosure: A Consultation Document (Cm 2864).

The provisions of the CPIA

In the second reading of the Bill in the House of Lords, the government said the aim of the legislation was to focus disclosure on material which might either weaken the prosecution case or assist the defendant, while reducing the time and money expended by both prosecution and defence in examining quantities of irrelevant material. The defence statement introduced by the Act was intended to clarify in advance the real issues between the parties.

During the debate, the Lord Chief Justice, Lord Taylor, said that:

> *'Ambush defences and fishing expeditions, if they are within the law, are ploys that defence lawyers can and have adopted. It may be thought that the time to restrict the extent to which that can be done has arrived.'*[17]

The CPIA came into force on 1 April 1997 for cases where the investigation began on or after that date. Part I created a statutory scheme for prosecution and defence disclosure to be conducted in stages. Section 1 provided that the scheme applies to summary cases where the accused pleads not guilty, and to all cases which proceed to the Crown Court for trial by any route. Section 2 determined that the disclosure scheme applies separately in relation to each person accused of an offence and that 'material' means material of all kinds, including information and objects of all descriptions. The requirements of primary disclosure were set out in section 3, namely that the prosecutor either discloses to the accused any previously undisclosed prosecution material which in the prosecutor's opinion might undermine the prosecution case, or tells the accused in writing that there is no such material. Prosecution material was defined in section 3 as material which the prosecutor possesses or has inspected in connection with the case against the accused. Section 4 required the prosecutor to give the accused the schedule of non-sensitive material.

Sections 5 and 6 stated that where the prosecutor has made primary disclosure, the accused is required to give a defence statement to the court and the prosecutor in Crown Court cases, and may do so voluntarily in summary trials where the defendant pleads not guilty. If the accused gives a defence statement, the prosecutor must under section 7 disclose any previously undisclosed prosecution material which might be reasonably expected to assist the accused's defence as disclosed by the defence statement or provide a written statement that there is no such material (secondary disclosure).

Section 8 enabled the accused to apply for a court order requiring the disclosure of prosecution material in certain circumstances. Section 9 required the prosecutor to keep under review whether there is any prosecution material which meets the tests for disclosure. Section 10 dealt with the prosecutor's failure to observe time limits. Section 11 set out the consequences of certain faults in disclosure by the defendant. Part II of the CPIA defined an investigation for the purpose of the Act and required the Secretary of State to prepare a code of practice governing disclosure.

Further details of the legislation, code of practice and other guidance are set out in relation to each issue discussed in subsequent chapters. Flowcharts showing the disclosure process from investigation through to trial are at Appendix B to this report.

17 H.L.Deb., 27 November 1995, cols 477-478.

Changes since implementation of the CPIA

The interpretation of disclosure has changed in a number of respects since implementation of the CPIA. Section 21 of the Act was intended to disapply 'all the common law rules relating to disclosure by the prosecutor, except those relating to whether disclosure is in the public interest.'[18] However, the replacement of the common law applied only to the situations to which the Act applied as defined in Section 1. Common law disclosure principles pre-committal were reasserted by the Court of Appeal in R v DPP *ex parte* Lee (1999) 2 All E.R. 737, resulting in new guidance for prosecutors stating that:

> *'the prosecution is under a duty to disclose any material which might assist the defendant to make a bail application, irrespective of the stage the proceedings have reached, and whether or not the CPIA applies.'*[19]

Other changes to the CPIA disclosure regime have been made through issuance of CPS Casework Bulletins.[20] The DPP has made known his view that the tests should be interpreted more generously and that 'in most cases it should be possible to disclose all necessary material in primary disclosure.'[21] The new Attorney General's Guidelines published on 29 November 2000 expanded on this approach. The Guidelines were the subject of a lengthy consultation exercise and underwent many drafts. The introduction to the final version states that in some areas the Guidelines go 'beyond the requirements of the legislation, where experience has suggested that such guidance is desirable.' These significant changes, along with local initiatives such as the Pan London Agreement[22], are seen as leading to 'a sea change in the workings of the CPIA.'[23] Further changes are anticipated in response to the recommendations of the CPS Inspectorate's Thematic Review. Nevertheless, concerns persist: the Law Society takes the position that 'there remains a need for root and branch legislative surgery.'[24]

During the course of this study, a wide range of respondents acknowledged that practice in some areas had already moved away from the provisions of the Act and reinstated principles of to the previous common law regime:

> *'What is required is a proper recognition that there is a statutory framework in existence. In some parts of the country, one would be forgiven for imagining that it was a Ugandan Rule of Practice that governed these matters rather than a UK statute.' (Judge)*

> *'Basically, the system is not working. By forcing the issue and insisting on maximum disclosure, I believe some of the worst risks of injustice can be avoided.' (Judge)*

> *'The police and CPS often refuse to disclose material which prosecuting counsel nearly always disclose at trial.' (Barrister)*

> *'In practice, the pre-CPIA regime is operated in most cases. The CPIA requires an immense allocation of resources, most of which is largely wasted since any sensible prosecution counsel will insist on the pre-CPIA regime being applied.' (Barrister)*

18 Introductory Guide to the Criminal Procedure and Investigations Act 1996, Home Office.
19 'Points for Prosecutors' (September 2000), Legal Secretariat to the Law Officers.
20 For example in relation to disclosure of witness convictions, overruling guidance on this issue in Annex A of the Joint Operational Instructions which had been issued before implementation of the Act.
21 David Calvert-Smith QC, The prosecuting authority's role; 'Disclosure under the CPIA 1996': British Academy of Forensic Sciences seminar, Gray's Inn, 1 December 1999.
22 Agreed between CPS, Metropolitan and City Police and endorsed by the Criminal Bar Association and London Criminal Courts Association; launched 28 November 2000.
23 Bruce Holder QC, Criminal Bar Association, speaking at the launch of the Pan London Agreement.
24 Malcolm Fowler, Chair of the Criminal Law Committee, the Law Society, press release accompanying the Attorney General's Guidelines on Disclosure, 29 November 2000.

'I apply the old common law when I prosecute.' (Barrister)

'Many judges take a pragmatic view and order disclosure despite the Act. This causes CPS to complain that the Act is not being adhered to. It also means there is often a "rush" of disclosure pre-trial once the matter gets into counsel's hands.' (Barrister)

'We should revert to the common law rules which are de facto being applied by many/most judges and lawyers in this area.' (CPS lawyer)

'The CPIA is an obstacle which has to be got around. It is a major stumbling block in the quest for justice and fairness towards the defence. That is why I do my best to comply with the Act and then tell the defence we can now get back to basics and ask "When would you like to come round to see the rest of it?" No defender I have ever met has thought that anything but best practice.' (DTI lawyer)

'The law should revert to the common law position. Many prosecutors take the view that if we want to examine documents we can, even if they do not think those documents undermine.' (Defence solicitor)

'Many judges say, "I'm going to operate the common law here."' (Senior police officer)

These departures from the CPIA illustrate the inconsistencies in practice around the country. Changing guidance on disclosure practice, the more generous interpretation of the disclosure tests advocated by the DPP, publication of the findings of CPS Inspectorate's Thematic Review, the Pan London Agreement and new Attorney General's Guidelines on Disclosure have meant that practice has had little chance to stabilise.

The period since implementation of the CPIA has seen other major changes to the criminal justice system. For example, the measures introduced by the Crime and Disorder Act 1998 have reduced case file preparation times but not the extent of prosecution disclosure obligations. This means that even less time is available for police and CPS to review unused material and apply the statutory disclosure tests. Nor is the pace of change slowing perceptibly. In January 2001, procedures for transferring indictable only cases to the Crown Court were implemented and in February 2001 the government published 'Criminal Justice: The Way Ahead', a ten-year plan for change.[25] Publication of Lord Justice Auld's Review of the Criminal Courts and revised Joint Operating Instructions are expected later in 2001.

Against this ever-shifting background, it might seem that the results of a study such as this are likely to be out-of-date by the time they are published. We disagree. The underlying seams of concern highlighted by our findings persist throughout the many adjustments that have taken place and those yet to be introduced. As well as suggesting improvements to practice, we hope this report will inform a debate on the principles that underpin our entire approach to disclosure.

The structure of the report

Chapter 2 explains the methodology used in carrying out the study. Chapters 3, 4 and 5 deal with the way in which police forces have responded to their disclosure obligations under the CPIA, the approaches adopted to the production of schedules and practice in relation to disclosing adverse information about prosecution witnesses. The ways in which the CPS exercises its disclosure responsibilities and the relationship with the prosecution advocate are described in chapter 6. Chapter 7 discusses the extent to which routine revelation by the police to the CPS of specific items is already practised and the degree of support that exists for extending it more widely.

25 Cm 5074

The disclosure issues that arise as cases progress through the courts are discussed in chapter 8 for cases tried summarily and chapter 9 for those dealt with on indictment. Chapter 10 addresses applications to withhold unused material from the defence on the grounds of public interest immunity (PII). Chapter 11 summarises practice in cases prosecuted by Customs and Excise, the DTI and the SFO. Cases that have failed at court because of disclosure issues are dealt with in chapter 12 and training issues are examined in chapter 13. Estimates of the costs of operating the disclosure regime are presented in chapter 14.

The views of the professional participants on the CPIA and ways in which practice might be improved are set out in chapter 15. The findings of the study are brought together in chapter 16 along with the conclusions to be drawn and the recommendations that follow.

Appendix A contains a glossary of terms used in the report. Appendix B has flowcharts of police and CPS actions in the disclosure process.

2 Methodology

Introduction

The project involved a combination of in-person and telephone interviews, questionnaire surveys and data collection from files examined in police and CPS offices, at HM Customs and Excise and the DTI. This chapter describes what was involved in each of these exercises.

Our initial plan of work was amended in light of the CPS Inspectorate's Report on the Thematic Review of the Disclosure of Unused Material which was published in January 2000. That report contained a detailed examination of the disclosure process as it relates to the CPS. We have tried to draw on, but not duplicate the Inspectorate's work. In consultation with the project steering group, we took a broad perspective of the working of the disclosure regime, drawing on the views of the police, prosecutors, defence practitioners, justices' clerks and judges.

We have tried to avoid making subjective judgments and, wherever possible, to obtain information from more than one source. It should be noted, however, that case files were often a poor record of what happened in relation to disclosure of unused material, even where the police and CPS files were examined together. Also, the cases in the study sample reflect disclosure practice at the time they were active; this had sometimes changed by the time we visited fieldwork areas. Interviews and responses to questionnaires provided a more up-to-date perspective on prevailing practice.

The force survey

Telephone interviews were held with a representative of each of the 43 regional forces. Interviewees were nominated by their Chief Constable in response to a request to speak to a senior officer with policy responsibility for disclosure matters. Their ranks were as follows (detective ranks are not identified separately) in Table 1.

Table 1: Ranks of police policy interviewees

Rank	Number of interviewees
Assistant Chief Constable	1
Chief Superintendent	3
Superintendent	11
Chief Inspector	7
Inspector	12
Sergeant	4
Civilian heads of AJU	4
Legal researcher	1
TOTAL	43

Questionnaire surveys

The groups surveyed by questionnaire and the relevant response rates are set out in Table 2.

Table 2: Survey response rates

Category of respondent	Questionnaires sent out	Completed questionnaires received	Response rate
Disclosure officers	430	262	61%
CPS	44	50	
Justices' clerks	148	81	55%
Defence solicitors	5,000	117	2%
Barristers	1,000	242	24%
Circuit Judges	380	180	47%
SFO lawyers	25	6	24%
Customs and Excise investigators	12	11	92%
Customs and Excise lawyers	10	10	100%
DTI investigators	10	9	90%
DTI lawyers	10	7	70%
TOTAL	7,069	975	

The position in respect of the CPS survey requires some explanation. A questionnaire was sent to each of the 42 CPS areas and to the casework directorates in London and York. Replies were received from 39 areas and the two casework directorates. Two areas completed two questionnaires, one completed three and one area sent in six replies. Most references in the text below are therefore to CPS respondents rather than CPS areas. However, where appropriate we have analysed responses by CPS area.

Senior officers in each force were sent ten questionnaires for distribution to disclosure officers in volume[26], major[27] and serious[28] crime. Responses were received from 262 disclosure officers drawn from all 43 forces. The ranks of respondents are shown in Table 3 (acting ranks are not distinguished).

Table 3: Respondents to disclosure officer survey

Status	Percentage of those responding
Detective constable	42%
Police constable	24%
Detective sergeant	16%
Civilian	5%
Police sergeant	5%
Higher ranks	4%
Status not indicated	4%

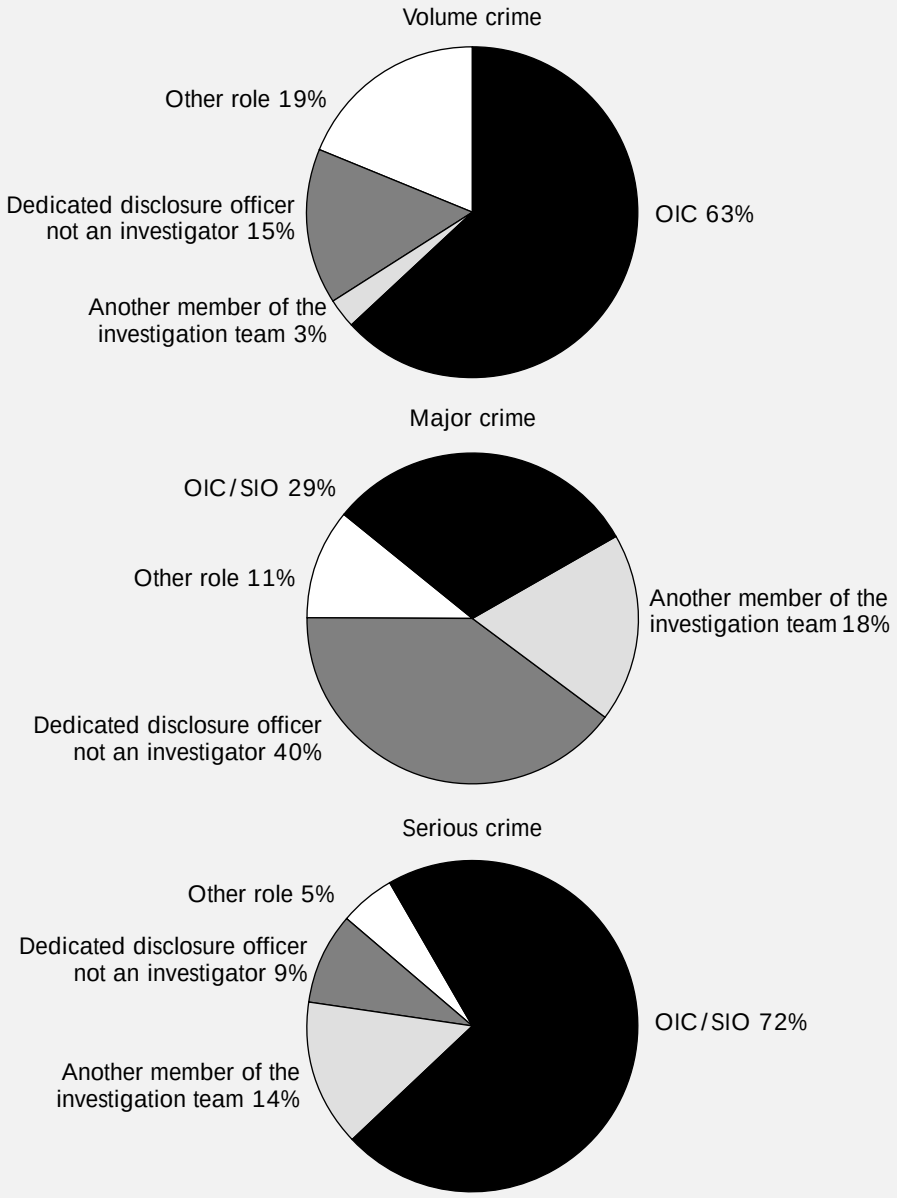
26 For example, deception, theft, ABH, public order.
27 Reactive investigations such as murder.
28 Proactive intelligence-led investigations such as significant drug supply, large-scale fraud, paedophile enquiries and serious robbery.

Sixty-three per cent had acted as disclosure officers since the implementation of the Act. The least experienced had been a disclosure officer for only a few weeks.

The average number of cases per year in which respondents said they acted as disclosure officers was 177 for volume crime, seven for major crime and 12 for serious crime. The figures for volume crime were strongly affected by a few respondents in administrative units who acted in a large number of cases: 17 such respondents (6%) acted in more than 300 cases a year. The median, which may be a better indication of average workload, was 38 cases in volume, three in major and five in serious crime.

Fifty-three per cent of disclosure officer respondents acted mostly in volume crime, 25 per cent in major crime and 21 per cent in serious crime. Their usual role in these investigations is illustrated in Figure 1.

Figure 1: Role of disclosure officers responding to our survey



Five questionnaires were sent to the resident judge at 74 Crown Court centres with a request that these be distributed to colleagues who presided regularly at plea and directions hearings (PDHs). Replies were received from 180 circuit judges. Smaller courts may not have had five PDH judges and so the real response rate may have been higher than indicated in Table 2.

Only 117 replies were received to 5,000 questionnaires for solicitors distributed with an edition of the Criminal Practitioners Newsletter. As the circulation is not restricted to defence solicitors, the response rate may be deceptively low. The Law Society received a similar number of responses to its disclosure questionnaire which was distributed in the same way.

The questionnaire for barristers was distributed to 1,000 members of the Criminal Bar Association chosen at random from its membership database. A total of 242 replies were received. They came from 181 (75%) barristers who both prosecuted and defended; 53 (22%) who acted only for the defence and eight (3%) who appeared only for the prosecution. Thirty-eight replies (16%) were from QCs. Years of call ranged from two to 39 with an average of 16 years.

Two questionnaires were sent to each of the 74 justices' chief executives with a request that they be completed and returned by experienced clerks to the justices; 81 replies were received.

Replies were received from six out of 25 SFO personnel; 21 out of 22 at Customs and Excise; and from 16 out of 20 at the DTI.

The examination of case files

We examined files relating to 193 prosecutions, just short of our target of 200 cases. A total of 314 defendants were involved: 138 cases (72%) had a single defendant and the other 55 cases (28%) involved between two and eight co-defendants.

Six fieldwork areas were identified by the project steering group. Preliminary visits were conducted to each area to meet nominated police and CPS contacts. All areas agreed to identify 30 police and CPS files in completed cases which had been prepared for trial and which represented a range of problems and good practice. In addition, Customs and Excise identified ten files for examination and the DTI selected five.

The cases supplied for our review by the fieldwork areas did not meet the agreed criteria in all respects. The final sample of 178 cases prosecuted by the CPS comprised 123 volume (69%), 38 major (21%) and 17 serious (10%) cases. This complied with our request for two-thirds volume crime and one-third either major or serious crime. However, the 33[29] (19%) summary cases provided fell short of the target of 48 (26%).

Some areas experienced problems in identifying closed cases for which both CPS and police files could be retrieved and which met the selection criteria. Six pending cases, which were nearing completion, were included in the sample, even though only closed cases had been requested. Fieldwork areas had been asked to list briefly the reasons for selecting the cases and to identify at least 36 cases in the total sample illustrating some aspect of good practice in the management of unused material. Despite this request, many cases were presented without an explanation for their selection and only 14 cases (8% of those prosecuted by CPS) were flagged as examples of good practice. In 41 (25%) of the remaining 164, we could not detect why the cases had been selected for inclusion in the study.

29 This number included six youth court cases. Some Crown Court cases also involved defendants who were youths.

Problems in identifying suitable cases were sometimes due to a lack of co-ordination between CPS and the police but also arose from practical constraints. For example, some forces had a policy of destroying files in cases not resulting in a conviction; in other areas, police or CPS case files were stripped of correspondence and schedules prior to archiving. For some cases, either the CPS or the police file was not available. In order to make up the requisite numbers, we found it necessary to identify some cases for review after we arrived at the fieldwork site. In one area, the police did not provide any files but information on some cases was retrieved from the force's computer system which held a record of schedules and case events.

An application for non-disclosure on the grounds of PII was made in 33 cases from fieldwork areas (short of the target of 48 such cases), but basic information about court applications was often missing from the files examined. Sometimes this was due to the fact that the brief as annotated by counsel had not been returned to the file and no CPS representative had been present to take a note in court. In two areas, we were provided with records concerning such applications which had been retained separately in a secure location.

The availability of files varied between sites. In all, 273 files were examined: in 104 cases (54%) only the prosecution file was seen, in nine (5%) only the investigator's file was available and in the remaining 80 cases (41%) both files were seen. It was particularly helpful where disclosure schedules on both files could be compared: in ten per cent of these cases, schedules were located on the police file which were not found on the prosecution file.

The research specification called for a comparison between cases in which disclosure was governed by CPIA and pre-CPIA regimes. To this end, we examined files relating to 12 pre-CPIA cases (6% of the total): two were identified by CPS Headquarters from those retained in their archives as being of long-term interest; six others were among those identified by the six fieldwork areas and four of the five DTI cases were pre-CPIA. Many of the pre-CPIA case files lacked a full record of correspondence and, in general, the recording of disclosure events was even poorer than in post-CPIA cases.

The categories of offence in study cases and the offence descriptions are listed Tables 4 and 5.

Table 4: Offence categories

Category of offence	Percentage of study cases in this category
Volume	66%
Major	20%
Serious	14%

Table 5: Study cases by type of offence

Offence description	Percentage of study cases involving this offence
Drugs	15.5%
ABH/GBH/common assault	13.0%
Burglary/theft/ handling	13.5%
Sex offences with children	11.4%
Murder	7.8%
Robbery	7.3%
Public order	6.7%
Other sex offences	5.7%
Deception	2.6%
Possession of offensive weapon	2.0%
Fraud	1.6%
Death by dangerous driving	1.6%
Other offences	11.3%

There were 160 cases in the sample (83%) that had been committed or transferred to the Crown Court for trial. The CPS prosecuted all 33 summary cases.

Other visits

Towards the end of the study, a visit was made to one area where the police and CPS had co-located following Sir Iain Glidewell's review of the CPS[30], and also to one of the fieldwork forces which was instituting new procedures for managing disclosure.

Canvassing views of interested organisations

Apart from surveys, approximately 100 interviews were conducted with interested organisations and individuals in the course of the research. These included discussions with members of the judiciary, with practitioners in fieldwork areas and also with representatives of:

- British Academy of Forensic Sciences
- Criminal Bar Association
- Customs and Excise
- CPS Inspectorate
- CPS Policy Directorate
- DTI
- JUSTICE
- Law Society
- Legal Services Commission
- LCD
- Legal Secretariat to the Law Officers
- National Crime Squad

30 The Review of the Crown Prosecution Service – A Report (1998).

- Police Information Technology Organisation
- SFO
- Trials Issues Group.

We also attended various seminars on the subject of disclosure, including one with Lord Justice Auld arranged by the organisation JUSTICE as part of the Review of the Criminal Courts.

As well as interviews, a letter inviting comments on the disclosure of unused material and the CPIA was sent to the following organisations. Those that responded are indicated with an asterisk:

- Association of Directors of Social Services*
- British Transport Police
- Criminal Cases Review Commission
- Criminal Courts' Review
- Department of Health Chief Medical Officer
- Department of Health Social Services Inspectorate
- Forensic Science Authority
- HM Inspectorate of Constabulary
- JUSTICE*
- Justices' Clerks' Society*
- Legal Action Group
- Legal Services Commission*
- Liberty
- Local Government Association
- London Criminal Law Solicitors' Association
- Magistrates' Association*
- Ministry of Defence Police Agency
- UK Atomic Energy Authority Constabulary.

The discussions and written comments were used to inform the development of survey questionnaires and the data collection instrument for the case file analysis.

3 Police organisational structures

'Our force has no consistent corporate view on the role of the disclosure officer and the preparation of schedules.' (Disclosure officer)

Introduction

This chapter explores different organisational approaches adopted by the police in relation to the disclosure officer's responsibility for the completion of schedules in volume, major and serious crime and summarises force plans to change how they deal with disclosure. It also describes problems encountered by disclosure officers in discharging their responsibilities.

The police case is submitted to the prosecution in a file prepared in accordance with the national Manual of Guidance. This contains a series of forms – the MG6B, C, D and E – of specific relevance to the disclosure process. Guidance for their completion is contained in the Criminal Procedure and Investigations Act 1996 Joint Operational Instructions – Disclosure of Unused Material, issued by ACPO and the CPS in March 1997. The responsibilities of the disclosure officer are set out in the Code of Practice issued by the Home Office under Part II of the CPIA. The Code requires the disclosure officer to:

- examine material retained during an investigation
- create schedules of unused material and submit them to the prosecutor
- reveal material to the prosecutor during the investigation and criminal proceedings
- certify to the prosecutor that action has been taken in accordance with the Code
- disclose material to the accused at the request of the prosecutor.[31]

The Code and the Joint Operational Instructions (JOPI) envisaged a regime in which completion of the MG6 disclosure schedules was carried out by a single individual, but we found that this was not invariably the case. In volume crime cases, some forces had removed responsibility for schedule completion from the officer in charge (OIC) or had shared it among officers as a consequence of implementing the Crime and Disorder Act 1988. Under these Narey reforms, the police gave priority to the preparation of expedited files within 24 hours of charge for defendants' first appearance in court. Intelligence-led policing and crime screening had also changed force priorities, resulting in greater specialisation and a move away from traditional police roles. Such organisational changes all had a bearing on how the disclosure officer's role was addressed.

Key findings in this chapter include the following:

- 23 per cent of forces reported that practice for completion of schedules in volume cases varied among divisions

31 Para. 2.1, Criminal Procedure and Investigations Act 1996 (s.23(1)) Code of Practice (1997), The Stationery Office.

- in around 80 per cent of forces, the disclosure officer in volume crime was usually the OIC, and in major and serious crime was likely to be a member of the investigative team
- in 21 per cent of forces, responsibility for schedule completion in volume crime did not lie with the OIC and sometimes did not even rest with a single individual
- 65 per cent of forces had plans to change their arrangements for dealing with disclosure.

Volume crime

The JOPI describes the responsibilities of the investigator, disclosure officer and OIC and states they may be performed by different people or by one person, as long as those performing the roles are clearly identifiable.

Disclosure officers were asked whether their appointment was usually automatic or someone else's decision. Out of 133 volume crime disclosure officers responding to this question, 126 (95%) said their appointment was automatic. Seventy-three out of 137 (53%) said they were appointed at the beginning of an investigation, 58 (42%) when a full file was requested and six (4%) at some other stage.

In volume crime, the decision about who should act as OIC and disclosure officer and who should complete the MG6 schedules was closely linked to force arrangements for investigative follow-up and file preparation. In our survey, arrangements for the preparation of volume crime schedules were consistent across divisions within 33 forces (77%). In the remaining ten forces (23%), practice varied among administrative divisions and this was perceived to cause problems:

> *'Our force is community-based in seven basic command units and there is no consistent approach to the completion of schedules.'*

> *'Depending on the division, all schedules are done either by a team member or an experienced ASU officer. It's a mishmash. Our force working group hopes to achieve consistency.'*

In 34 forces (79%), responsibility for all three disclosure schedules – the MG6C, D and E – lay with the OIC who was usually of constable rank. However, the traditional role of OIC was breaking down. Greater specialisation and targeting of resources meant that in some forces, lead responsibility was handed from one officer to another as the investigation developed.

Take, for example, a call reporting a burglary which is then allocated to an area crime management unit. The unit assesses the call and sends out a crime scene attender (a uniformed constable) who interviews the householder, assesses the crime scene, decides whether there are forensic opportunities requiring follow-up by scenes of crime officers (SOCOs), makes initial enquiries at neighbours' homes, and updates the crime report with his findings. On the basis of this report, the crime management unit decides that further enquiries are merited and allocates the case to an area crime unit investigator (a detective). The burglary is thought to be one of a series, and an intelligence unit is asked to seek information from informants about those believed to be responsible. This intelligence is passed to the investigator who obtains a search warrant. The tactical support team is tasked with executing the warrant, making the search and arresting the suspect. Once the suspect is in custody, the investigator or someone from the case investigation team interviews the suspect and builds the file. This model of a routine investigation illustrates the problems confronting the disclosure officer (in this example, the investigator who builds the file) because unused material is likely to be generated at every stage in the process.

Even in forces where the OIC was responsible for initiating schedules, personnel in the Administrative Support Unit[32] (ASU) might amend deficient schedules rather than return them to the disclosure officer, or schedule additional unused material as the full file is put together:

> *'The OIC is the disclosure officer and completes the schedules but this conflicts with the role of file preparer/ file manager, so there is tension about this part of the paperwork. This division of responsibility flies in the face of our process for file preparation.'*

In three forces (7%), the disclosure officer who completed all three schedules was an officer or civilian in the ASU:

> *'The investigator completes an aide-memoire checklist of documents. This goes to an ASU officer who liaises with the investigator and completes all three schedules.'*

> *'Each ASU contains police enquiry officers and prisoner process officers. At a not guilty plea, the file belongs to an enquiry officer who acts as disclosure officer and puts together schedules based on information from the arresting officer. The enquiry officer may have difficulty contacting the arresting officer to get information to put the schedules together – this does not always work well. In indictable only cases, the arresting officer creates the schedules although the enquiry officer is still the disclosure officer.'*

> *'If a full file is needed, a specialist enquiry officer becomes the disclosure officer and liaises with the OIC, especially if there is a defence statement.'*

The allocation of responsibilities described by senior officers in the six remaining forces (14%) was less clear-cut. In three forces, the disclosure officer could be either the OIC or a member of the ASU, and in five forces responsibility for schedule completion could be shared between police personnel[33] (two of these forces used both models). Examples included:

> *'The OIC has initial responsibility for scheduling then passes the schedules to the civilian process marker who signs the MG6E but does not re-review the unused material as he doesn't necessarily receive it. Any additional material coming in as the file is built is the responsibility of the process marker to schedule. Because of Narey, the arresting officer is very little involved beyond the first stage.'*

> *'In not guilty pleas, the OIC completes a draft of the MG6C and D and a member of the ASU file team acts as disclosure officer and completes the MG6E. The relationship between the OIC and the disclosure officer is crucial: the disclosure officer relies on the OIC to identify what is relevant. They always meet face-to-face. All unused material is submitted to the disclosure officer.'*

> *'Within the force, the disclosure officer could be the OIC or an officer or civilian in the ASU. In metropolitan areas, a "conveyer belt" system is used to prepare the full file. A response officer arrests the suspect, hands over to an interview team or investigating officer and a case builder in the ASU is the disclosure officer. In rural areas, the OIC is the disclosure officer. The system works less well where the OIC is the disclosure officer. Their supervisors don't take disclosure seriously.'*

32 We refer to 'administrative support unit' throughout, although other names such as 'administration of justice unit' are used. Civilian personnel in such units are often retired police officers.

33 Para. 8, Attorney General's Guidelines on Disclosure (29 November 2000) appears tacitly to recognise such a division by referring to 'disclosure officers, or their deputies.'

'The arresting officer may obtain a statement, for instance from a store detective. He then books in the prisoner at the custody office. The prisoner reception team officer takes over, interviews the suspect and puts together a minimal Narey file. Once a not guilty plea has been entered, a file builder in the ASU tasks divisional personnel to take more statements. Everyone in this chain has a responsibility for disclosure. The arresting officer drafts an MG6C even though he has minimal involvement; the prisoner reception team officer could also complete an MG6C. The disclosure officer will be a file builder on division who receives MG6Cs from everyone in the chain. This gives an audit trail.'

The issue of shared responsibility for schedule completion was highlighted further by disclosure officer responses. Although the vast majority (89%) completed all three schedules in volume crime cases, disclosure officers in 13 forces indicated that they shared responsibility for completion of schedules with other police personnel (a practice mentioned by only five forces in the force survey). Disclosure officers in these forces described their responsibility variously as:

- only for the MG6E (the majority)
- for the MG6C and MG6E but not the MG6D
- for the MG6C and the MG6D
- only for the MG6C.

The certifying signature required by the Code appears only on the MG6E[34] so that, strictly speaking, only those completing this schedule are 'disclosure officers.' Curiously, two responding disclosure officers in volume crime said they did not complete any schedules. One of these said his role was restricted to quality control.

Thirteen disclosure officers who were not investigating officers, or who shared responsibility for completion of schedules with others, identified problems caused by discontinuity. Some wanted to see the responsibility transferred back to investigating officers while others wanted to give more time to disclosure and to become a dedicated disclosure officer. Those responsible for completion of the MG6E complained of not getting all the evidence and unused material with the file or being provided with MG6Cs and Ds that were incomplete or had 'scant detail.' Civilians sometimes had problems in getting a response from officers. This group of disclosure officers were conscious of their limited knowledge of the enquiries in question:

'I have to chase officers who attend an incident and arrest someone overnight when the case investigation is handed over to me to deal with the following day.'

'It is a worry whether I know enough about all of the proactive operations to ensure that the case officer who completes the MG6C and D hasn't missed out something.'

'As secondary disclosure officer, it is not always easy to access all material or be sure that you have been made aware of it. Schedules are poorly prepared by initial disclosure officers, items are missing, and there are insufficient details.'

'The problem is having to draft schedules quickly for complex cases when I have had no involvement in the actual investigation, suspecting that items may have been withheld from me.'

34 The revised Manual of Guidance to be issued in 2001 requires schedules MG6C and D to be signed by the person who completes them.

'My office crosses the boundaries of three police divisions. As disclosure officer, how am I supposed to have knowledge of a case in another division? It is basically down to trusting the OIC. It is really a case of paying lip service.'

'All unused material should be supplied within one week of the fast track file being submitted. Alternatively, the investigating officer should complete the MG6C, D and E forms.'

Major and serious crime

The disclosure officer's role in major crime was described by senior officers as 'central' and 'immense'. Disclosure officers agreed:

'It is not until an individual is assigned to carry out disclosure duties on a major case that he or she realises the full impact of the CPIA.'

The police response to major and serious crime differs from that in volume crime. The investigation is more likely to be conducted by specialist officers; major crime investigations will probably be supported by the HOLMES or HOLMES 2 computer system; and file preparation and liaison with the CPS may be dealt with directly by the enquiry team or specialist unit instead of through an ASU.

The force survey indicated that disclosure officers in major and serious crime (usually detective sergeants or experienced detective constables) were more likely than in volume crime to be appointed at the start of the investigation: 59 out of 65 (91%) said they were appointed at the beginning of a major investigation and six (9%) when a full file was requested or at some other stage. In serious crime, 39 (70%) were appointed at the start and 17 (30%) at the full file stage or at some other point. Several mentioned the problems resulting from late appointment:

'A lot happens in the first days of a major enquiry and it can take weeks to catch up if you are not there at the outset.'

In most major and serious crime, the disclosure officer appointed by the SIO was another member of the investigation team, but in a small number of forces the SIO routinely acted as disclosure officer. This doubling up of tasks could be a problem:

'We need more staff so that the OIC in major investigations is not the disclosure officer which is always the case here.'

Table 6: Role of disclosure officer

Type of case	Forces in which the disclosure officer is usually:		
	SIO	Another member of the investigation team	Other
Major	5%	86%	9%
Serious	9%	81%	9%

Arrangements in the 'other' category included appointing as disclosure officers uniformed or ASU officers who were not part of the enquiry team and the sharing of responsibility for schedule completion, with the MG6E completed by the SIO as disclosure officer and the MG6C and D by another member of the investigative team:

'One disclosure officer is designated by the SIO but different people may complete their own schedules – it is important to be flexible.'

In the force survey, some disclosure officers in major crime shared responsibility with others, for example acting as disclosure officer only in relation to PII applications or only being appointed as disclosure officer at the secondary stage.

Plans to change how forces deal with disclosure

Twenty-eight forces (65%) in our survey had plans to change the way in which disclosure was dealt with; most expected the changes would be implemented by the end of 2000. Many others hoped to make changes in the near future, particularly in light of the findings in the CPS Inspectorate's Thematic Review, implementation of the Human Rights Act in October 2000 and publication of the Attorney General's Guidelines which were in preparation throughout most of the study period and were published on 29 November 2000. The Guidelines are intended as an interim measure only.

Several forces with plans underway commented on the need for national leadership to resolve inter-agency differences, but said that they could not wait for this and had therefore put together local disclosure steering groups with CPS membership. Some such groups had been formed as a result of losing an important case because of disclosure problems.

Components of local plans included:

- broadly-targeted CPIA training with input from the CPS
- training for the local Bar and solicitors
- the development of a more consistent corporate approach to disclosure across the force
- revised police guidance
- the making of a video on disclosure
- reviewing procedures on retention and storage of unused material following conviction
- amending Joint Performance Management procedures to cover the quality of disclosure schedules
- routine revelation to the CPS (see chapter 7).

Three forces expected to change the geographical configuration of their ASUs to accommodate disclosure functions more effectively.

Nine forces were considering the use of disclosure specialists, for example:

- a disclosure mentor to advise on and monitor the work of disclosure officers in major crime
- nominated disclosure officers for serious crime (possibly ex-police officers)
- reassigning ASU supervisors (mostly sergeants) to divisions as disclosure officers

- the establishment of a disclosure unit
- file development officers to complete the MG6E
- disclosure co-ordinators (probably sergeants) in major crime where the work is excessive for a single disclosure officer, with overview responsibility and for sensitive material
- specialists to audit and quality assure all investigations
- disclosure officers on each area who will review all unused material as part of mini-ASUs.

A tenth force had adopted a co-ordinated approach involving the appointment of lawyers to provide legal advice, training and quality assurance in respect of criminal investigations and preparation of case papers; area-based disclosure advisers to support investigating officers and identify and respond to their supervision and training requirements; and disclosure trainers working on area and at headquarters to plan and deliver training on disclosure and criminal justice issues to the force. This involved providing different levels of accredited training. The first full-time training course for the disclosure advisers was four weeks in duration. Those who did not pass the final examination were not confirmed in post.

Co-location of police and CPS personnel

Sir Iain Glidewell's report on the CPS recommended amalgamating some functions of the CPS Branch and the police ASU into criminal justice units, so that the CPS could assume responsibility for the prosecution process from the point of charge. Such units would have responsibility for case management in the magistrates' courts.[35] Pilot units in which CPS personnel and police officers were co-located had been set up in a handful of areas by the end of the study period.

We asked the police and CPS for their views of the likely impact of co-location on the disclosure process. Many thought that benefits would appear only in the longer term because of logistical constraints. A few areas had no plans to co-locate because geographical areas were too large or because CPS and police ASU areas were not harmonised.

In the force survey, 33 forces (77%) felt the new arrangements would improve communication on disclosure issues, principally in relation to volume crime. Eight (19%) thought that Glidewell would have no effect on disclosure, either because working arrangements with the CPS were already close or because there were no immediate plans to co-locate.

Sixty-one per cent of CPS respondents thought the new arrangements would lead to an improvement in disclosure practice while the other 39 per cent felt co-location would have no effect.

Our visit to one of the pilot sites for co-location indicated that the ability of CPS to review disclosure decisions would continue to be limited by time and resource constraints. Nor was there more ready access to unused material: this was not included in the single prosecution file shared with the police. Neither the police nor CPS reported that co-location had had an immediate effect on the reviewing of unused material.

35 Recommendations 13-16, The Review of the Crown Prosecution Service – A Report (1998).

4 Scheduling and management of unused material

'Senior officers need to appreciate what is involved in the disclosure process. They should realise that it is not a ten-minute job that can be carried out in a "slap dash" manner.' (Disclosure officer)

Introduction

This chapter deals with cases investigated by the police and prosecuted by the CPS. It describes our findings concerning the completion of the MG6C (non-sensitive), D (sensitive) and E (disclosure officer's report) unused material schedules as well as police procedures for quality assurance of schedules. It discusses problems of unused material presented by closed circuit television (CCTV) systems and the potential offered by software support for the management of unused material. It also presents the views of police disclosure officers about the measures needed to improve their performance.

Two general points about the management of schedules are worth noting. Firstly, the original forms are pink to make them easy to pick out. However, the schedules sent to the CPS are often photocopied and their distinctiveness is therefore lost. This makes it much harder to locate schedules on file. The second point relates to tracking the receipt of schedules. We were unable to establish precisely when schedules were provided to the CPS. Police MG20 cover sheets which accompanied schedules were date-stamped on receipt but were usually filed separately, making it impossible to tell when individual schedules were received.

Key findings in this chapter include the following:

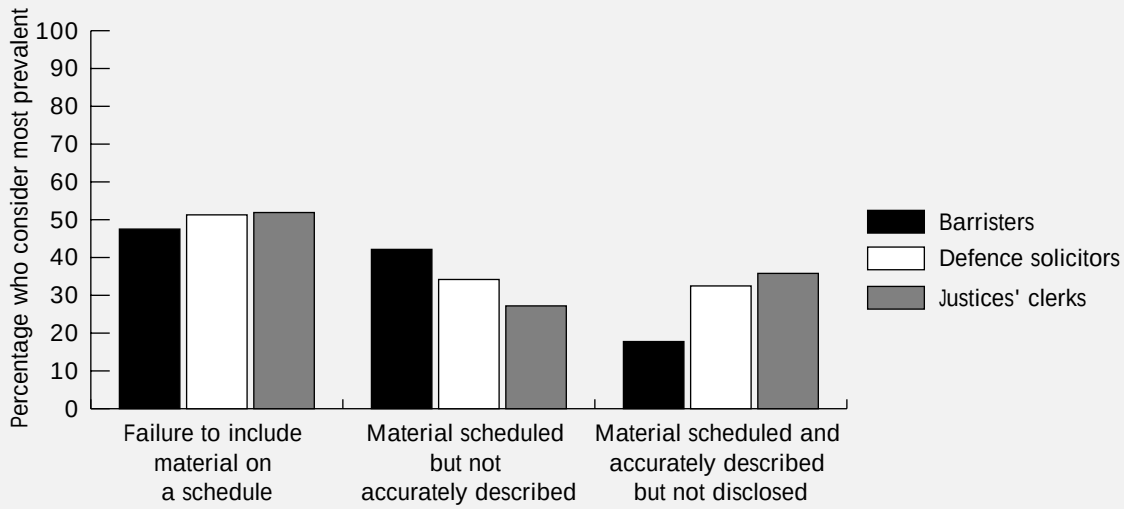
- the most prevalent problem with unused material according to the CPS, barristers, defence solicitors and justices' clerks was the failure by the police to include material on a schedule
- undated schedules were found in 37 per cent of post-CPIA cases containing an MG6C and in 40 per cent of those with an MG6D
- in eight per cent of cases with an MG6E, this schedule was undated and in eight per cent it was unsigned
- in volume crime, an MG6C was completed prior to the defendant's first appearance in court in 39 per cent of cases
- we classified descriptions of items on MG6Cs as 'poor' in 73 per cent of cases. We judged that good reasons for sensitivity were given on MG6Ds in 43 per cent of cases
- where the case contains no sensitive unused material, an MG6D is not required but this fact should be noted on the MG6. This was done in only two out of 44 cases
- only 14 per cent of forces had special arrangements for the scheduling of sensitive material

- practice varied in relation to cross-referencing Forensic Science Service schedules on the police MG6C and D. It was often hard to determine whether the Forensic Science Service non-sensitive unused material schedule was provided to the defence at primary disclosure
- separate schedules were prepared for each co-accused in only nine per cent of multi-defendant cases
- 63 per cent of forces conducted quality assurance checks on schedules but these were often limited to ensuring that schedules were present on the file and that the MG6E had been signed by the disclosure officer
- the benefits of software support for the scheduling and management of unused material had not been fully realised. Use of the HOLMES system was concentrated on major crime cases and only nine forces had developed in-house systems to assist with disclosure
- in free-form comments, 43 per cent of disclosure officers thought that better training would deliver the greatest improvement in performance. Twenty eight per cent thought better guidance on categorising unused material was the most pressing need.

Participants' perceptions of problems with schedules

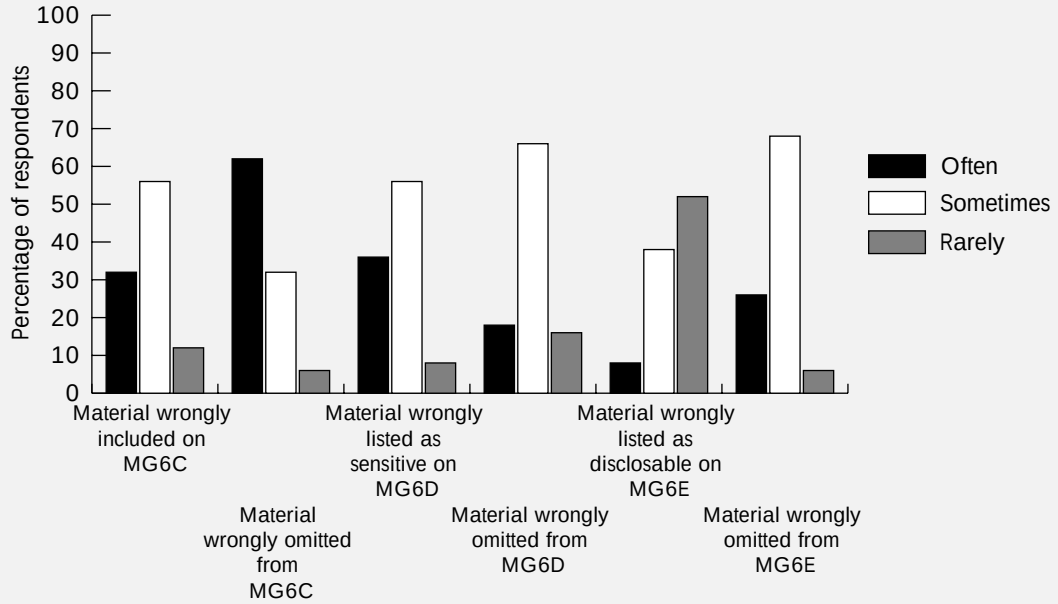
Barristers, defence solicitors and justices' clerks were asked which problem concerning disclosure of non-sensitive unused material was the most prevalent. All these groups cited the failure to include relevant material on a schedule.

Figure 2: Views on the most prevalent problem with non-sensitive unused material



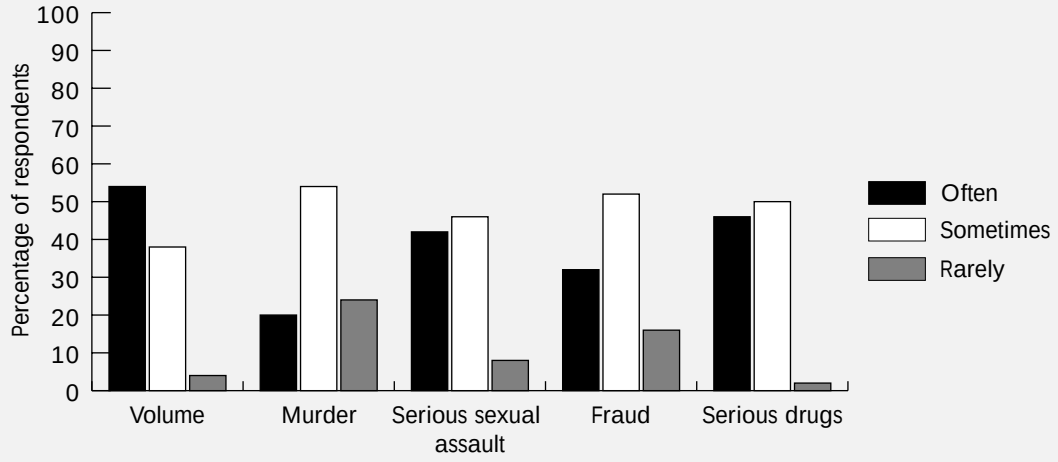
The nature of the problems was explored further with CPS respondents, who identified errors in compiling schedules in a range of categories. As with other participants surveyed, they identified omission of unused material from the MG6C as the most common problem.

Figure 3: Frequency with which problems with schedules occur – CPS view



CPS respondents were asked to rate, by type of offence, the frequency with which problems arise in the quality of schedules received from the police. Volume crime and serious drugs cases were considered the most problematic in this respect.

Figure 4: Frequency of problems with schedule quality by offence type – CPS view



Dating the schedules

Sixty-one (37%) of the 167 post-CPIA cases with an MG6C and 50 (40%) of the 126 with an MG6D contained at least one undated schedule of that type. The certification on the MG6E must be signed and dated by the disclosure officer. Twelve cases (8% of the 53 with an MG6E) contained an undated MG6E on file and the same number, but not all the same cases, had an unsigned MG6E.

Undated schedules were a greater problem in some forces than others. The percentages of cases with undated schedules in each of the six fieldwork forces are shown in Table 7.

Table 7: Percentage of cases with undated schedules by fieldwork force

	Cases with at least one undated schedule (percentages of cases in that force with schedules of specified type)		
	MG6C	MG6D	MG6E
Force 1	38%	41%	5%
Force 2	8%	35%	0%
Force 3	60%	48%	17%
Force 4	52%	58%	7%
Force 5	10%	31%	3%
Force 6	48%	29%	14%

The MG6C schedule of non-sensitive unused material

At least one MG6C was on file in all but five (97%) of the 178 cases investigated by the police, including six of the eight pre-CPIA cases. Of these 173 cases, 78 (45%) had a single MG6C. The Code places responsibility for updating schedules on the disclosure officer.[36] The greatest number of MG6Cs on file was six for a volume case, seven for a serious case and 12 for a major case.

For those Crown Court cases where all MG6Cs were dated and where the dates of first appearance and committal or transfer were known, the timing of completion of the first MG6C by the police was examined. There were only 78 such cases: 49 were volume crime and 29 were major or serious crime. These figures have been used in calculating percentages in Table 8. Although the JOPI states that it is not necessary to maintain schedules from the start of all investigations, a surprisingly high number of schedules in volume crime were initiated before the defendant's first appearance in court. This suggests that in some cases disclosure officers are preparing schedules in the expectation of a not guilty plea, presumably based on the defendant's interview.

Table 8: Timing of completion of first MG6C

Category of offence	Before first court appearance	Between first appearance and committal/transfer	After committal/transfer
Volume	39%	59%	2%
Major or serious	14%	66%	21%

The quality of descriptions on the MG6C

The Code requires that:

> *'The description of each item should make clear the nature of the item and should contain sufficient detail to enable the prosecutor to decide whether he needs to inspect the material before deciding whether or not it should be disclosed.'*[37]

36 Para. 8.1.
37 Para. 6.9.

The quality of descriptions is of central importance to the prosecutor. In the case file analysis, we classified as 'good' item descriptions in which the source or author of the item was identified, its date was given, and there was a reasonable indication of the contents, for example 'Officer X's notebook pages 20-23 refer to the arrest and interview of John Smith, and is consistent with Officer X's statement.'

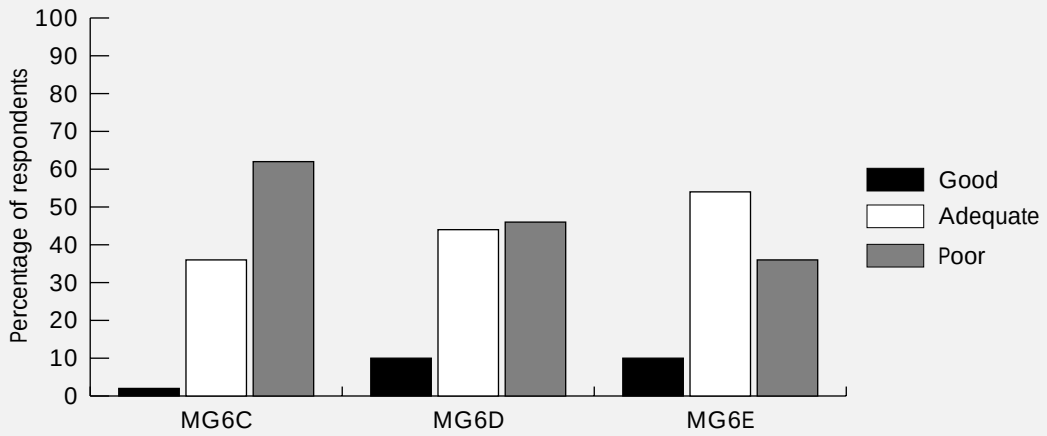
We rated as 'poor' those entries on the MG6C in which it would not have been possible for the prosecutor to assess the nature of the material. Examples of poor entries included those which merely listed 'police officers' note books', 'messages', 'actions', 'crime reports' or forms referred to by number only.[38] Schedules containing both good and poor descriptions were designated as 'mixed.' Overall, the quality of the police descriptions on the MG6C was unsatisfactory.

Table 9: Quality of descriptions on the MG6C

Category of offence	Quality of descriptions (percentages within offence type)		
	Good	Mixed	Poor
Volume	3%	19%	78%
Major	6%	39%	56%
Serious	0%	29%	71%
All	3%	24%	73%

CPS respondents also criticised the quality of descriptions on schedules. Sixty-two per cent rated as poor the descriptions on the MG6C, the only schedule seen by the defence.

Figure 5: CPS view of the quality of descriptions on schedules



One CPS respondent suggested that these problems affected the way in which the statutory disclosure tests were applied:

> *'Poor description of items scheduled means staff must tend towards disclosure rather than apply the regime absolutely correctly.'*

38 'Where items are described by generic titles or quantities, the disclosure officer must ensure that items which might meet the test for disclosure are listed individually': para. 2.58, JOPI.

Twenty-six per cent of CPS respondents had noticed an improvement to the quality of descriptions on schedules since the publication of the CPS Inspectorate's Thematic Review of the Disclosure of Unused Material early in 2000. However, 70 per cent said the quality had stayed the same and four per cent said it had deteriorated.

Sensitive material and the MG6D

The MG6D schedule is used to reveal to the CPS the existence of unused material which the disclosure officer, after consulting with the OIC, believes should be withheld from the defence because it is not in the public interest to disclose it. This schedule is itself regarded as sensitive and not disclosed to the defence.[39]

The tight control exerted over sensitive material caused scheduling problems for disclosure officers and affected what was communicated to the CPS. In intelligence-led investigations, certain classes of information were often accessible only to a few officers within the force in order, for instance, to protect informants. The disclosure officer and even the officer in the case might not be authorised to access the material. This gave rise to problems in describing the reasons for sensitivity on the MG6D and in applying the statutory tests for disclosure to such material. The problems were most acute where the investigation involved more than one force or organisation.

In the survey, forces were asked if they had any special arrangements to deal with the scheduling of sensitive material. Only six forces (14%) had such arrangements. These included the adoption by special units of an aide-memoire on sensitive material and a pro forma MG6D with bullet points to which descriptions of the material could be added; discussion of sensitive material by a divisional inspector and intelligence branch inspector in each case; and creation of a separate policy book by senior investigating officers (SIOs) to cover discussions of any sensitive information, especially surveillance.

The JOPI states that sensitive material scheduled in the MG6D 'must nonetheless be revealed to the prosecutor.' In order to make a proper assessment, the prosecutor needs to either see the material or be fully informed of its contents: in certain circumstances, copying may not be feasible.[40]

Examples of special arrangements for revealing sensitive material to the CPS

Force 1 submitted sensitive material to a senior officer who certified it for revelation:

'The advice of the director of intelligence provides greater uniformity. We want transparent revelation to the CPS – we always want to reveal to them.'

In Force 2, all cases involving MG6D intelligence were referred to a headquarters detective chief inspector who liaised directly with the Chief Crown Prosecutor. The detective chief inspector retained responsibility for reviewing the status of sensitive information through the trial.

In the case file analysis, at least one MG6D was on file in 131 (74%) out of 178 cases, including five which were pre-CPIA. In 93 cases (52% of the 178), at least one MG6D identified items of sensitive material. Where a case does not contain sensitive material, an MG6D is not required but the disclosure officer is expected to note that there is no sensitive material on the MG6. In fact, blank MG6Ds were sent to the CPS in 38 of the 131 cases. The MG6 was marked 'no sensitive unused material' in only two of the 44 post-CPIA cases without an MG6D.

39 Paras. 2.15, 2.16, JOPI.
40 Paras. 2.65, 2.72.

Sensitive material may be identified at various stages during the pre-trial period and schedules may therefore need to be updated. There were 48 post-CPIA cases (55% of those with sensitive material listed) with a single MG6D listing sensitive material. The greatest number of MG6Ds on file was four for a volume case, five for a serious case and 11 for a major case.

Reasons for sensitivity on MG6Ds

The disclosure officer should describe sensitive unused material on the MG6D and explain why he believes it is not in the public interest to disclose the items. The Code lists 14 categories into which sensitive information may fall.[41] We classified as 'good', reasons given for sensitivity which fell into one or more categories identified by the Code. Data input documents for HOLMES set these categories out in full as guidance for officers; some forces used a rubber stamp on the MG6D to summarise them.

Table 10: Quality of reasons for sensitivity given on the MG6D

Category of offence	Quality of reasons for sensitivity (percentages within offence type)		
	Good	Mixed	Poor
Volume	44%	27%	29%
Major	42%	29%	29%
Serious	43%	21%	36%
All	43%	27%	30%

Even where the reasons for sensitivity were classified as 'good', descriptions of sensitive items on MG6Ds were often (perhaps not surprisingly) fairly cursory. Where forces had not instituted routine procedures for joint review of sensitive material, it was common to see requests from the CPS to the police, such as: 'Please appraise me of the contents of the MG6D. I cannot assess without knowing its nature.' Sometimes the prosecution even had to ask for confirmation that the arrest was as a result of receipt of intelligence.

MG6E disclosure officer's report

The disclosure officer uses the confidential MG6E form to identify any unused material thought to undermine the prosecution case or to assist the defence set out in a defence statement and to give a brief explanation of the reasons.[42] The JOPI describes the disclosure officer as responsible for handling the 'administrative side of disclosure'[43] but the identification of material which may undermine or assist is clearly not exclusively an administrative responsibility. The CPS Inspectorate's Thematic Review acknowledged that police officers are 'required to make judgments that are usually regarded as more suitable for lawyers.'[44]

There was at least one MG6E on file in 156 (88%) out of 178 cases investigated by the police; these included three that were pre-CPIA. In 76 (50%) of the post-CPIA cases the file contained a single MG6E. The greatest number of MG6Es on file in a single case was four in both volume and serious crime and nine in major crime.

41 Para. 6.12.
42 Para. 2.98, JOPI.
43 Para. 2.7.
44 Para. 13.3, 13.10, CPS Inspectorate's Report on the Thematic Review of the Disclosure of Unused Material (2000), Thematic Report 2/2000.

In 93 cases (60% of those with an MG6E), the MG6Es sent to the CPS listed no items for disclosure. In the 63 cases where the MG6E contained entries, the numbers of items listed are shown in Table 11.

Table 11: Numbers of items listed on MG6Es

Category of offence	Minimum	Maximum	Mean	Median
Volume	1	25	3	2
Major	1	190	22	3
Serious	1	14	5	2

The disclosure officer is also required to sign the MG6E to certify to the prosecutor that:

> *'To the best of my knowledge and belief, all material which has been retained and made available to me has been revealed to the prosecutor in accordance with the Code.'*

The disclosure officer makes this certification when the MG6E is submitted at the primary stage, and again at the secondary stage when a defence statement has been supplied and the retained unused material has been reviewed again.[45] The header on the MG6E instructs the disclosure officer to indicate whether the form is being submitted in relation to primary or secondary disclosure. This can be done either by deleting the relevant part of the header or by indicating in words whether it refers to material that undermines the prosecution case or assists the defence case. Such an indication was made on MG6Es in only 27 cases (17% of those with an MG6E). Across the six fieldwork forces, compliance with this requirement ranged from seven to 30 per cent.

We could identify the date on which the first defence statement was sent to the police by the prosecutor in 96 post-CPIA cases. In 32 cases (33% of the 96), one or more MG6Es were produced following police receipt of the defence statement and prior to the service of secondary disclosure.[46]

In 19 cases, 24 per cent of those with more than one MG6E on file, the forms were signed by different disclosure officers. Changes may be inevitable when cases are pending for a long time before they come to trial, but in these cases it was often unclear from the file at what point the disclosure officer had changed. Even where the same person signed all MG6Es, the documentation could be confusing. In one case, for example, the disclosure officer was the OIC; the primary disclosure letter to the defence named someone else and at secondary disclosure the defence was advised to contact a third person in order to view the unused material.

The MG6E requires the disclosure officer to provide the prosecutor with certain categories of material under section 7.3 of the Code. We saw little evidence of compliance with this requirement.

Cross-referencing items on the MG6E

Items from an MG6C appeared on an MG6E in 48 cases. In 26 of these (54%) copies of all such items were supplied to the prosecutor and some items were supplied in one further case; the number of items supplied ranged from one to 25.

45 JOPI paras. 2.118-120. Additional MG6Es produced as the result of the continuing review of unused material should also be certified.

46 This may also have happened in other cases where an MG6E was undated or the date of sending the defence statement to the police was unknown.

In 16 cases, items from an MG6D were included on an MG6E. In seven cases (44%), copies of all such items were supplied to the prosecutor; and some were supplied in a further three cases. The number of items supplied ranged between one and 16.

Among the 63 cases in which an MG6E identified unused material to disclose, 15 (24%) listed items, information or disclosure officer comments which did not appear on or cross-refer to an MG6C or MG6D. Some of the entries on the MG6E were comments about statements in evidence, for example, observing that a child victim had stated that there were other abusers as well as the defendant; that a statement undermined the credibility of the victim; and that there was a discrepancy between witness statements as to the colour of the jacket worn by the offender (CPS had endorsed this item 'the witness will be subject to cross-examination'). Other matters not referred to on an MG6C or D but appearing on an MG6E included:

- the arrest of suspects not charged as they had not been picked out at an identification parade (information relating to the parade had not been scheduled)
- a video shown to several police officers only one of whom identified the defendant as the offender (the names of the officers were not listed)
- the history of previous allegations by the complainant (in one case, a false allegation)
- that the complainant had been in the company of a convicted sex offender
- that the complainant's mother had allowed the defendant unsupervised access
- medical evidence which did not confirm digital penetration
- police notebooks, the crime report and a statement made by the defendant at the defence's request that the victim had attacked her first (listed without further explanation)
- reference to social services files on victims and housing association files relating to one defendant
- items ordered to be disclosed at the PDH which were then put on the MG6E but not on the C or D
- a list of vehicles excluded from the investigation
- the explanation that, as the case resulted from an entrapment run by a newspaper, the officer in the case did not know the source of the journalist's information.

Primary and secondary disclosure are discussed in chapter 9.

Forensic Science Service schedules

Medical and forensic experts are classified as third parties. The Forensic Science Service produces its own equivalent of the MG6C and D. These differ from those prepared by the police as the description fields consist of pre-printed general categories which the person completing the form only has to tick. No item-specific descriptions are added. As with the police MG forms, there is a space for the CPS reviewing lawyer's comments and signature, but it is difficult for the prosecutor to assess the unused material based on the pre-printed categories alone.

Fieldwork forces adopted different practices in relation to these schedules. Some cross-referenced them on the police MG6C and D; others did not. It was often hard to determine from CPS letters whether the Forensic Science Service non-sensitive unused material schedule was provided to the defence at primary disclosure.

Scheduling statements

The practice of scheduling statements in fieldwork forces also varied. Some forces did not attempt to distinguish evidential from unused statements and did not list unused statements on schedules, leaving this differentiation to the CPS. Other forces scheduled unused statements, which almost invariably meant that schedules became out-of-date as the status of individual statements changed. Disclosure officers were not always kept up-to-date:

> *'If the police submit a file of 100 statements to CPS as relevant material, the CPS may decide that only 80 support the case. If the 80 are served, the other 20 then become unused and should be subject to scheduling. However, this will not have been done as the police will have not been told that the statements are not being used.'*

The CPS sometimes maintained its own lists of used and unused statements, particularly in larger cases, although there were also problems in keeping these up-to-date.

Auto examination forms

In one fieldwork force, we discussed the use of a local form, the Vehicle Fraud and Autocrime Unit Examination Form, with the unit in question. This (and similar forms used in other forces) was used when the origins of a car alleged to be stolen were in question. The form was two-sided; the front, which described the examination of the vehicle and recorded the results, was routinely disclosed. The force classified the reverse as 'confidential – not to be disclosed. This documented commercially confidential information from manufacturers about the location of unique reference markings enabling the police to identify with certainty the vehicle in question. If such information was disclosed, it would enable car thieves to locate and erase the markings.

The unit advised us that the defence routinely challenged the status of the confidential part of this examination form. In a recent case, the court had ordered its disclosure and the prosecution had to offer no evidence. They suggested that a national two-part form be developed with official status equivalent to an MG6C and D.

Multi-defendant cases

Section 2 of the CPIA states that the disclosure scheme applies separately in relation to each person accused of an offence. The statutory tests for disclosure therefore relate to the case against each accused person individually. It follows that schedules of unused material should be prepared in respect of each defendant in multi-defendant cases. It could be argued that joint MG6C and D schedules are acceptable as any relevant unused material is bound to be relevant for all accused (although items of evidence against one defendant may be unused in respect of another defendant). However, this does not apply to the MG6E which lists only material meeting the statutory tests. In the case file analysis, separate schedules were prepared for each co-accused in only five (9%) of the 55 multi-defendant cases.

The amount of unused material

The CPS Inspectorate suggested that our study should 'include some more detailed assessment of the likely volume of material presently held by disclosure officers and not copied to or inspected by prosecutors'[47] which would have to be scrutinised if, as the Inspectorate suggested, more unused material was examined by the CPS. We were unable to do this because unused material was often not clearly distinguished (folders or cover sheets designated 'Unused Material' were often empty or not attached to any papers) or because the unused material was too bulky to be supplied with the file for examination.

We did, however, measure the total amount of paper in the files themselves. Bearing in mind that many of these were 'problem' cases, that unused material was sometimes not provided and that some files were incomplete (see chapter 0), the following figures shed some light on the quantity of paperwork which disclosure officers, OICs, SIOs and CPS prosecutors have to deal with.

Table 12: File sizes for study cases prosecuted by the CPS

Category of offence	Police files		CPS files	
	Number	Average size in inches	Number	Average size in inches
Volume	63	3.6	113	3.8
Major	17	16.4	37	21.5
Serious	9	22.0	16	54.6

Another indication of the scale of disclosure officer work is the number of items to be described and scheduled. These numbers were recorded for each MG6C and D.

Table 13: Numbers of items listed on MG6Cs

Category of offence	Minimum	Maximum	Mean	Median
Volume	2	348	29	16
Major	4	4297	357	67
Serious	5	906	140	42

The difference between the mean and the median number of items is a result of a few cases with very large volumes of unused material.

In the 93 cases where the MG6D identified sensitive unused material, the numbers of items listed were as in Table 14.

47 Para. 13.7. CPS Inspectorate's Report on the Thematic Review of the Disclosure of Unused Material (2000), Thematic Report 2/2000.

Table 14: Numbers of items listed on MG6Ds

Category of offence	Minimum	Maximum	Mean	Median
Volume	1	62	6	3
Major	1	808	121	8
Serious	2	600	59	11

Quality assurance

The Law Society has criticised the absence of basic quality controls to prevent what it describes as 'process corruption' in relation to unused material. The hallmarks of such controls are said to be:

> *'managers and supervisors ready, willing and able to set standards, to monitor and reward integrity of decision-making and action; [and] the existence of, and willingness to apply, real sanctions when an investigating officer acts unethically.'*[48]

The standard criteria for Joint Performance Management of file quality as agreed between the police and CPS do not include the MG6 series of disclosure schedules. Individual forces were therefore asked if they applied any quality assurance checks to the preparation of schedules. Twenty-seven forces (63%) said quality control was applied consistently throughout the force area; two (5%) only used checks in some divisions. Twelve forces (28%) had no such checks and two (5%) were unsure.

Quality assurance procedures were more likely to be in place in volume crime, though the methods employed and the extent to which schedules and disclosure decisions were scrutinised varied widely between forces. Responsibility for quality assurance lay mostly with ASUs.

Those undertaking quality assurance were described variously as case review officers, case paper officers, quality control sergeants, file readers in case handling units, divisional quality reviewers, ASU law clerks, legally qualified civilian decision-makers, case building officers, dedicated file authorisers, file quality managers and file team managers. Many of those in civilian posts were former police officers.

Quality assurance tended to focus on the review of files prepared for committal. The tasks undertaken ranged from 'dip-sampling' or 'spot checks' to routine scrutiny of all full files. The effectiveness of quality control on schedules depended on the number of people involved (in one force, only three people covering six divisions); the level of expertise of the person conducting the review; and the time available, given the pressure to submit timely full files to the CPS. Many reviewers did not have access to unused material and were therefore unable to tell whether material had been incorrectly omitted from a schedule.[49] The number of cases for review was crucial: one respondent spoke of checkers being 'swamped' and others conceded that schedules could be overlooked:

> *'In theory, the whole process is checked by the process marker but in practice the process marker does not review schedules.'*

Reviewers' checks often consisted only of ensuring that schedules were present on the file and that the MG6E was signed by the disclosure officer, or were limited to file preparation checks for 'Narey' magistrates' courts;

48 p. 222, Roger Ede and Eric Shepherd (2000) Active Defence. Law Society Publishing.
49 Failure to include material was identified as the most common problem with schedules by barristers, defence solicitors and justices' clerks. See chapter 4 'Participants perceptions of problems with schedules".

they did not review schedules submitted at a later stage. The difficulties of quality assurance were summed up by one senior officer:

> *'Our focus in reviewing files is JPM, not disclosure. Operational supervision is diluted and there may be no oversight of a patrol constable. We used to have 41 superintendents and now only have 16, with the effect that tasks in volume crime are pushed down the chain. This lack of supervision is where disclosure goes wrong. Patrol constables can be "myopic" in trying to prove their case. They are not liars but are inexperienced which results in items being left off schedules. Different levels of resources apply according to the level of the crime; for example, in a public order offence, there were two video cameras but only one tape was produced as evidence. The conviction was quashed on appeal because the tape from the other camera had not been disclosed. There was no intent to withhold evidence. We used to have supervision at the scene which made partial investigation less of a problem. But we can never get back to this because the resources are not available.'*

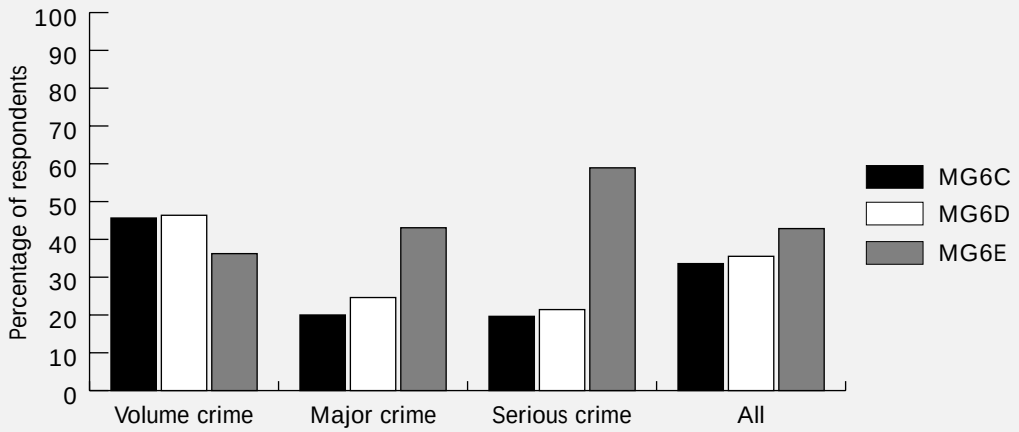
Quality control of schedules: useful practices

- *returning deficient schedules to the disclosure officer*
- *a senior officer countersigning schedules to confirm that they have been quality assured*
- *using the Joint Performance Management forum to monitor disclosure schedules*
- *closer monitoring of an ASU where schedules seemed particularly problematic*
- *supervisors' review of computerised schedules on the system*
- *quality audits conducted by the force performance review team*
- *introducing a 'disclosure MoT certificate' before trial for all cases.*

The force survey indicated that, in serious and major crime, quality assurance of MG6 series schedules was more likely to be carried out by the SIO than by checkers independent of the investigation. Exceptions included forces where major crime support units or senior officers' external to the investigation made spot checks. In one force, a senior officer reviewed disclosure periodically throughout the life of all major crime cases.

Disclosure officers were asked whether disclosure schedules were quality assured. Fewer than half those acting in volume crime cases said that any of the three schedules was routinely reviewed; the MG6E was less likely to be the subject of quality assurance than the MG6C and D. The position was reversed in major and serious crime where the MG6E was more likely to be reviewed than the other schedules.

Figure 6: Disclosure officers who said schedules were reviewed



Videotape material

In the case file analysis, 40 per cent of cases prosecuted by the CPS involved a videotape (other than that of a witness interview) as evidence or unused material, although such material proved problematic in only 14 per cent of these cases.

Videotape material may arise, for example, from cameras in police cars or covert surveillance of intelligence operations. Videos in custody suites may be relevant to the defendant's condition but were seldom retained by the police beyond the period in which tapes are re-cycled; the defence rarely requested the tapes. Videos are increasingly used by the police to record scenes of crime. However, the most problematic unused video material came from CCTV systems used by third parties to monitor public, commercial and private places. Forces had identified over 30 recording formats including computer disks, camcorder cassettes and multiplex systems. The latter record video signals from different cameras onto a single multiplex tape. This requires special play-back equipment which not all forces possessed.

'Guidelines for the Handling of Video Tape' produced by the Home Office Police Scientific Development Branch in 1998 stressed the importance of video as 'an invaluable modern tool to assist in the detection and solving of crimes.' Forces described the benefits and also the drawbacks of such material. Whether or not videos were used as evidence, review was often resource-intensive. The original quality of tapes was sometimes poor and copying could degrade quality even further. The sheer quantity of CCTV cameras covering possible crime scenes often made it difficult for disclosure officers to view all videotaped material for assessment.

The management of cases with large quantities of videotaped material

In a case concerning a large-scale public order offence which generated over 500 videotapes of varying length and quality, it took eight officers nine months to copy and view the material. This was described as 'a mammoth undertaking. A compilation tape was served on the defence which showed the occasions on which their client appeared, with a ten-minute segment on either side of the evidential facts in issue. This was acceptable to most of the defence lawyers involved, as an alternative to viewing the unedited videos.

In another case which had six co-defendants, the defence required access to over 1,000 video and audio tapes. A single set of tapes was provided to one solicitor who maintained the 'library' on behalf of the other defence lawyers.

Senior officers in several forces felt that the prosecution and courts increasingly complied with defence requests for access to unused videotape material which did not meet the statutory criteria and where the effort of making it available was not proportionate:

'A recent case cost the force £87,000 to copy videos, none of which contained anything relevant. Either you pay up, or throw in the towel.'

'The defence are now asking for copies of tapes in summary matters, even when the case is just about going through a traffic light.'

'There are demands for copies of tapes before the defendant will enter a plea.'

Twenty-eight forces (65%) had specific guidance on the retention, review and scheduling of CCTV tapes and 12 of these forces provided us with copies of their guidance. Issues addressed generally included codes of practice for the management of CCTV in partnership with local authorities and others[50]; the identification of CCTV videos as evidence or unused material; continuity; copying; ensuring all previous recordings are erased prior to tape re-use; storage; and retention periods. Other matters covered by individual forces were:

- police vetting of those who work in local authority CCTV control rooms[51]
- designating an inspector responsible for CCTV systems to supervise them on behalf of the local authority and other members of the CCTV partnership and to keep an evaluation log of recorded incidents through to prosecution
- requiring officers who become aware of videotaped evidence to make a written request, countersigned by an inspector, to the CCTV operator within seven days to withdraw and retain tapes and to view them within 14 days, otherwise withdrawn tapes would be re-cycled
- appointment of officers with responsibility for updating an enlarged map of areas covered by CCTV displaying camera positions and indicating the depth of field of individual cameras. These maps should be displayed in sector offices and briefing rooms
- providing replacement tapes to third parties from whom tapes were seized.

Case law has established the need for investigators to retain all videos that are viewed in the course of an investigation. However, practice in relation to the viewing, seizure and retention of videotapes was inconsistent among those forces that provided written guidance.[52] Seven forces in the force survey noted that officers may view but not seize tapes; practice was sometimes inconsistent across divisions of the same force. Force instructions differed in respect of tapes which were viewed and found to be of no evidential value, for example:

- retain and cite on the MG6C (or MG6D if sensitive)
- do not retain unless it is a serious crime i.e. murder or rape, but the officer should make a pocket book entry stating he/ she has viewed the tape which contains no evidential value
- do not retain except in serious indictable only cases, but cite on the MG6D
- if not retaining tapes, consult the divisional crime manager/ SIO.

Three forces viewed, but did not copy local authority tapes. Instead, they asked the authority to retain them. One force had a formal agreement under which the council retains master tapes for a minimum period of one year and allows the defence to view the tape. It makes a copy of any relevant part at the defence's request. This was not the case for the other two forces that viewed, but did not copy local authority tapes:

'We ask third parties to keep tapes for a month but they are not bound to do so.'

50 Some referred to Local Government Information Unit 'A Watching Brief' CCTV Code of Practice (March 1996).
51 British Standard BS7858: 1996 'Code of Practice for the Security Screening of Personnel employed in a Security Environment.'
52 In February 2001, ACPO advised us that it was about to publish a national policy on the use of CCTV (commercial and custody).

'We view but do not copy tapes in local authority possession at present. We ask them to retain but eventually they'll refuse.'

Failure to check on availability of CCTV material can lead to abuse of process arguments

The defence successfully argued abuse of process in a case where the defendant, in interview, raised the possibility of video material outside a bank which would support his contention about his whereabouts. The interviewing officer said further enquiries would be made following the interview. The disclosure officer later made a statement that he had checked and been told that cameras did not have a view of the night safe. However, the unit managing the relevant CCTV cameras said there was no record of the disclosure officer's visit or enquiry. It had re-cycled the tapes after 30 days. The CPS asked the police to 'check whether CCTV can help' but not until four months after the defendant's interview. The judge described this as a 'lost opportunity' case. It was discussed by the police and CPS at a Joint Performance Management meeting and it was agreed that, in future, written confirmation should be obtained that video footage does not exist.

Software support for managing unused material

Senior officers and disclosure officers were enthusiastic about the potential for software to support the management of large quantities of documents and to systematise decision-making through data entry prompts about classes of documents. Such systems also made it easier to reorganise the content of schedules according to counsel instructions. Requests of this kind were commonplace: 55 per cent of the barristers surveyed said that they had asked for schedules to be ordered or presented in a different way. The work involved was time-consuming without automated support.

Forces were asked whether they used any software other than word-processors to assist in the management of unused material. Twenty-three (53%) had software support for disclosure in major crime investigations. Nine of the 23 also used software to support disclosure in serious crime and seven in volume crime.

Seventeen forces reported using HOLMES software, or the enhanced version HOLMES 2. The use of these systems was concentrated on major crime enquiries. HOLMES has no specific facility for the preparation of schedules although documents can be described and classified as sensitive, non-sensitive and potentially undermining using key words. These lists can then be 'pasted' onto MG6 form templates on a separate computer. HOLMES 2 has a separate disclosure module in which production of MG6 schedules is an integrated task. Every time a new action, exhibit or document is raised or registered, a record is created in the disclosure facility of HOLMES 2 and becomes available for assessment by the disclosure officer. The system supplier, Unisys, is considering developing the disclosure package as a stand-alone system for use on non-HOLMES 2 investigations, with the option of giving CPS electronic access to documents through a secure interface. Towards the end of the study, Unisys advised us that no decision had yet been reached on whether to proceed, partly because it was unclear what the take-up would be of a stand-alone disclosure management package within the police service.

HOLMES experience was seen to be of particular benefit to disclosure officers[53]. However, some disclosure officers had encountered difficulty in obtaining HOLMES training.

53 The system supplier, Unisys, trains police trainers who are then responsible for training within the force.

Nine forces used in-force systems to assist with disclosure. These included full case preparation packages accessed through a local area network; software for schedule completion with lists of material likely to be scheduled; and basic applications such as spreadsheets and exhibits packages. Some of these basic systems will be replaced by the superior HOLMES 2 disclosure package if its use is extended beyond major crime cases.

We visited two areas where investigators and prosecutors were communicating by e-mail (one was a police force where the CPS had access to the police network; the other was Customs and Excise). In both locations, the use of e-mail made a significant contribution to the speedy resolution of questions about unused material.[54]

At the start of the project, we were advised that the National Strategy for Police Information Systems (NSPIS) case preparation project was unlikely to offer much in the way of prompts or other support for the completion of MG schedules. The NSPIS team did not respond to our request for further information at the end of our project, though we were advised that the case preparation package had been delayed, possibly by a further 12 months.

In November 2000, as work for this study ended, the Pan London Agreement on revelation of material to the CPS was signed (see chapter 7). In conjunction with this event, a computerised package developed by the Metropolitan Police was launched. The package, known as the *Metropolitan Police Service's MG Forms Application*, provides assistance in completing the MG series of forms. A test version was made available to us for the purposes of this study.

The system runs on a PC. The first screen requires the user to input details of the police officer in the case and the offender, the unique reference number for the case, the CRO number and the CPS office involved. A main menu then offers assistance with completion of forms MG1 through MG20, including the MG6 series of forms relating to disclosure. There is also a 'case wizard' feature that guides the user through the creation of various kinds of case file: an advice file for suspects who have not been charged, a Narey file for the first appearance in court or a full file following a not guilty plea.

If the user chooses to prepare an MG form, the system immediately provides advice on the key issues to consider when completing the form. Paragraph references are provided to relevant sections in the Manual of Guidance. Checklists of items are offered to assist the user in deciding what to include on the form. When an item is chosen from the list, specific input screens and advice appear. Warnings remind of the need to edit out sensitive information on items listed on the MG6C. Prompts ensure that the description and location of unused material is entered. Details input to the system are then added automatically to a Word template of the chosen form. When all items have been listed, the completed form can be printed and added to the case file.

Although simple in design, the system should prove an invaluable tool in improving the quality of disclosure schedules. It should be of particular help in reducing the large number of schedules where information is missing or incomplete.

Improving disclosure officers' performance

Police disclosure officers were asked how their task could be made easier. In free-form responses, 115 (43%) saw training as the most pressing need. They acknowledged there was a lack of basic awareness of CPIA provisions throughout the police service. Some had received only 'word of mouth' training or a short session from force training staff whom, it was believed, were not capable of performing the role themselves. They

54 The government has stated that by 2003, all criminal justice professionals will be able securely to e-mail each other: p.10 Criminal Justice: The Way Ahead (Cm 5074).

wanted more constructive training on a regular basis, 'not just a two-hour lecture to 20 people.' As well as disclosure officers, training was needed for investigators, civilians in file preparation units, and supervisors and senior officers to raise awareness of the importance of the disclosure officer role:

> *'Disclosure officers need a recognised status within the force. Disclosure is an important part of an investigation for which senior management do not allocate sufficient manpower in relation to volume crime.'*

The training needed ranged from 'grass roots' to in-depth training for specialists (particularly those involved in major and serious crime cases) with legal input, advice about Human Rights Act implications and feedback about problem scenarios. Some suggested instituting a national standard course with an examination which disclosure officers would have to pass.

The second issue, mentioned by 74 respondents (28%), concerned the need for more guidance on categorising unused material, distinguishing miscellaneous administrative paperwork, identifying what was relevant, sensitive or undermining, and deciding the level of detail required on schedule entries. Disclosure officers found it difficult or impossible to update schedules and keep up with the status of statements that could be moved from unused material to evidence and vice versa at any point up to the trial. Uncertainty about the standards required and the risk of being held responsible when 'things go wrong at court' had an impact on the quality of schedules:

> *'The fear of losing cases through lack of, or incomplete, disclosure encourages everything to be put onto the schedule whether relevant or not.'*

Many disclosure officers in this group mentioned particular problems in accessing CPS advice on the status of unused material and several found their job was made more difficult because of differences in approach between prosecutors and courts:

> *'What is sensitive and what is not seems to differ according to different barristers and judges.'*

> *'There is a dispute over the necessity to detail all actions and memos on schedules. In a protracted enquiry the task is phenomenal. The requirements can depend on the individual CPS lawyer.'*

> *'There should be more contact with a CPS lawyer for advice. You normally get office personnel who cannot assist you.'*

Some saw a need for better communication specifically about CPS disclosure decisions:

> *'There needs to be compulsion for CPS to tell us their disclosure decisions. In a recent case, we gave the CPS a schedule of 1,500 HOLMES actions: the items were withheld, the defence argued abuse of process and the result was a judge directed acquittal. The judge criticised the decision to withhold but we had not been aware of it. We had no objection to defence disclosure.'*

> *'The CPS has sometimes disclosed unused material when we have only asked for advice about its status. Their decisions need to be more transparent to us.'*

Suggestions included:

- providing examples or lists of material most commonly categorised as unused and as sensitive

- an agreed format to make the police aware of documents served as evidence on the defence
- prompts for the completion of MG6 forms, such as 'persons interviewed but not arrested'
- a printed list, with definitions, to be given to officers at the start of an investigation to facilitate retention of all relevant material
- a national standard for the description of certain documents
- guidance on any overlap between the responsibilities of the disclosure officer and exhibits officer for unused exhibits.

Non-police investigators referred to the need for better guidance on linked cases:

> *'It is problematic to identify relevant unused material generated as part of a number of other linked operations, together with a general lack of understanding of the requirements of CPIA throughout the Department.' (Customs and Excise)*

> *'Cross-disclosure in similar frauds has presented significant problems whereby relevance and classification of material has been an issue.' (DTI).*

The third concern, raised by 44 disclosure officers (17%) was lack of time. Common items of unused material do not flow automatically into disclosure officers' in-trays. They complained of insufficient time to track down, review and schedule unused material because of their other responsibilities. Completion of schedules had become more difficult and inefficient as a result of Narey file preparation deadlines. Further problems were anticipated as a result of time limits in cases involving persistent young offenders.

Familiarity with the evidence is important in assessing whether unused material is undermining. Disclosure officers were sometimes being asked to complete schedules when the evidence file was not available to them:

> *'Under Narey, files must be submitted before going off duty. This generally means submitting the bare minimum, which does not include the MG6C, D and E. Requests for these are sent weeks later, and so the time taken vastly increases as you may have to dig all the relevant information out again.'*

Many disclosure officers mentioned the time needed to deal with the volume of material generated in larger cases and the conflict between completing schedules and getting on with other pressing enquiries. Some noted that the unused material was often larger than the evidence file itself. This could result in 'less comprehensive schedules' being submitted.

The fourth issue concerned raising awareness among investigating officers and others of the need for speed in identifying, recording, retaining and passing on unused material. This was seen as a significant problem by 43 disclosure officers (16%). Poor practice most frequently referred to included:

- officers attending incidents declining to provide copies of their notebooks
- investigators viewing but not seizing unused material and failing to make the disclosure officer aware of its existence[55]

55 ACPO and the CPS consider that case law on the police responsibility to view and retain unused material is not clear.

- officers failing to notify the disclosure officer voluntarily of 'flaws in their actions' relating to disclosure

- officers leaving an incident room and returning to normal duties without submitting all unused material, notebooks and interview notes.

The fifth issue, mentioned by 25 disclosure officers, was the increased use of dedicated disclosure officers or 'doubling' up in large cases. Some disclosure officers in major crime had a dedicated role and were relieved of their other duties. Where this did not happen, many had difficulty in managing disclosure alongside other tasks. It was thought that dedicated disclosure officers, able to move from one large enquiry to another, would produce a more professionally presented and informed result. Several identified problems of recruitment to the role in a major crime enquiry:

> *'We tried to identify officers for fast track training but the job of disclosure officer is unpopular. It is the least "sexy" job in a major enquiry because it can leave you so exposed to criticism.'*

Other suggestions made by disclosure officers included quality control of schedules; proper storage facilities for unused material 'other than already overloaded paperwork trays'; submission of all unused material with the case file; greater availability of IT; and the use of support staff to search for unused material or to enter schedules onto a computer system.

Customs and Excise disclosure officers overwhelmingly felt the need for more training in carrying out their disclosure duties. Among DTI investigators, an injection of resources was seen as the most pressing need.

5 Adverse information about prosecution witnesses

'We follow the guidance in the JOPI. We're aware of the decision in Guney but we're "sitting on our hands" for now.' (Senior officer)

'We only run the checks when the case gets to trial.' (Senior officer)

'We don't always know if the CPS decides to disclose: they should tell us.' (Senior officer)

'The criminal justice unit runs routine checks on convictions and cautions only in the more serious cases. Narey has resulted in this procedure being slowed down in volume crime.' (Senior officer)

Introduction

The Code requires the disclosure officer to give the prosecutor 'any material casting doubt on the reliability of a witness.'[56] This is set out in more detail in the JOPI which advises the disclosure officer to bring to the prosecutor's attention records of previous convictions and cautions for prosecution witnesses and disciplinary findings against police officers.[57] In R v Guney (1998) 2 Cr App R 242, the Court of Appeal recommended that the CPS should also be notified of judicial decisions 'on the express basis of misconduct or lack of veracity of identified police officers.' This chapter examines how these responsibilities are carried out.

Key findings in this chapter are as follows:

- although the JOPI suggests that the disclosure officer is responsible for communication to the CPS of adverse information about prosecution witnesses, this duty was often carried out by other police personnel
- in some forces, checks on the prior records of non-police witnesses were the responsibility of the ASU; in others, of the OIC/disclosure officer; and in a third group, it could be done by either
- such checks were not done routinely. We found that all witness entries were endorsed on the MG9 in only 24 per cent of relevant cases
- over half of all forces said they revealed prosecution witness convictions, cautions and police disciplinary records to the CPS at the primary stage, though CPS respondents indicated this happened somewhat less frequently
- results of criminal record checks on prosecution witnesses were disclosed to the defence at the primary stage in four per cent of study cases

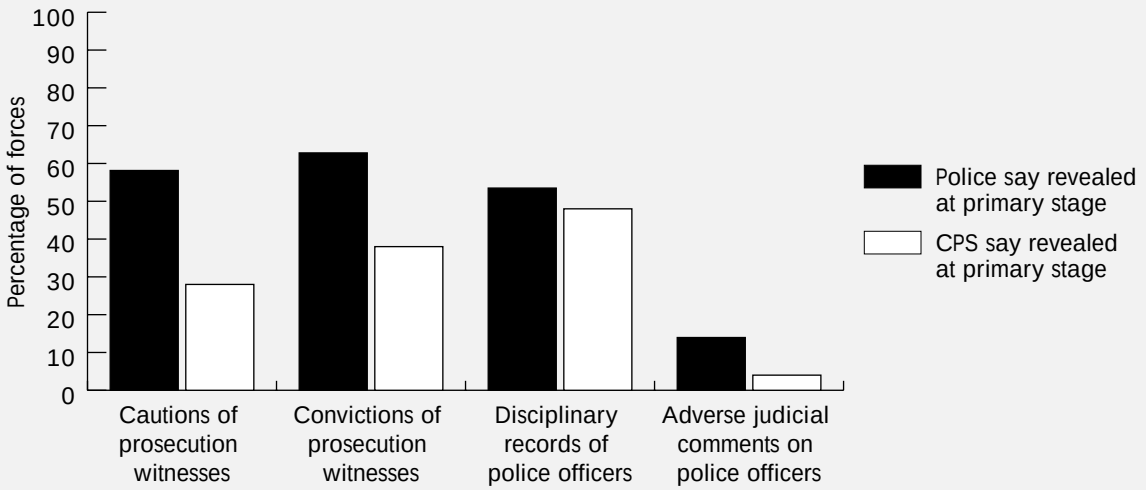
56 Para. 7.3. For full reference see footnote 31.
57 Para. 2.94, JOPI.

- most forces relied on the integrity of officers with disciplinary findings to communicate this to the CPS either directly or through the complaints and discipline department. Only four forces described a more systematic process
- only one of the 39 CPS areas that responded kept a record of adverse judicial comments relating to police officers.

Revealing witness information to the CPS

Senior officers were asked about revealing to the CPS witnesses' previous convictions and cautions, disciplinary findings against police witnesses and adverse judicial comments on police conduct. Prosecution witness convictions, cautions and police disciplinary records were revealed to the CPS at the primary stage by 53 to 63 per cent of forces.

Figure 7: Revelation at primary stage of information about prosecution witness



Fourteen per cent of forces indicated that prosecution witness convictions, cautions and police disciplinary records were revealed to the CPS at the secondary stage. Some of those revealing information to the CPS at the secondary stage did so only if the CPS requested it; 21 to 26 per cent said information in these categories was not routinely disclosed.

Overall, there was a lack of formal policy on how information about adverse judicial comments should be made available to the CPS, with only 16 per cent of forces saying this information was given to the CPS at either the primary or secondary stage.

Checks on witness previous convictions and cautions

Annex B of the JOPI concerns the need to pass adverse information to the CPS about witnesses who are not police officers. Previous offending by such witnesses is confidential and 'should not be made public when it has no bearing on an issue in the case. Whether a Criminal Records Office (CRO) check on a witness has been made should be noted on the confidential form MG9 (witness list). The JOPI restricts checks to the following categories:

- key witnesses, irrespective of whether their evidence is likely to be challenged e.g. victims and eyewitnesses in sexual offences and assault cases, identification witnesses etc.
- witnesses whose accounts are disputed or are likely to be disputed
- witnesses who might be classified as accomplices
- witnesses whose accounts are challenged in the defence statement
- at the prosecutor's request.

The CPS Inspectorate's Thematic Review found that in some cases, the CPS had to prompt the police to conduct CRO checks even in the first four of these categories.[58]

According to the JOPI, it was up to CPS lawyers to sift previous convictions and disciplinary findings in order to decide whether they should be disclosed. In R v Guney (1998) 2 Cr App R 242, the Court of Appeal dealt with the common law against the background of the CPIA (Guney was tried in 1996). The Court emphasised that police officers were 'not to be treated more or less favourably than any other witnesses. Lord Justice Judge accepted the argument that the defence was entitled to be informed of any convictions and disciplinary findings against any officers in the case.

Following advice from First Senior Treasury Counsel about the decision in Guney, the CPS decided that appellate courts would require the same disclosure of convictions and disciplinary findings under the CPIA as was the case at common law, rather than accepting the construction in the JOPI restricting checks to the five categories listed above. In order to ensure a consistent national approach, new guidance was issued to CPS prosecutors in a Casework Bulletin in September 1999. This stated that all previous convictions of prosecution witnesses must be disclosed to the defence at the primary stage, except for minor road traffic matters, regardless of their age or whether they are spent and whether or not the defence has requested this information.

No clear picture emerged from the force survey about who carried out checks on the prior records of non-police witnesses. In some forces, checks were the responsibility of the ASU; in others, of the OIC as disclosure officer; and in a third group, it could be done by either. Where checks were not conducted by the disclosure officer, they were not necessarily informed of the results. Some forces confirmed that these checks were 'not always done' or were carried out only if requested by the prosecution.

Uncertainty about where responsibility lies for making witness checks

The Court of Appeal ordered a retrial in a study case in which the defendant had been convicted and sentenced to eight years imprisonment when it emerged that two Crown witnesses had previous convictions. At sentencing in the first trial, the judge had made commendation orders for these witnesses and the OIC submitted a report requesting that they receive an award from a special fund. This request gave rise to enquiries which uncovered their prior convictions. No previous PNC checks had been made. The OIC believed that PNC checks had been carried out by the criminal justice unit and the defence were informed three months before the trial that there were no convictions recorded against any of the civilian prosecution witnesses. However, the criminal justice unit had not made any such checks.

58 Para. 4.135, CPS Inspectorate's Report on the Thematic Review of the Disclosure of Unused Material (2000), Thematic Report 2/2000.

In the case file analysis, there were 110 cases in which checks on the criminal record of prosecution witnesses were appropriate (i.e. in which there were civilian witnesses) and in which there was an MG9 witness list on file. Each witness entry on the MG9 should be endorsed in such cases to confirm that checks have been carried out. The CPS Inspectorate's Thematic Review noted that the MG9 'is often silent as to whether the appropriate checks have been carried out.[59] In our study, the extent of such endorsement in the 110 cases is shown in Table 15.

Table 15: Endorsement of witness checks on MG9

Extent of endorsement	Percentage of cases
All witness entries endorsed (apart from police and experts)	24%
Only some witness entries endorsed	9%
No witness entries endorsed	67%

In individual forces, the percentages of cases with an unendorsed MG9 are shown in Table 16 (percentages of eligible cases from each force).

Table 16: Percentage of cases with unendorsed MG9s by fieldwork force

	Percentage of cases with an unendorsed MG9
Force 1	79%
Force 2	67%
Force 3	56%
Force 4	87%
Force 5	36%
Force 6	81%

The prosecution disclosed the results of checks on the criminal record of prosecution witnesses to the defence at the primary stage in seven (4%) of 139 relevant cases. At least 60 cases in which the results of checks were not disclosed began after the September 1999 CPS Casework Bulletin was issued, so in these cases the advice in the Bulletin was not followed.

The CPS Inspectorate's Thematic Review noted that 'there is no consensus as to the extent of the prosecutor's obligation' in respect of the possible effect of the judgment in Guney as regards cautions, and in relation to certain categories of witness, professional disciplinary findings. The Inspectorate expressed concern about the potential disadvantages of universal disclosure of convictions: 'this point raises both civil liberties and human rights issues and also the risk that victims and witnesses might be deterred from giving evidence.'[60] ACPO raised the possibility that a class of victims will be created who do not report offences to the police because they know that their previous convictions will be disclosed to the defendant. A number of police respondents shared these concerns about the effect on civilian witnesses; some queried whether witnesses should be put on notice of prosecution policy when they are asked to give a statement. ACPO questioned whether Article 8

59 Para. 4.137, CPS Inspectorate's Report on the Thematic Review of the Disclosure of Unused Material (2000), Thematic Report 2/2000.

60 Para. 4.147-9, CPS Inspectorate's Report on the Thematic Review of the Disclosure of Unused Material (2000), Thematic Report 2/2000.

of the ECHR, the right to privacy, has altered the position in respect of the automatic disclosure of previous convictions. The CPS took the view that, while the matter has not been tested, it is most likely that the absolute right of a defendant to a fair trial under Article 6 will outweigh witnesses' qualified right to privacy under Article 8.

Following Guney, discussions took place between the police and CPS concerning the disclosability of police disciplinary offences which have been expunged or which result in a caution, and in relation to cautions of other witnesses that are more than five years old, all of which are excepted from disclosure by the JOPI. However, no further guidance had been issued on these matters at the time of writing this report.

Police disciplinary records

Annex A of the JOPI requires police officers who make statements to notify the prosecutor on a form MG6B of convictions, whether spent or otherwise, and of disciplinary findings of guilt against them. Exceptions are findings which were expunged or resulted in a caution, complaints which did not result in a disciplinary finding of guilt, and findings in respect of charges arising out of neglect of health, improper dress or untidiness or entering licensed premises, unless the CPS specifically request them. Where there are no findings of guilt recorded against any police officer witness in the case, this fact should be recorded on form MG6.

The CPS Inspectorate Thematic Review recommended that the CPS and ACPO should agree arrangements to ensure that an MG6B containing sufficient detail is submitted in all appropriate cases, and that the MG6 contains an appropriate statement that there are no disciplinary findings or convictions against all the officers who are witnesses in the case, if that is the situation.[61]

Our force survey and file review indicated that different practices operated in respect of MG6Bs. In a few forces, officers submitted a negative return on an otherwise blank MG6B although this is not a Manual of Guidance requirement. In most forces, they completed the form only if they had something to report. Most forces relied on the integrity of officers with adverse findings to communicate this to the CPS either directly or through the complaints and discipline department. Four forces described a more systematic process. In three, the CPS had access to a current list of disciplinary records through liaison with the police disciplinary and complaints department. In the fourth force, the names of officers with disciplinary matters were flagged on a computer system accessed by ASU personnel. The force described this as a 'backstop' if the officer failed to submit an MG6B form.

In the case file analysis, it was only possible to say whether an MG6B was supplied to the CPS in the 169 cases where the prosecution file was examined. Twenty-two of these prosecution files (13%) contained an MG6B. Of the remaining 147 cases, only seven (5%) stated on the MG6 that there were no disciplinary offences recorded against police witnesses. Again, there were differences in practice between forces. At one extreme, 17 out of 30 files (57%) in one force contained information about whether or not officers had disciplinary records. At the other, none of the 27 files in a second force and only two out of 32 files (6%) in a third force contained such information.

One officer interviewed during the course of the study was the subject of a disciplinary finding and had been confined to a desk job. He said his force revealed such findings to the CPS automatically, even after they were spent. He said that he was unable to find out what effect this would have on his career:

61 Recommendation 13, CPS Inspectorate's Report on the Thematic Review of the Disclosure of Unused Material (2000), Thematic Report 2/2000.

'Our ACPO representative says disciplinary findings are disclosable for three years but I think I will always have to tell the CPS and they would have to decide if it is relevant to the case. I can't get a straight answer about my future as a detective and I am afraid that I will be ruled out of all operational placements indefinitely.'

Adverse judicial comments

In R v Edwards (1991) 1 WLR 207, the Court of Appeal quashed a conviction because of the non-disclosure of two previous cases which cast doubt on the credibility of a number of police officers. In Guney, the Court of Appeal addressed how this prosecution duty was to be complied with. It recommended that:

'in addition to convictions and disciplinary findings, the records available to the CPS should include transcripts of appellate decisions where convictions were quashed on the express basis of misconduct or lack of veracity of identified police officers, as well as cases which have been stopped by the trial judge, or been discontinued, on the same basis.'

ACPO has pointed out that currently there is no standard mechanism for reporting back to the police and recording judicial decisions where convictions were quashed or cases were stopped or discontinued 'on the express basis of misconduct or lack of veracity of identified police officers' (the criteria set out in R v Guney). Among the 36 forces (84%) which did not routinely reveal adverse judicial comments, nine said none had been received, ten had no system or policy to address how such comments should be revealed to the CPS and three said that officers did not need to reveal this information as the CPS would already know about such criticism. Only one of the 39 CPS areas that responded kept a record of adverse judicial comments relating to police officers. Neither of the two casework directorates did so. One force said that although an adverse judicial comment would be routed to the ASU and recorded by the area commander on the officer's personal development record, it would not result in a flag on its computer system, as happened with disciplinary records.

6 Crown Prosecution Service and the prosecution advocate

'The legislation is a fair compromise on the duties of the team and the rights of an accused. Problems arise from lack of resources enabling police and CPS to do their legislative jobs in a satisfactory way.' (CPS lawyer)

'The reality has been that we and the police have attempted to comply with the CPIA but once a case reaches the Crown Court, prosecution and defence counsel advocate disclosure of anything which the defence wishes to see.' (CPS lawyer)

'The CPIA is workable and if dealt with properly will successfully combine justice and efficiency. Unfortunately, there is a lack of trust and so the provisions do not have the opportunity to work as they should.' (CPS lawyer)

'Rarely when prosecuting have I seen any meaningful questioning by the CPS in correspondence of the contents of the schedules prepared by the police.' (Barrister)

Introduction

The national objectives for the CPS include:

'To enable the courts to reach just decisions by fairly, thoroughly and firmly presenting prosecution cases, rigorously testing defence cases and scrupulously complying with the duties of disclosure.'

This chapter describes how the CPS exercises its disclosure obligations and its relationship with the prosecution advocate. The issues covered are review of schedules; consultation with the police; primary and secondary disclosure letters; response to defence statements; disclosure tasks undertaken by caseworkers; instructions to the prosecution advocate; and consultation with advocates concerning disclosure.

Key findings in this chapter include the following:

- 66 per cent of CPS respondents said their lawyers could not review schedules adequately in the time available. Of these, 73 per cent blamed general pressure of work and 58 per cent said it was because schedules were received late
- across the six fieldwork areas, reviewing lawyers had not signed MG6Cs in between 30 and 52 per cent of cases. MG6Ds were unsigned in 43 per cent to 100 per cent of relevant cases
- the reviewing lawyer had commented on the sensitivity status of items listed on MG6Ds in 28 per cent of cases
- fewer than one in five disclosure officers said that consultation with the CPS about disclosure matters took place in most cases

- we assessed that 54 per cent of defence statements in CPS cases either contained a bare denial of guilt or did not meet the requirements of section 5 of the CPIA; however, the prosecution requested further details in response to the defence statement in only eight per cent of cases
- 65 per cent of prosecution barristers did not routinely advise on the compliance of defence statements and 90 per cent of CPS respondents said they would not ask counsel for such advice
- 74 per cent of CPS respondents said advocates were not briefed to raise the non-compliance of defence statements with the court; 78 per cent of prosecution barristers said that they did not do so and 77 per cent of judges agreed that this rarely happened
- the CPS decision concerning primary disclosure was included in 44 per cent of briefs but omitted from 35 per cent of briefs even though they were served after primary disclosure
- 75 per cent of prosecution barristers said their instructions rarely contained an adequate account of the reasons for primary disclosure decisions
- prosecution counsel's advice on disclosure was sought in 32 per cent of cases
- 74 per cent of prosecution counsel said they did not usually receive copies of unused material with the brief
- 72 per cent of defence barristers, but only 45 per cent of prosecution barristers, often discuss disclosure with those instructing them
- all CPS respondents but only 62 per cent of barristers said a CPS representative was usually present when disclosure was discussed with the police
- at meetings with the defence advocate, 26 per cent of CPS respondents but only eight per cent of barristers said that a CPS representative was present.

Review of MG6 disclosure schedules

The JOPI states that the prosecutor should consider the schedules of unused material and copies of any items supplied by the police to see if the tests for disclosure are satisfied. It may be necessary to examine material not copied, although there is no duty to inspect every scheduled item.[62] The new Attorney General's Guidelines adopt a more proactive tone, urging prosecutors to 'at once take action' where no schedules have been provided and to correct omissions or deficiencies.[63]

Thirty-four per cent of CPS respondents said their lawyers were generally able to review schedules adequately in the time available. However, 66 per cent said they could not do so. The latter group were asked why they had difficulty (they could cite more than one reason). Seventy-three per cent of this group blamed general pressure of work and 58 per cent said it was because schedules were received late.

62 Para. 3.2.
63 Para. 14, 29 November 2000.

The reviewing lawyer is expected to sign and date the MG6C and D as evidence of review.[64] There was an MG6C on file in 158 of the post-CPIA cases where the CPS file was examined. Sensitive material was listed on an MG6D in 83 of the cases with a CPS file. We found that the reviewing lawyer's signature was missing in a significant number of cases in all fieldwork areas (Table 7). MG6Ds were particularly poor in this respect.

Table 17: Percentage of cases with unsigned schedules by fieldwork force

	Cases with at least one schedule not signed by a reviewing lawyer (Percentages of cases in that area with schedules of specified type)	
	MG6C	MG6D
Area 1	42%	100%
Area 2	52%	100%
Area 3	33%	75%
Area 4	33%	43%
Area 5	30%	64%
Area 6	37%	69%

MG6Ds contained comments from the reviewing lawyer about the sensitivity status of the items listed in only 23 (28%) of the 83 cases with sensitive material listed. (PII applications and items on MG6Ds marked by the prosecutor for court application are discussed in chapter 10).

CPS endorsements on the MG6D

The police found it helpful where the reviewing lawyer classified individual MG6D items as follows:

- *Enter on C in edited form*
- *Enter on C in edited form: inspect/ disclose*
- *Disclose as undermining in edited form*
- *Query re secondary disclosure – keep under review*
- *Sensitive but general intelligence, therefore no application necessary*
- *Court application to be made*

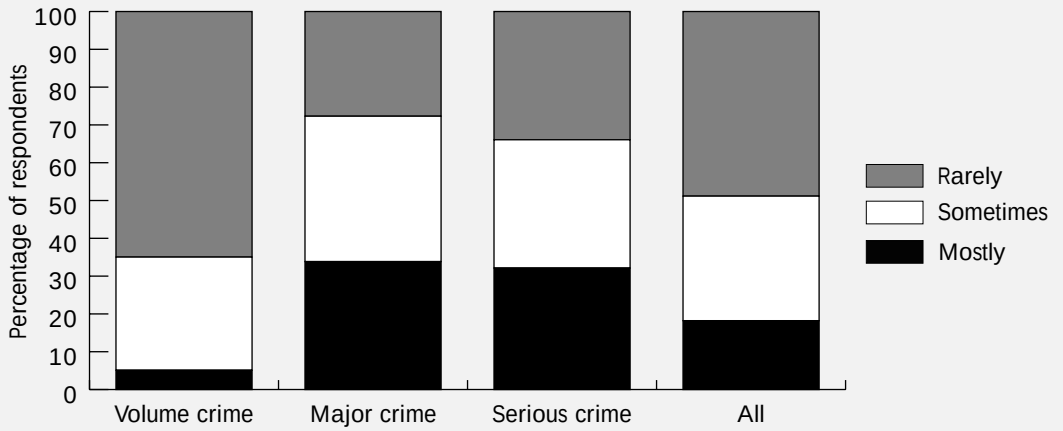
When a decision has been made as to what material should be disclosed to the defence at the primary stage, the reviewing lawyer should record the decision on the appropriate schedule.[65] In the case file analysis, the reviewing CPS lawyer had marked one or more items on the MG6C for disclosure or inspection by the defence in 90 post-CPIA cases (57% of those with an MG6C on the CPS file). In 21 of these cases (13% of those with an MG6C), all items on the MG6C had been so marked.

Consultation between the police and CPS

The Code states that the OIC, the disclosure officer or an investigator may 'seek advice from the prosecutor about whether any particular item of material may be relevant to the investigation.[66] Disclosure officers in major crime cases were most likely to consult CPS during the preparation of schedules. Overall, fewer than one in five disclosure officers said that consultation took place in most cases.

64 JOPI para. 3.24.
65 Para. 3.24, JOPI.
66 Para. 6.1.

Figure 8: Frequency of consultation with the CPS during preparation of disclosure schedules



As noted previously, there were difficulties in communication between the police and the CPS about the nature and content of sensitive material: in 72 (82%) of the 88 cases with items listed on an MG6D, none of these items was ticked to indicate they had been supplied to the prosecutor. In the other 16 cases, between one and seven items on MG6Ds were ticked as having been supplied.

There was a record of a prosecutor's request to the police for copies of unused material in 38 per cent of post-CPIA cases; some files indicated that unused material had been inspected by the lawyer or caseworker although such inspections were not routinely documented on schedules.

The CPS prompted the disclosure officer to supply schedules in 21 per cent of post-CPIA cases and to amend schedules in 21 per cent of such cases. The Code places responsibility for creating and updating schedules on the disclosure officer, and the JOPI emphasises 'consequently they may not be amended by the prosecutor.[67] There were, however, at least eight cases in which prosecutors amended schedules.

Primary and secondary disclosure letters

We were able to locate a primary disclosure letter in 140 (82%) of the 170 post-CPIA cases prosecuted by CPS. The reviewing lawyer was named in the letter in 132 of these cases (94% of the 140), although he or she was not always the signatory.

Secondary disclosure letters were on file in 67 post-CPIA cases. One of these was a summary case and the other 66 were tried in the Crown Court (just under half of the 137 post-CPIA Crown Court cases). The CPS lawyer was named in the summary case letter and in 52 (79%) of the letters in Crown Court cases.

Response to defence statements

Section 5 of the CPIA requires the defendant to serve a defence statement in all cases where there are proceedings in the Crown Court and where primary disclosure has been made. Section 6 allows, but does not require, the defendant to serve a defence statement following primary disclosure in cases which proceed to summary trial and where the defendant pleads not guilty. A defence statement is defined in section 5(6) as a written statement:

(a) setting out in general terms the nature of the accused's defence,

67 Para. 2.87.

(b) indicating the matters on which he takes issue with the prosecution, and

(c) setting out, in the case of each such matter, the reason why he takes issue with the prosecution.

Although responsibility for compliance of the defence statement with the statutory criteria lies with the defence, if the statement is deficient the reviewing lawyer 'should consider explaining to the defence that there will be difficulty in identifying material that might meet the test for secondary disclosure.[68]

In our view, 48 (41%) of 117 first or sole post-CPIA defence statements in CPS cases contained only a denial of guilt (see chapters 8 and 9). Statements in a further 15 cases (13%) fell short of the requirements set out in the CPIA. However, the prosecution requested further details in response to the defence statement in only nine cases, eight per cent of those in which a defence statement was submitted.

Among prosecution barristers, 65 per cent did not routinely advise on the compliance of defence statements and 90 per cent of CPS respondents said they would not ask counsel for such advice. Nor were perceived shortcomings likely to be raised by the prosecution at court: 74 per cent of CPS respondents said advocates were not briefed to raise the non-compliance of defence statements with the court; 78 per cent of prosecution barristers said that they did not do so and 77 per cent of judges agreed that this rarely happened.

The role of caseworkers

The Glidewell report raised concerns about the limited involvement of lawyers in Crown Court cases:

> *'…except in the most serious cases, much preparation for the Crown Court is, in practice, carried out by caseworkers with only limited guidance from a lawyer.'*[69]

CPS Inspectorate reports published after implementation of the CPIA but prior to its Thematic Review of disclosure have pointed to similar concerns.[70] In one area, caseworkers could not always ascertain from file endorsements whether primary disclosure had been made and, as a result, would make primary disclosure even though it was possible that this had already been done.[71]

In an unpublished snapshot study in one CPS area, CPS Management Audit Services estimated that 80 per cent of unused material was dealt with by caseworkers.[72] Following publication of the CPS Inspectorate's Thematic Review, Management Audit Services advised us that caseworker involvement had fallen to around 50 per cent.

The CPS survey asked which disclosure-related tasks were undertaken by caseworkers rather than lawyers. Respondents from four areas said that caseworkers had no such responsibilities, and those from a further six said that all decisions were taken by lawyers: 'Lawyers do not, or at any rate should not, delegate inspection of material to the caseworker. The remainder indicated that caseworkers had a range of responsibilities, from administrative tasks such as sending copies of defence statements to the police to drafting correspondence. Seven areas said caseworkers were active post-committal, liaising with counsel and the police on disclosure matters. One of these said that there was 'very little evidence of lawyer involvement post-committal' and another said caseworkers undertook 'all post-committal work.

As noted later in this chapter, 74 per cent of CPS respondents said they were represented by a caseworker at meetings with counsel.

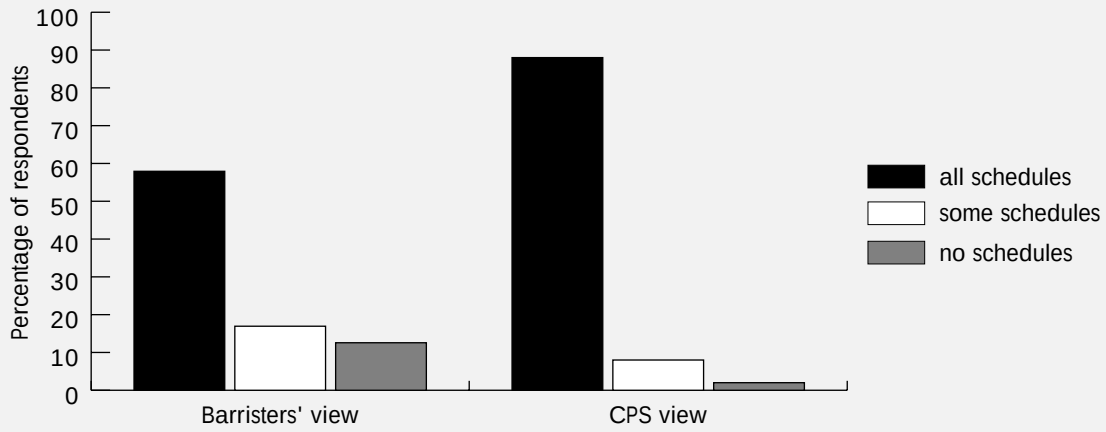
68 Para. 3.43, JOPI.
69 p. 67, Sir Iain Glidewell (1998) The Review of the Crown Prosecution Service, Cm 3960.
70 For example, para. 7.32, Report 2/97 on the Exeter Branch of CPS South West (August 1997); para. 7.29, Report 9/97 on the Teesside Branch of CPS North (September 1997).
71 Para. 6.12, Report 21/98 on the Highbury Branch of CPS London (September 1998).
72 Activity Based Costing Team, CPS Management Audit Services (1998).

The brief to counsel

We observed that briefs had become shorter and less informative since we last reviewed CPS files for research purposes in the mid-1990s. In some areas, briefs contained little or no information about the offence. There was lax editing of standard language. Inconsistencies were common, for example, schedules were listed as 'attached' when the main text said that schedules had not yet been submitted, or the main text drew counsel's attention to schedules which were not attached to the brief.

CPS respondents and prosecution barristers were asked which schedules of unused material were included with the brief. Eighty-eight per cent of CPS respondents but only 58 per cent of counsel thought that all schedules were usually included.

Figure 9: Disclosure schedules included with the prosecution counsel brief



Twenty-one per cent of counsel said they usually received copies of unused material with the brief while 74 per cent did not.

The brief to counsel was on file in 118 (84%) out of 140 cases in which the prosecution file was examined. We checked whether these briefs included copies of disclosure schedules.

Table 18: Inclusion of disclosure schedules in prosecution brief

Were disclosure schedules provided with the brief to counsel?	
Yes	77%
no, brief served before prosecutor had received disclosure schedules	8%
no, even though brief served after receipt of schedules by the prosecutor	8%
no, but could not tell when brief was served	7%

The CPS Inspectorate's Thematic Review recommended that instructions to counsel should 'address fully' decisions or comments of the prosecutor concerning disclosure.[73] We checked whether such decisions were incorporated into the brief.

73 Recommendation 15, CPS Inspectorate's Report on the Thematic Review of the Disclosure of Unused Material (2000), Thematic Report 2/2000.

Table 19: Inclusion of decision on primary disclosure in prosecution brief

Did the brief contain the prosecuting authority decision on primary disclosure?	
Yes	44%
no, brief served before primary disclosure	14%
no, even though brief served after primary disclosure	35%
no, but could not tell when brief was served	7%

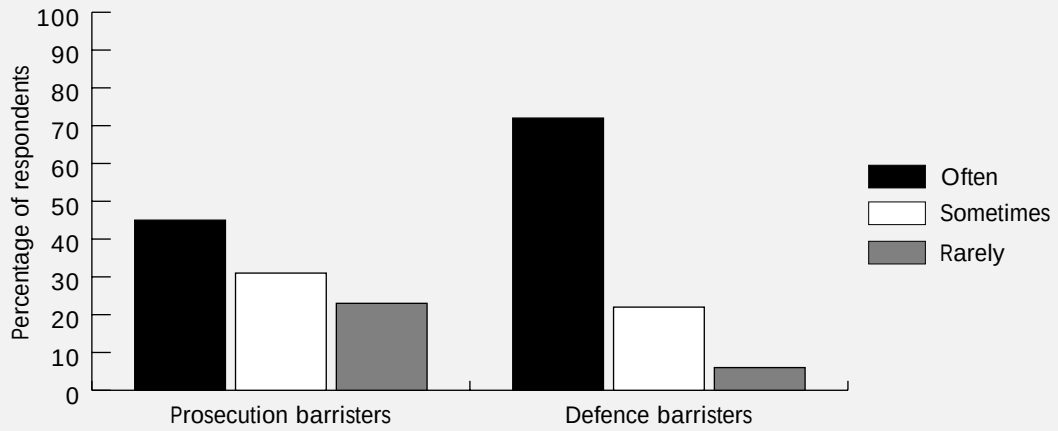
Prosecution barristers were asked whether their instructions adequately described the reasons for primary disclosure decisions: 75 per cent said this happened rarely, 22 per cent that it happened sometimes, while only one barrister said that it happened often.

Consultation about disclosure between barristers and those instructing them

Counsel's advice on disclosure was sought in 45 (32%) of the 140 cases in which the prosecution file was examined.

We asked prosecution and defence barristers about discussing disclosure issues at a pre-trial conference with the prosecuting authority or their instructing solicitor. This apparently happened more frequently on the defence side.

Figure 10: How often do barristers discuss disclosure with those instructing them?



CPS respondents and prosecution barristers were asked whether a CPS representative was usually present when the prosecution advocate discussed disclosure with the police or the defence advocate. All CPS respondents but only 62 per cent of barristers said a CPS representative was usually present when disclosure was discussed with the police. At meetings with the defence advocate, 26 per cent of CPS respondents but only eight per cent of barristers said a CPS representative was present.

Seventy-four per cent of CPS respondents said they were represented at such meetings by a caseworker, ten per cent by a lawyer and the rest said they could be represented by either.

7 Routine revelation to the prosecutor

'Routine revelation flies in the face of fast-tracking and reducing paperwork.' (Senior officer)

'Putting the documents together for routine revelation has been easier than we originally thought.' (Senior officer)

Introduction

This chapter discusses the issue of routine revelation by the police to the CPS of key documents. Matters addressed include the differences between policy and practice; whether routine revelation implies routine disclosure to the defence; responsibility for editing; and the Pan London Agreement introduced on 28 November 2000.

The crime report brings together various steps in the case, starting off with the initial complaint. The Law Society has observed that:

> *'Prior to the CPIA, it was routine for the full crime report to be forwarded to the CPS and subsequently disclosed to the defence. When the Bill was being debated, the government held out the crime report as a fundamental means of identifying the potential existence of undermining material.'*[74]

ACPO considered that crime reports were not routinely revealed to the CPS and disclosed to the defence prior to the implementation of the CPIA. This view was supported by the CPS Inspectorate who found that it was rare for the prosecutor to supply a copy of the crime report in pre-CPIA cases.[75]

The log of messages is a composite list of messages about the reporting of the offence and the police response (usually on a computer). In many cases, the crime report and messages log contain the first details or information about the offence under investigation and they are the two classes of document most frequently requested by the defence. Apart from the potential to undermine the prosecution,[76] the Inspectorate noted that their contents may be relevant to the prosecutor's consideration of the 'realistic prospect of conviction' test in the Code for Crown Prosecutors. The JOPI failed to advise how these documents could be described in sufficient detail on the MG6C which, in practice, was often silent about their contents.[77] The Inspectorate recommended that the JOPI and Manual of Guidance be amended to ensure that in all cases, a copy of the crime report and log of messages be provided with the MG6C.[78]

ACPO points out that the Narey and Glidewell initiatives have significantly reduced the average cost per file. Routine revelation would increase costs again at a time when the Public Sector Regulatory Impact Unit in the Cabinet Office is seeking to reduce the administrative burden on the police.

74 p. 230, Roger Ede and Eric Shepherd (2000) Active Defence. Law Society Publishing.
75 Para. 4.64, CPS Inspectorate's Report on the Thematic Review of the Disclosure of Unused Material (2000), Thematic Report 2/2000.
76 ACPO points out an apparent contradiction between the Inspectorate's para. 4.68: 'In most cases, the crime report and log of messages do not contain material that clearly might undermine the prosecution case or assist the defence'; and para 4.75: 'We consider that the view, informed by experience, can be held that the contents of crime reports and logs of messages will almost inevitably be material which might be expected to assist the accused's defence.
77 Paras. 4.57, 4.72.
78 Recommendation 6.

The issue of routine revelation was hotly debated during the consultation exercise on the new Attorney General's Guidelines on Disclosure, but no agreement was reached. It was decided that the question 'was most appropriately taken forward as part of the CPS response to the Thematic Review, given the fact that such information is specific to CPS cases, whereas the guidelines are applicable to prosecutors generally.'[79]

Key findings in this chapter include the following:

- although no national consensus has yet been reached, an increasing number of forces and CPS areas, including London, reached agreement on routine revelation during the course of the research
- 47 per cent of forces indicated they were in favour of routine revelation
- 37 per cent of forces currently routinely reveal crime reports to the CPS; 30 per cent reveal logs of messages; 26 per cent reveal officers' notebooks; and 33 per cent reveal Scene Of Crime Officer (SOCO) work records
- more than a third of CPS respondents said their area routinely disclosed crime reports, logs of messages and police officers' notebooks to the defence at primary disclosure
- more than two out of three of judges felt that routine disclosure should be practised more widely
- among forces that routinely reveal material to the CPS, 56 per cent edit crime reports before revelation; 44 per cent edit logs of messages; 64 per cent edit notebooks; and 50 per cent edit SOCO work records.

Policy and practice

A majority of senior police interviewees (53%) said that their force policy was opposed to routine revelation. Objections included that it was contrary to the intentions of the CPIA; the cost of locating, copying and editing documents (see chapter 14); and the concern that routine revelation would result in routine disclosure to the defence, even where the documents contained no undermining material. Some feared that routine revelation would result in police officers and managers ceasing to exercise their judgment about disclosure issues. There was also concern about the interpretation of internal police documents:

'Crime reports can be misleading. The complexion of a case can change during an investigation. The control room log is not designed to be disclosed; it is intended to be user-friendly for officers. We would have to edit it extensively before revelation.'

'The command and control log is a real-time jotting pad. The system records what people say and do but much of this may turn out to be wrong in light of later events. For example, it may record that six officers are detailed to attend an incident but only three actually go. It may look to the CPS as if three statements are missing. It would create a lot of work to verify that only three officers went.'

Some senior officers questioned whether routine revelation would actually make a difference to the quality of the CPS review in the absence of extra resources:

'CPS would like routine revelation but acknowledge that they have insufficient staff to review, so why should we supply the documents? It would be different if they would actively review and revise disclosure decisions.'

79 p. 5, Commentary, 29 November 2000.

Forty-seven per cent of senior police officers reported that their force was in favour of routinely revealing to the CPS certain key documents. Some felt this reduced the risk of losing cases at court as the result of disclosure challenges. In addition to crime reports and logs of messages, candidates for routine revelation were work records of SOCOs and police officers' notebooks (the latter are disclosed to the defence at court if officers wish to use them to refresh their memory).

Table 20: Police interviewees in favour of routine revelation to the CPS

Material	Percentage in favour of routine revelation
Crime reports	42%
Control room message logs	37%
Police officers' notebooks	30%
SOCO original work records	30%

CPS respondents and police interviewees were asked about current practice in respect of routine revelation of these documents. There had been an increase in the number of forces undertaking routine revelation since an ACPO survey some months earlier.

Table 21: Current practice in respect of routine revelation to the CPS

Material	Respondents who said this material is routinely revealed by the police	
	Police forces	CPS
Crime reports	37%	48%
Control room message logs	30%	48%
Police officers' notebooks	26%	46%
SOCO original work records	33%	10%

Routine disclosure to the defence

Over a third of CPS respondents said their area routinely disclosed crime reports, logs of messages and police officers' notebooks to the defence as part of primary disclosure. A majority of judges felt that routine disclosure of these documents should be adopted more widely.

Table 22: Routine disclosure to the defence

Material	CPS routinely disclosing to defence	Judges in favour of routine disclosure
Crime reports	38%	76%
Control room message logs	42%	74%
Police officers' notebooks	36%	72%
SOCO original work records	20%	67%

Editing

A significant police concern about routine revelation was the editing of documents if the prosecutor decided that they should be disclosed to the defence. Senior police officers differed as to whether responsibility for editing out sensitive information such as witness addresses should lie with the police or CPS. Some forces expected CPS to edit documents before disclosure to the defence but others were not confident this would be done appropriately:

> *'We can't count on the CPS to edit before disclosure. We're already lending CPS our administrative staff to catch up on their filing.'*

> *'If we supplied documents routinely we would need to edit them first as CPS sends out documents automatically in error.'*

However, one force already undertaking routine revelation said that, in the vast majority of cases, they left editing to the CPS 'though this needs dialogue.'

Editing practice among forces that currently routinely reveal material was as follows:

Table 23: Police forces that edit documents before revelation to the CPS

Material	Percentage of those that reveal who edit first
Crime reports	56%
Control room message logs	44%
Police officers' notebooks	64%
SOCO original work records	50%

Among the 20 forces that were in favour of some routine revelation, 14 (70%) said the police would first want to edit the revealed material.

Pan London Agreement

On 28 November 2000, an agreement was signed by the CPS and Metropolitan and City Police and endorsed by the Criminal Bar Association and London Criminal Courts Association. The Agreement established minimum standards for the timing and nature of material to be passed by the police to the CPS following the initiation of a prosecution. It was seen as taking forward the recommendation of the CPS Inspectorate's Thematic Review on routine revelation.

Under the Agreement, automatic revelation is triggered at the primary disclosure stage when a not guilty plea is entered or the case is committed or transferred to the Crown Court. The documents in question – the custody record and copies of the message log and the original crime report – must be forwarded to the CPS within seven days, or a time estimate must be given as to when the material will be available. Editing will usually be conducted by the detective sergeant in charge of case paper quality. At this point, if key witness statements or, in identification cases, records of description have not yet been revealed to the CPS, these should also be considered.[80]

80 Paras. 2.9, 2.10.

The custody record must be disclosed to the accused under PACE and the Agreement notes that the interview tape and custody record may already have been provided to the defendant or his legal adviser on leaving detention after charge. Where this has occurred the action must be recorded, a signature obtained from the person provided with the material and the CPS notified.81

In relation to disclosure to the defence, the Agreement states that:

> *'On receipt the CPS will review the material and, after such additional editing as may be required, then disclose as appropriate to the defence, recording clearly what has been disclosed, and when. This record will be required at subsequent pre-trial hearings should the defence allege that the material has not been supplied.'*

At the launch of the Agreement, a CPS speaker stressed that automatic revelation 'does not mean automatic disclosure to the defence.'

81 Para. 3.1.

8 Cases tried summarily

'I cannot comment on the prevalence of problems with disclosure schedules because these are seldom brought to the attention of the court.' (Justices' Clerk)

'Some solicitors demand every scrap of evidence, even if it is not relevant, in order to delay matters.' (Magistrates' Association)

Introduction

The question of disclosure in summary cases[82] is addressed separately in this chapter because many interviewees stressed that 'disclosure works differently in the magistrates' court. Nevertheless, many participants were unhappy with the CPIA. The Justices' Clerks' Society told us:

'The CPIA disclosure regime was intended to fulfil the government's intention that it should be fair, efficient and effective. The Society is not convinced that it is any better than the developing common law system that operated at that time.'[83]

This chapter deals with perceptions of disclosure problems; primary disclosure; defence statements and secondary disclosure; pre-trial reviews; and sanctions.

Key findings in this chapter include:

- primary disclosure was served in 21 out of 33 cases; in ten cases no items were disclosed at the primary stage and in seven between one and 24 items were disclosed
- defence statements were served in two cases and secondary disclosure followed in one of these
- 94 per cent of CPS respondents, 84 per cent of justices' clerks and 66 per cent of defence solicitors agreed that defence statements were rarely served in summary cases
- 56 per cent of defence solicitors, 16 per cent of CPS respondents and 24 per cent of justices' clerks said the lack of defence statements was often due to service of primary disclosure less than 14 days before trial
- in 15 out of 18 cases, primary disclosure was served at least two weeks before trial
- 32 per cent of prosecutors and clerks said the prosecution often let the defence see unused material without the trigger of a defence statement; only 13 per cent of defence solicitors agreed that this often happened

82 We had asked the six fieldwork areas to provide a total of 48 such cases for examination but only 33, including six youth court cases, were forthcoming. All were post-CPIA.
83 Letter to the researchers, 3 July 2000.

- in six out of 25 summary cases, unscheduled items were disclosed
- around half of justices' clerks and CPS respondents said that the bench rarely enquired about the status of disclosure of unused material at a pre-trial review
- 41 per cent of justices' clerks said their court would make a costs order against the prosecution if it failed to disclose as required by the CPIA. However, 19 per cent would take no action in such a situation.

Perceptions of disclosure problems

In its letter to the researchers, the Justices' Clerks' Society referred to 'widespread evidence of poorly completed schedules.' It continued:

> *'the CPS relies to a substantial extent on the police service to fulfil the obligations of the Act. The requirement for full and frank disclosure is often overlooked by the police service and this frequently leads to placing the Crown Prosecutor in the invidious position of having to seek an adjournment to fulfil his obligations.'*

Justices' clerks and CPS respondents were asked about the extent to which disclosure was problematic across various categories of offences and in the youth court. Both groups concluded that theft, handling and burglary caused most difficulties, followed closely by offences of violence, fraud and forgery. However, the CPS respondents perceived disclosure as more problematic in both the magistrates' court and the youth court than did justices' clerks.

Primary disclosure

In summary trials, the prosecutor's duty of primary disclosure to the defence under the CPIA is triggered by a plea of not guilty in the magistrates' or youth court.[84] We could tell that primary disclosure had been served in 21 (64%) out of 33 cases. The JOPI recognises that in summary cases:

> *'there may not be a secondary stage to prosecution disclosure, and no opportunity to provide assisting material. In the interests of justice, the identification of material which might undermine the prosecution case should be interpreted as widely as possible.'*[85]

In ten cases (48% of those with primary disclosure), no items were disclosed at the primary stage. In seven cases (33%) between one and 24 items were disclosed. This represented all the unused material listed on the MG6C in four of these cases. In the remaining four cases (19%) we could tell that primary disclosure had taken place but not what it comprised. In two of the 12 cases with no primary disclosure, there was an indication on the file that some unused material had been shown to the defence.

The CPS Inspectorate's Thematic Review expressed concern about cases in which the late provision of schedules by the police resulted in primary disclosure being provided on the day of trial. The dates of both primary disclosure and disposal were available in 18 cases. In 15 of these primary disclosure was served at least two weeks before the trial and in one it was served three days before trial. In two others it was served on the day of trial. One of these ended in a guilty plea; in the other, the magistrates stayed proceedings.

84 Paras. 1.8-1.9, JOPI.
85 Para. 2.131.

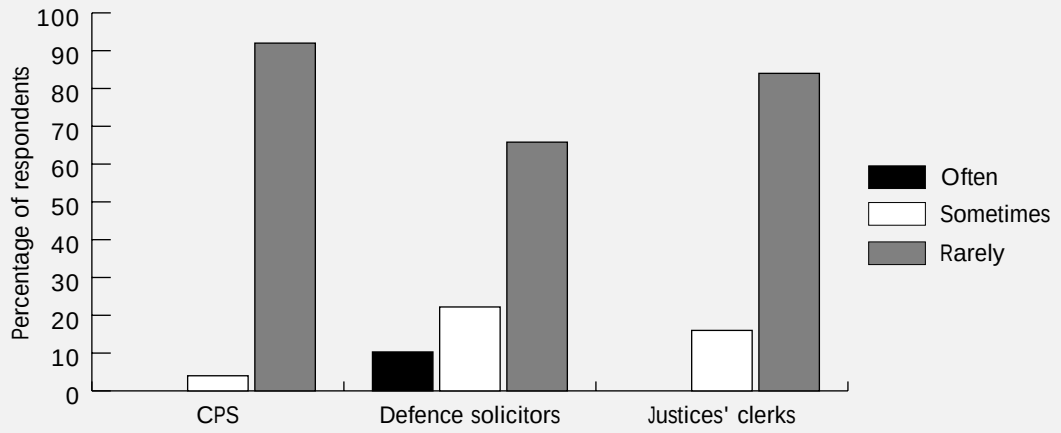
It may be relevant to timely service of primary disclosure that in half of the 18 cases for which data were available, the first MG6C was created prior to the defendant's first appearance in court.

In the 12 cases with no primary disclosure on file, two ended in a trial, five in pleas of guilty and in five the CPS offered no evidence.

Defence statements and secondary disclosure

In summary trials, the defence need not provide a defence statement. Ninety-two per cent of CPS respondents, 84 per cent of justices' clerks and 66 per cent of defence solicitors agreed that defence statements were rarely served.

Figure 11: How often are defence statements served in summary cases?



Even where a defence statement was served, 85 per cent of clerks and 90 per cent of CPS respondents said these were rarely followed by a section 8 application.

Where no defence statement was filed, 84 per cent of clerks and 76 per cent of CPS respondents said the defence rarely applied for court-ordered disclosure. In the case file analysis, the bench ordered prosecution disclosure of unused material in only one summary case.

The reasons for the scarcity of defence statements were explored with defence solicitors, CPS respondents and justices' clerks. Fifty-six per cent of defence solicitors, 16 per cent of CPS respondents and 24 per cent of justices' clerks said this was often due to service of primary disclosure less than 14 days before trial. Service on the day of trial was a common occurrence according to 20 per cent of defence solicitors and ten per cent of clerks but no CPS respondents agreed with this view. As noted in the previous section, primary disclosure was served on the day of trial in only two out of 18 cases.

Thirty-two per cent of prosecutors and clerks said the prosecution often let the defence see unused material without the trigger of a defence statement; only 13 per cent of defence solicitors agreed that this often happened. In an additional question, 30 per cent of defence solicitors conceded that failure to file a defence statement in summary cases was often a tactical decision.

A defence statement was served in two (6%) of the 33 summary cases. One of these was served out of time although no application was made for an extension of the time allowed for service. One statement contained only a denial of guilt. A secondary disclosure letter was served in one case, 130 days after service of the defence statement: it said that there was nothing to disclose in support of the defence case. There were no section 8 applications in the sample of cases tried summarily.

The Justices' Clerks' Society was concerned that the absence or inadequacy of defence statements was used by the CPS to evade their ongoing disclosure obligations:

> *'there appears to be reluctance by the CPS to observe their continuing duty to disclose. They frequently rely upon the requirement for a defence statement or suggest that a statement was inadequate and overlook the obligation which applies no matter what the defence may do.'*

See Figure 12 opposite

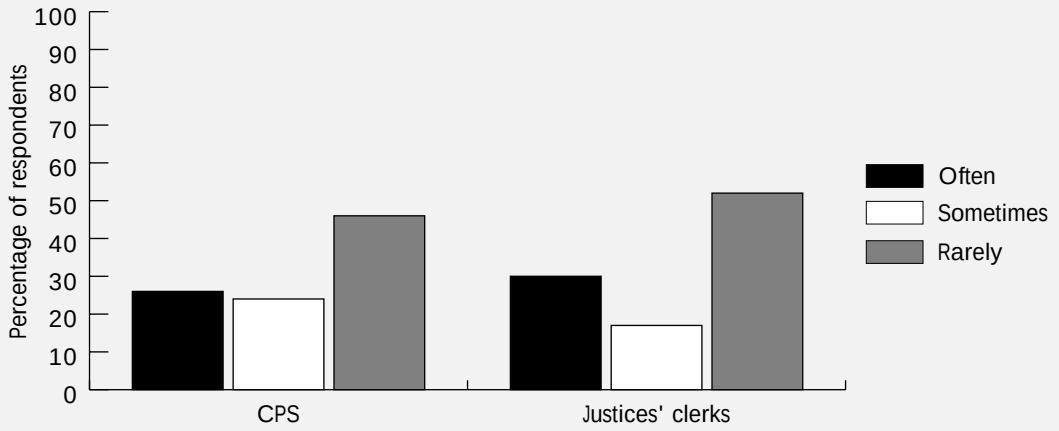
Police assessments of what should be disclosed

There were 17 cases in which we could establish what was disclosed. An MG6E was on file in all but one of these cases. In four (25%), nothing was listed on the MG6Es and nothing was disclosed. In the other 12 cases (75%), the list of items disclosed differed from what was on the MG6E. In most of these cases disclosure comprised all items on an MG6E and more. In six (24%) out of 25 summary cases for which the information was available, unscheduled items were disclosed.

Pre-trial reviews

Around half of justices' clerks and CPS respondents said that the bench rarely enquired about the status of disclosure of unused material at a pre-trial review (PTR).

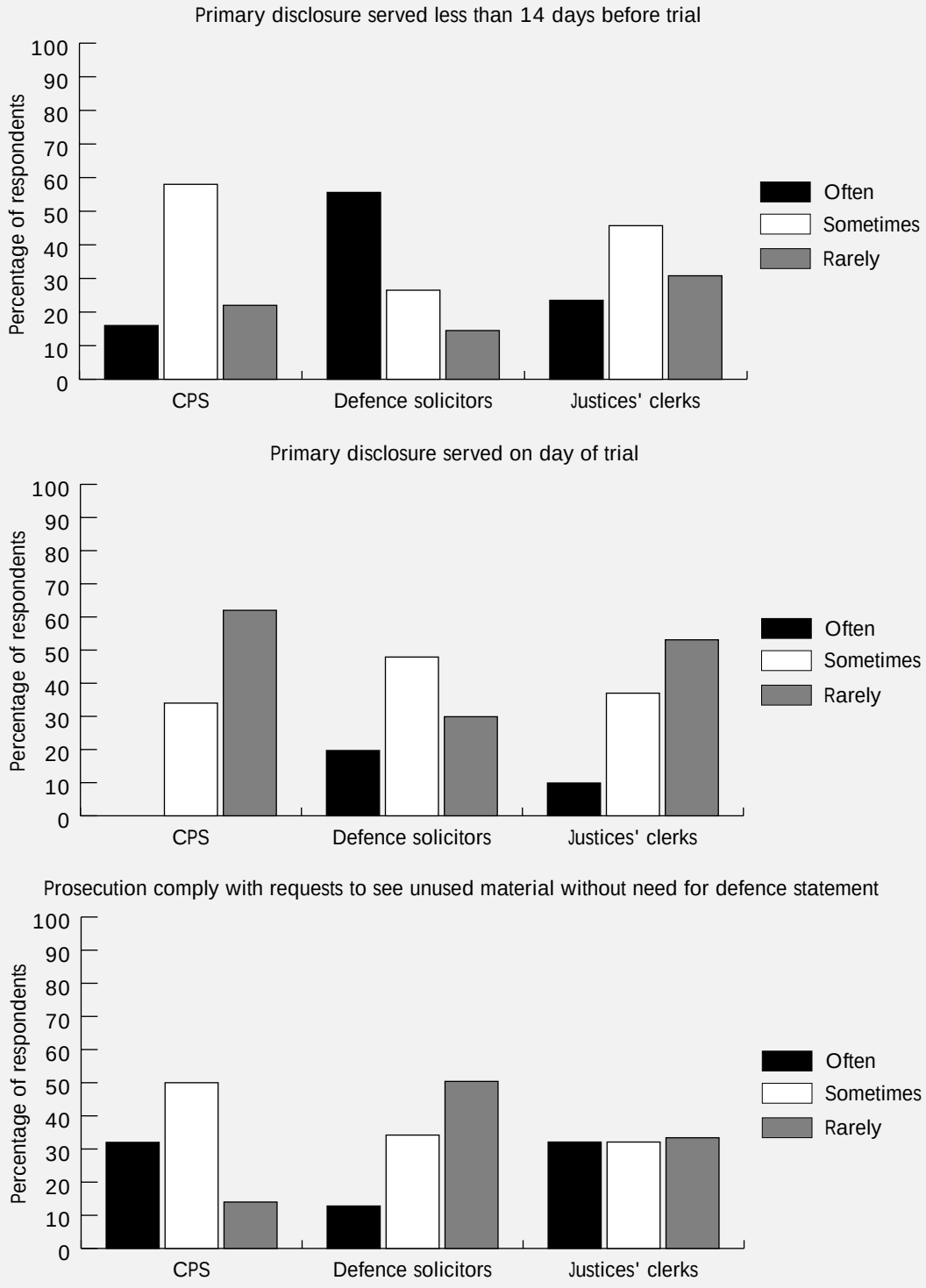
Figure 13: How often does the court enquire about the status of disclosure of unused material at a PTR?



Sanctions

Justices' clerks were asked what sanctions the bench would consider imposing for failure to disclose. As with judges, the clerks stressed the need to consider each case on its merits. Fifteen per cent had no experience of failure to disclose as required by the CPIA and 23 per cent had no experience of failure to disclose as required by a court order.

Figure 12: Reasons for not filing defence statements in summary cases



Some referred to a range of possible sanctions. The figures in Table 24 draw on only the most stringent option suggested by those respondents with experience of sanctions.

Table 24: Clerks' views of sanctions employed for failure to disclose

Sanction	Courts that would employ sanction for failure to disclose: as required by the CPIA	as required by court order
None	19%	14%
Verbal censure	2%	1%
Demand an explanation	1%	1%
Adjourn / issue further direction to disclose	7%	2%
Order costs against the prosecution	41%	33%
Invite abuse of process applications / dismiss case	12%	20%

9 Cases tried on indictment

'Too often at the date of the trial, matters are dug out by prosecution counsel and served. There appears to be a lack of understanding on the part of police officers, CPS caseworkers (who often seem to have conduct of cases) and CPS lawyers as to what should be disclosed and what is pertinent to an enquiry.' (Barrister)

'The adversarial approach should be limited to testing the evidence available from both sides in court, not in the pre-trial procedures.' (Judge)

'Much time and effort seems to be spent in attending to disclosure of material which has little bearing on the case instead of concentrating on that which does.' (Judge)

Introduction

This chapter deals with disclosure issues arising in offences tried on indictment and prosecuted by the CPS. It addresses respondents' perceptions of disclosure problems; the timing of primary disclosure; the content of primary disclosure; the timing, contents and signing of defence statements; secondary disclosure; the accuracy of assessments of disclosability by the police; defence requests for disclosure; section 8 applications; sanctions; and judicial criticism of practitioners in relation to disclosure.

Key findings in this chapter include the following:

- over 90 per cent of CPS respondents but only 60 per cent of defence solicitors said primary disclosure was often served at or just after committal; in the case file analysis, primary disclosure was served by committal in 61 per cent of cases
- nearly 60 per cent of barristers (72% of defence barristers), 50 per cent of defence solicitors and 15 per cent of judges said that, in their opinion, non-sensitive unused material was often withheld from the defence when it should have been disclosed. It was not possible to check directly whether disclosable material was withheld in study cases
- items were disclosed with the primary disclosure letter in 32 per cent of post-CPIA cases. Disclosure was also made after the primary disclosure letter but prior to service of a defence statement in 22 per cent; in more than a third of these cases, material had already been disclosed at the primary stage
- one-third of CPS respondents, 22 per cent of barristers and 15 per cent of the defence solicitors felt that defence statements were rarely served within 14 days of primary disclosure. Defence statements were served out of time in 65 per cent of cases in the case file analysis
- 32 per cent of CPS respondents said the defence often applied to extend the time for service of a defence statement. In the case file analysis, the defence applied for an extension in 20 per cent of cases in which a statement was served

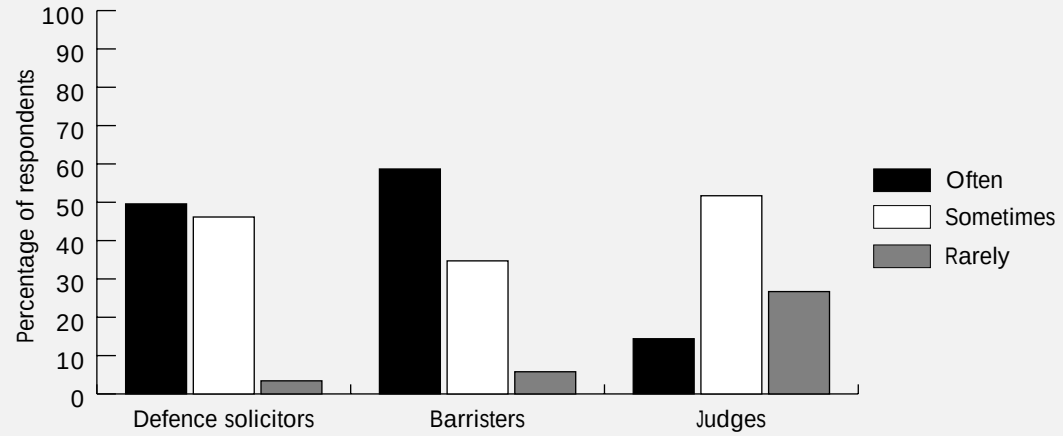
- we considered that 52 per cent of cases with a defence statement either contained a bare denial of guilt or did not meet the requirements of section 5 of the CPIA
- 59 per cent of judges said they would order a non-compliant defence statement to be amended, but only four per cent of CPS respondents and prosecution barristers thought that most judges did so
- 43 per cent of judges would initiate legal argument on whether an inference should be drawn where no defence statement is served or the defence at trial differs significantly from the defence statement. Among CPS respondents, 44 per cent would brief advocates to suggest to the court that an inference should be drawn
- defence statements were signed by the defendant in 14 per cent of cases with a statement on file
- 81 per cent of barristers, 70 per cent of judges and 62 per cent of CPS respondents thought that secondary disclosure was rarely served by the PDH. Secondary disclosure was served between committal and the PDH in only 19 per cent of cases
- 48 per cent of secondary disclosure letters identified material to be disclosed. This was followed by further voluntary disclosure in some of these cases as well as in some of the cases in which there was nothing to disclose according to the secondary disclosure letter
- further disclosure was made voluntarily after formal service of the secondary disclosure letter in 57 per cent of post-CPIA cases. Material was subsequently disclosed in at least 53 per cent of the cases in which nothing was disclosed at secondary and in 58 per cent of the cases where items were disclosed at the secondary stage
- the disclosure officer's listing of undermining or assisting material on an MG6E was not a good predictor of disclosure by the prosecutor. In at least half the cases with items listed on an MG6E, some of that material was not disclosed
- material which was scheduled but not listed on an MG6E was disclosed to the defence, other than by court order, in 74 per cent of cases
- unscheduled unused material was disclosed in 45 per cent of cases
- in 75 per cent of cases with nothing listed on an MG6E, some items were disclosed
- 72 per cent of cases with a defence statement contained or were accompanied by a request for specific unused material. In response to such requests, 56 per cent of judges said they would order disclosure if the material was not sensitive while 23 per cent would do so only if they considered that the material would assist the defence
- 78 per cent of prosecution barristers said they would allow the defence access to non-sensitive material, even if it fell outside the statutory criteria. Only four per cent said they would resist such a request
- in the case file analysis, the court ordered disclosure of unused material other than as a result of a section 8 or PII application in 37 per cent of Crown Court cases

- 53 per cent of judges said they would grant section 8 applications automatically provided the material in question was not sensitive; 36 per cent would refuse the application unless the material might assist the defence as set out in the defence statement
- 60 per cent of CPS respondents said section 8 applications were rare. In the case file analysis, the defence made such an application after the PDH in four per cent of cases
- 36 per cent of judges said that their court monitored compliance with orders relating to disclosure
- the most commonly used judicial sanction for failing to disclose as required by the CPIA was issuance of a further direction to disclose. If the prosecution failed to disclose when ordered by the court to do so, 46 per cent of judges said they would order costs against them
- in relation to disclosure, 82 per cent of judges had criticised police officers; 75 per cent criticised CPS personnel and 22 per cent had criticised advocates.

Perceptions of disclosure problems

Nearly 60 per cent of barristers (72% of defence barristers), 50 per cent of defence solicitors and 15 per cent of judges believed that non-sensitive unused material was often withheld from the defence when it should have been disclosed. Over half of responding judges said this sometimes happened.

Figure 14: How often is non-sensitive unused prosecution material wrongly withheld from the defence?



It was not possible to check directly whether disclosable material was withheld in study cases although we identified wide discrepancies between the police and CPS view of what was disclosable (see chapter 9).

The timing of primary disclosure

In trials on indictment, the prosecutor's duty of primary disclosure to the defence under the CPIA is triggered by committal or transfer, or the preferment of a voluntary bill of indictment. The JOPI states that disclosure to the defence must take place as soon as is reasonably practicable after the duty arises.[86] The fact that the obligation starts at committal rather than the defendant's first appearance is itself problematic. Section 17 of

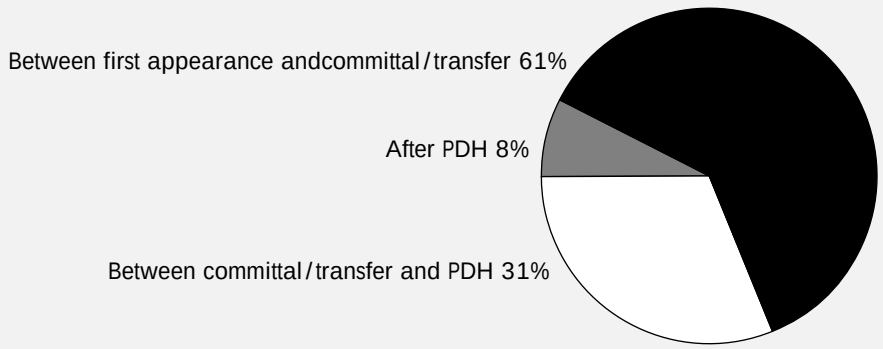
86 Paras. 1.8-1.9, JOPI.

the CPIA provides that material disclosed to the defence under the provisions of the Act cannot be used, except with the permission of the court, other than for the purposes of the criminal proceedings to which it relates or any subsequent associated criminal proceedings such as an appeal. Material disclosed before committal does not enjoy this protection under the CPIA. Prosecutors told us that the fact pre-committal disclosure was not shielded by section 17 acted as a disincentive to disclose at that stage even though, as made clear in *ex parte* Lee, there is an obligation to disclose some material pre-committal. There was little awareness of the House of Lords decision in *Taylor and others v Serious Fraud Office and others* (1998) 4 All E.R. 801-820. This gives similar protection to material disclosed before committal. The judgment stated that material disclosed by the prosecution to a defendant in criminal proceedings was subject to an implied undertaking that it would not be used for any purpose other than the defence in the criminal proceedings.

Over 90 per cent of CPS respondents but only 60 per cent of defence solicitors said primary disclosure was often served at or just after committal. The proportion of barristers and judges who agreed that disclosure was often served at that stage was even smaller, although these groups are less directly involved at committal.

We were able to identify the date of service of primary or first disclosure in 123 cases, of which five were pre-CPIA. The date was usually taken from the primary disclosure letter to the defence but where this was undated or missing, it was sometimes possible to identify the primary disclosure date from other file material. The earliest primary disclosure in these cases occurred 114 days before committal; the latest was 26 days after the PDH.

Figure 15: Timing of primary disclosure in post-CPIA Crown Court cases



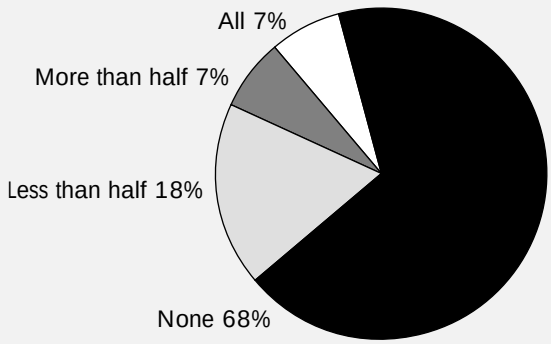
In the five pre-CPIA cases, primary disclosure occurred before committal in one case, after the PDH in one case and between committal and PDH in three cases.

The content of primary disclosure

We could determine whether material was disclosed at the primary stage in 129 post- CPIA and eight pre-CPIA cases. Our source was usually the primary disclosure letter and the attached MG6C. In more recent cases, defence lawyers in some areas were allowed to inspect quantities of unused material. In such situations, primary disclosure letters or attached schedules indicated that the material was being disclosed or made available for inspection. Some letters indicated that the material in question was not considered undermining but other letters failed to indicate whether, in the opinion of the prosecutor, any of the unused material undermined the prosecution case.

Some items were disclosed at the primary stage in 41 (32%) of the 129 post-CPIA cases for which the information was available. Disclosure ranged from a single item to all or almost all unused material. The general pattern is illustrated in figure 16.

Figure 16: Proportion of items listed on an MG6C that were disclosed at the primary stage in post-CPIA cases



This chart should be treated with some caution. Because many MG6Cs were undated, some may have been produced after primary disclosure. There may therefore be more cases where all the unused material available at the time was disclosed at the primary stage.

Prosecutors in some fieldwork areas said they would now allow the defence to inspect much or all of the unused material in bigger or more serious cases. This policy did not seem to apply in the cases we looked at during fieldwork. However, many cases in our sample dated from some time ago and prosecutors indicated to us that a more generous approach to primary disclosure had recently been adopted in line with statements by the DPP.

Although we could tell that disclosure took place in eight pre-CPIA Crown Court cases, we could establish what was disclosed in only four. All scheduled material was disclosed in three. These involved 4,297, 259 and 143 items respectively. In the fourth case, 44 items were disclosed but we could not tell whether or not this was all the unused material as there were no schedules in the case file.

Primary disclosure was not always a single event. Items were disclosed voluntarily after the primary disclosure letter but prior to service of a defence statement in 28 (22%) out of 129 post-CPIA cases. In ten of the 28, material had already been disclosed at the primary stage.

The timing of defence statements

Section 5 of the CPIA requires the accused to give a defence statement in Crown Court cases where the prosecution has made primary disclosure. The defence statement must be made within 14 days from the day when the prosecutor gives, or purports to give, primary disclosure.[87] The formal notice 'Disclosure: Rights and duties of accused persons' sent out with primary disclosure states that the 14-day period 'starts on the day that the prosecutor writes to you, not the date when you receive his letter.' However, the CPS and some Crown Court judges apparently take the view that the time begins to run when the defence receives primary disclosure.[88]

87 Regulation 2, CPIA 1996 (Defence Disclosure Time Limits) Regulations 1997.
88 p. 382, Roger Ede and Eric Shepherd (2000) Active Defence. Law Society Publishing.

One-third of CPS respondents, 22 per cent of barristers and 15 per cent of the defence solicitors felt that defence statements were rarely served within 14 days of primary disclosure.

A defence statement was served in 115 (84%) out of 137 cases (in five of these, two statements were served on behalf of a single defendant). Something akin to a defence statement was served in two of the eight pre-CPIA cases.

We could calculate the period from the date of the primary disclosure letter to the date on the first defence statement in 102 (89%) of the 115 post-CPIA cases in which a defence statement was served. In 21 (21%) of these cases the defence applied for an extension of time in which to serve a defence statement. In 48 (59%) of the 81 cases in which no extension was applied for, the defence statement was served more than 14 days after primary disclosure. In these 48 cases, the median time interval between primary disclosure and service of the defence statement was 35 days.

Examination of such time intervals illustrates the difficulty of reconstructing the story of disclosure from files. Our analysis found the following individual case examples in which:

- the defence statement pre-dated primary disclosure
- all formal disclosure was completed pre-committal
- primary disclosure appeared only as a result of a judge order following the provision of a defence statement
- the defence statement and primary disclosure bore the same date (in this case the defence disputed the actual date of primary disclosure. Secondary disclosure was made on two separate occasions. On the second, the letter used was that for primary disclosure).

Any application to extend the time for submission must be made within the initial 14-day period to file the defence statement. Thirty-two per cent of CPS respondents said the defence often applied to extend the time for service and 84 per cent thought that such applications were often granted. In the case file analysis, the defence applied for an extension of the time allowed for service of a defence statement in 23 (20%) of the 115 post-CPIA cases in which a statement was served, although it was not always possible to say whether the application had been made within the 14-day period. Files rarely recorded whether such applications were granted but we found no record indicating an application had been rejected, even when it was significantly out of time.

The contents of the defence statement

Section 5 of the CPIA requires the defence statement to contain 'in general terms the nature of the accused's defence' and the matters and reasons for taking issue with the prosecution. In R v Tibbs (*The Times,* February 28, 2000) the Court of Appeal held that this is not to be restricted to the general legal description of the defence, for example, accident, mistake, self-defence, identity, but is to be taken as extending to the facts relied on by the defendant.

We tried to judge whether defence statements contained information other than a statement of the defendant's innocence. Out of 115 first or sole defence statements in Crown Court CPS cases, 45 (39%) contained only a denial of guilt. We looked also at whether the defence statement addressed the requirements of section 5. We

were generous in our assessment – if the statement mentioned these matters we regarded them as having been addressed however bland the wording used. The decision in R v Tibbs was not available at the time most study cases were completed.

Table 25: Content of defence statements

Issue	Percentage of defence statements in which this was addressed
Nature of defence	84%
Matters in issue	76%
Reasons for taking issue	66%

In all, 60 cases (52% of those with a defence statement) either contained a bare denial of guilt or did not meet the requirements of section 5 of the CPIA.

If the defence proposes to rely on an alibi at trial, section 5 requires this to be included in the defence statement in order that the police can investigate. Nine defence statements (8%) gave notice of an alibi defence.

Eighty-six per cent of judges said they routinely asked at a PDH whether a defence statement had been served. Fifty-nine per cent of judges said they would order a non-compliant defence statement to be amended while 37 per cent would not. However, only four per cent of CPS respondents and prosecution barristers thought that judges would take a robust attitude to non-compliant defence statements.

Table 26: Judicial attitudes to defence statements

Which best describes judicial attitudes to defence statements?	CPS	Bar
Most judges order amendment of a non-compliant defence statement	4%	4%
Most judges take no action over a non-compliant defence statement	58%	36%
Judicial practice in respect of defence statements varies	38%	58%

Nearly 90 per cent of both judges and barristers agreed that the prosecution rarely or never adduce evidence of the contents of a defence statement at trial, other than to rebut alibi evidence.

A minority of judges and CPS respondents took a robust view of defences put forward at trial that differed from those in defence statements. Judges were asked, "where no defence statement is served or the defence at trial differs significantly from the defence statement, do you initiate legal argument on whether an inference should be drawn?" Fifty-two per cent said they would not initiate argument while 43 per cent would. Among CPS respondents, 54 per cent would not brief advocates to suggest to the court that an inference should be drawn while 44 per cent would do so.

Signing the defence statement

In R v Wheeler (*The Times,* July 7, 2000) the defendant's evidence in cross-examination contradicted his account in the defence statement served by his solicitors, where he had appeared to admit knowledge that he later denied. The defendant maintained that there had been a mistake in the document. The conviction was

declared unsafe and the Court of Appeal took the view that defence statements should be signed personally by defendants 'rather than being permitted to be served by solicitors on their behalf without steps being taken to ascertain accuracy.' While the judgment did not make signatures mandatory, the Court said '… we think it must be wise in all cases to obtain one.' The cases seen in our file analysis pre-dated the decision in Wheeler and defence statements in only 16 cases (14% of the 115) were signed by the defendant.

Written acknowledgement from the lay client

Some defence statements signed by the defendant closed with the following language:

'I have read the above defence case statement. I approve it being served on my behalf in relation to my case. I understand:

- *that responsibility for the accuracy and completeness of the case statement is mine*
- *that I may subsequently be cross-examined upon the case statement if it is accurate or incomplete*
- *that comments adverse to my case may be made if the statement does not accurately or completely set out my defence.*

Guidance issued by the Bar Council suggests that defence counsel ought to insist on written acknowledgement from the lay client that he understands the importance of the accuracy and adequacy of the defence statement and has had the opportunity of considering the contents of the statement carefully and approves it.[89]

Secondary disclosure

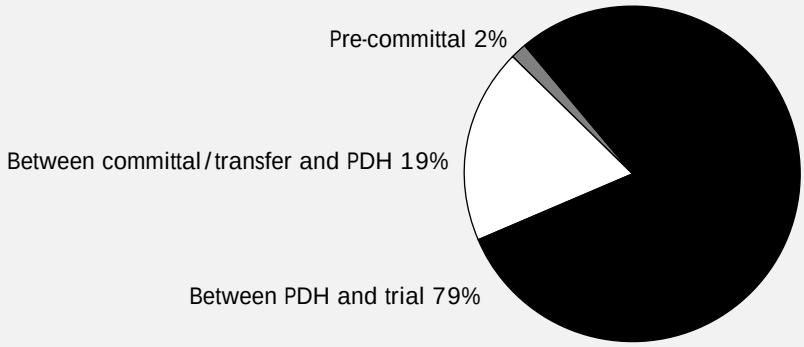
Receipt of the defence statement triggers the disclosure officer's review of the retained unused material in order to draw the attention of the prosecutor to any material which 'might reasonably be expected to assist the accused's defence.' The median time in 98 study cases between the date on the defence statement and the date it was sent to the police by the CPS was six days.

The letter setting out the prosecutor's decision concerning secondary disclosure should be signed by the reviewing lawyer and sent to the defendant 'as soon as reasonably practicable.'[90] Data on the time interval between service of the defence statement and secondary disclosure were available in 61 study cases. The median time between these events was 31 days.

Eighty-one per cent of barristers, 70 per cent of judges, and 62 per cent of CPS respondents thought that secondary disclosure was rarely served by the PDH. The case file analysis confirmed this to be the case. The date of secondary disclosure was available in 64 post-CPIA cases.

89 Professional Conduct and Complaints Committee of the Bar Council, 24 September 1997.
90 Paras. 2.106, 3.45, JOPI.

Figure 17: Timing of secondary disclosure in post-CPIA Crown Court cases



In the single case in which secondary disclosure occurred pre-committal, disclosure followed a curious course. The defendants were charged with perverting the course of justice in a murder investigation. The first disclosure event was the service of the defence statement, followed by primary and then secondary disclosure. All three occurred before committal.

Just as with primary disclosure, secondary stage disclosure was not necessarily a single event. The secondary stage letter indicating the prosecutor's decision was available in 65 cases. In 31 of these (48%), the letter identified material to be disclosed, ranging from one to 194 items. We could determine what happened following the sending of a secondary disclosure letter in 83 cases. Material was subsequently disclosed voluntarily in 18 (58%) of the 31 cases where items were disclosed with the secondary disclosure letter and in at least 18 (53%) of the 34 cases in which nothing had been disclosed.

The prosecutor has a duty to keep disclosure issues under continuous review during the life of the case.[91] Progressive disclosure as the case proceeds can be interpreted as 'continuing review' in action. However, in many cases, it was clear from correspondence that multiple disclosure was often made in response to a continuous stream of defence requests for unused material.

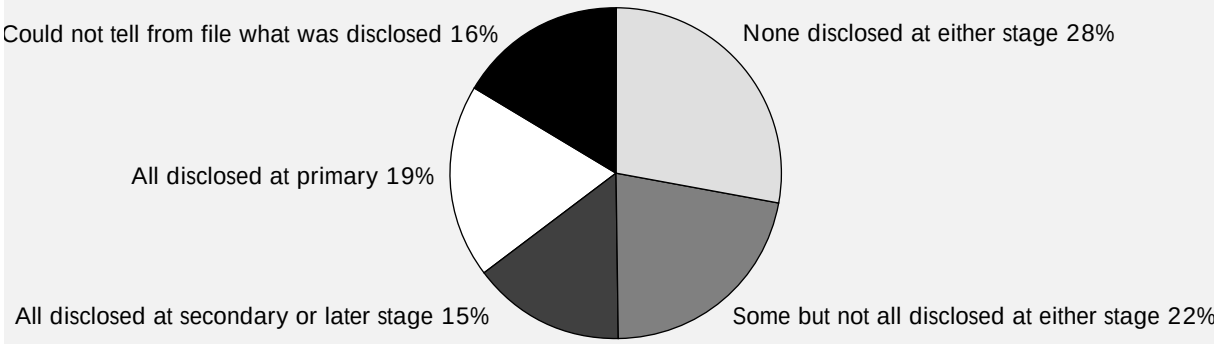
Forty per cent of CPS respondents and 36 per cent of prosecution barristers agreed that advocates were often asked to help decide what to disclose to the defence at the secondary stage. This proportion may increase in light of the new Attorney General's Guidelines issued in November 2000. These emphasise the role of the prosecution advocate in continuing review and the importance of consultation between the advocate and those instructing him or her.[92]

Police assessments of what should be disclosed

We looked at whether the items disclosed to the defence by the prosecutor corresponded with those listed by the disclosure officer on MG6Es. Percentages are of the 54 post-CPIA Crown Court cases in which items were listed on an MG6E.

91 Para. 1.22, JOPI.
92 Paras. 22-26.

Figure 18: Proportion of items on MG6Es that were disclosed



In at least half the cases with items listed on an MG6E, some of that material was not disclosed.

Material which was scheduled but not listed on an MG6E was disclosed to the defence, other than by court order, in 91 (74%) of the 123 cases in which this could be determined. Unscheduled unused material was disclosed in 54 (45%) out of 121 cases.

In only one (2%) of the 54 post-CPIA Crown Court cases with items listed on an MG6E did disclosure comprise precisely the material listed. We could tell that disclosure did not correspond with the MG6E in 50 (93%) of these 54 cases.

In 14 (19%) of the 72 post-CPIA cases with no items listed on an MG6E, we could tell from the files that no items were disclosed. In 54 (75%) of these cases some items were disclosed and in the remaining four cases (6%) we could not tell whether items were disclosed.

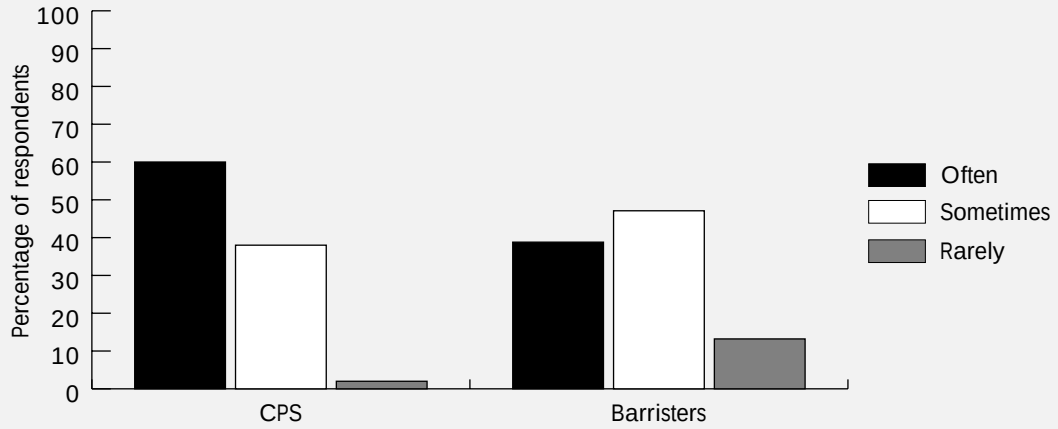
Defence requests for disclosure

At secondary disclosure, the prosecutor must disclose material which might reasonably be expected to assist the accused's defence as set out in the defence statement. The Law Society encourages defence solicitors not to wait for the prosecutor's response to the defence statement but to send a request with the defence statement listing specific items or asking the prosecutor to inspect them.[93] In 88 cases in the case file analysis (72% of those with a defence statement), the defence statement either contained or was accompanied by a request for unused material.

CPS respondents and barristers accepted that defence requests to see unused material were often acceded to without the need for a section 8 application.

93 pp. 395-7, Roger Ede and Eric Shepherd (2000) Active Defence. Law Society Publishing.

Figure 19: ***How often are defence requests for disclosure of unused material acceded to without the need for a section 8 application?***



We wished to assess the extent to which prosecution barristers and judges applied the CPIA disclosure criteria in responding to defence requests for unused material. Seventy-eight per cent of prosecution barristers said they would comply with such a request provided the material was not sensitive, even if the statutory criteria were not satisfied. Only four per cent would resist such a request.

Judges were asked about their response to defence statements which included a request for disclosure of specific unused material. Fifty-six per cent said they would order disclosure if the material was not sensitive while 23 per cent would do so only if they considered that the material would assist the defence.

In the case file analysis, the court ordered disclosure of unused material other than as a result of a section 8 or PII application in 54 post-CPIA Crown Court cases (37% of the total). The greatest number of times that the court ordered disclosure in a single case was three. In 36 of these cases (67%) disclosure was ordered at or before the PDH and in seven, further disclosure was ordered at a later date. In 13 cases (9% of the total) a pre-trial court hearing was required specifically to deal with disclosure issues other than a PII or section 8 application. The largest number of such hearings in a single case was three.

Section 8 applications

Sixty per cent of CPS respondents said that section 8 applications were rare. Fifty-three per cent of judges said they would grant section 8 applications automatically, provided the material in question was not sensitive. Thirty-six per cent would refuse the application unless the material might assist the defence as set out in the defence statement.

In the case file analysis, the defence made a section 8 application after the PDH in six post-CPIA cases (4%). All but one of these applications were successful. In four cases, including that in which the application was unsuccessful, the prosecution had disclosed material voluntarily after secondary disclosure. File correspondence showed that in numerous cases a section 8 application was contemplated but did not proceed because disclosure was made voluntarily.

Sanctions

Judges were asked what sanctions they employ if the prosecution fails to disclose as required by the CPIA or by a court order. While stressing the need to look at the individual circumstances of each case, they indicated the likely use of the sanctions listed in Table 27 (only the most stringent sanction suggested was counted).

Table 27: Sanctions employed by the judiciary in respect of non-disclosure

Sanction	Judges employing sanction for failure to disclose:	
	as required by the CPIA	as required by court order
None	7%	5%
Verbal censure	7%	4%
List for mention to demand an explanation	20%	9%
Issue further direction to disclose	29%	2%
Order costs against the prosecution	20%	46%
Stay proceedings	6%	14%

Three per cent of judges said they had no experience of failure to disclose as required by the CPIA while eight per cent had no experience of failure to disclose as required by court order.

All judges were asked if their court monitored compliance with orders relating to disclosure: 36 per cent said they did while 58 per cent said they did not.

Judicial criticism concerning the police, CPS and Bar

Most judges said that they had criticised the behaviour of police officers and CPS staff in relation to disclosure; fewer had criticised advocates.

Table 28: Judicial criticism of participants in relation to disclosure

Category of participant	Judges who had criticised behaviour relating to disclosure
Police officers	82%
CPS staff	75%
Advocates	22%

10 Public Interest Immunity in CPS prosecutions

'The doctrine of PII must be protected and recognised on all sides. Where material is sensitive it should be revealed to the judge who would be in a position to carry out the "balancing act". When the Davis and Rowe case was decided, now some years ago, policing was not much involved in intelligence activity. Today… the reality is that many cases will have an intelligence background and what was described as exceptional in the Davis and Rowe case is in fact normal.' (ACPO submission to Lord Justice Auld's Review of the Criminal Courts, 2000)

Introduction

The issues surrounding PII are complex. This chapter addresses PII in CPS prosecutions only in the limited context of this study. PII could easily justify a research project its own.

Rules of court govern the procedures for making PII applications. The JOPI states that sensitive material must not be disclosed at either the primary or secondary stage if a court, on application by the prosecutor, concludes that it is not in the public interest to disclose it and orders accordingly.[94]

There are three types of PII application, known respectively as *inter partes, ex parte* with notice and *ex parte* without notice. They arise in the following circumstances:

- notice of an application should ordinarily be served on the accused and specify the nature of the material to which the application relates. Both prosecution and defence will be present at the hearing
- in certain circumstances, the prosecutor need not specify the nature of the material in respect of which protection is sought, if to do so would create the mischief which the application seeks to avoid. In these circumstances, the defence will not be present when the application is made
- very exceptionally, if the prosecutor considers that to disclose even the fact that an application is being made could create the mischief which the application seeks to avoid, the prosecutor may seek to proceed without giving the accused notice, and again the defence will not be present.

We had difficulty in collecting data on PII applications during fieldwork. Details were generally not recorded in the CPS file. Briefs annotated with an account of what happened at court hearings were often missing. The material to which the application related was usually kept in a secure location, and the application itself was seldom on the file. It was therefore not possible, for example, to check whether applications were drafted by the prosecutor or the police and whether both had signed them (issues considered by the Inspectorate).

94 Para. 1.27, JOPI.

The Court Service confirmed that court records contain little detail on PII applications. The fact that an application has been made is not entered on the CREST computer system. The clerk's log on the court file would record, as a minimum, the date and time at which an application was heard but not necessarily the type of application or the outcome of the hearing. The court reporter should produce a record of the hearing, although in one project case questions arose about what was said at an *ex parte* hearing in chambers because the recording system failed. Even where a record is made, it is not kept for an indefinite period.

Key findings in this chapter include:

- no national statistics are compiled on the number, type, basis or outcome of PII applications
- 26 per cent of the CPS areas responding to our survey and one casework directorate maintained a log of all PII applications
- most CPS respondents, barristers and judges felt that the number of PII applications had stayed the same or increased since the CPIA was introduced
- PII was seldom an issue in summary cases: 91 per cent of justices' clerks said that PII applications were rare
- respondents saw little difference between PII and other disclosure issues in terms of their impact on the case. PII was no more likely than other disclosure issues to be a factor in judge ordered or directed acquittals
- CPS respondents, barristers and judges confirmed that prosecution summaries formed the basis of most *ex parte* PII applications, rather than evidence on oath or affidavits
- the prosecutor's review of the MG6D was not a good indication that a PII application would be made. Prosecutors had marked items for court application in only one of the 17 cases with a PII application in which material was listed on a MG6D
- 36 per cent of the PII applications in the case file analysis were at least partially successful
- 40 per cent of forces had agreed protocols on the management of third party material with all local social services departments in their area.

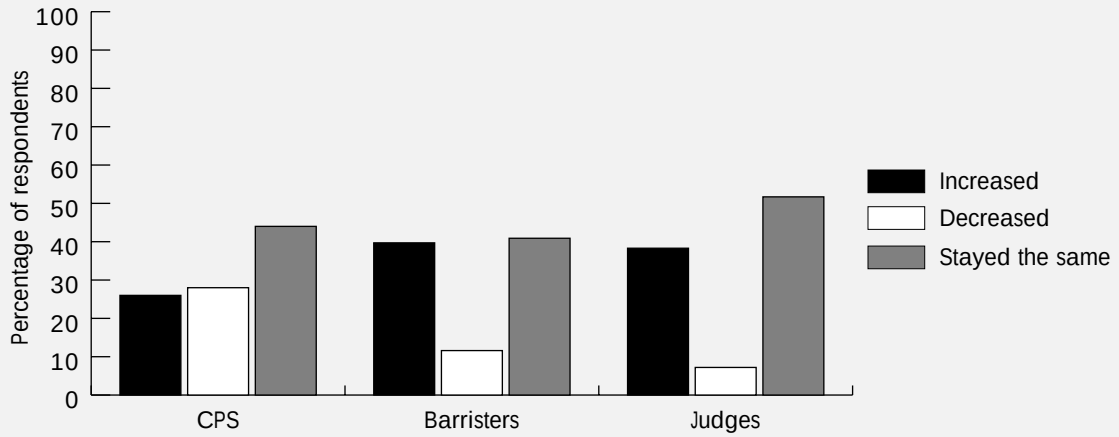
The number of PII applications

No national statistics are compiled on the number, type, basis or outcome of PII applications. The CPS Inspectorate's Thematic Review concluded that there needed to be 'considerable tightening up of the procedures' for handling PII; it recommended that logs be maintained of all PII applications recording the type and result of the application and the general nature of the sensitive material.[95] However, only ten (26%) of the 39 CPS areas responding to our survey and one casework directorate said that such a log was maintained. A further four areas (10%) kept a log for *ex parte* with notice or *ex parte* without notice applications only.

95 Para. 6.46; Recommendation 26, CPS Inspectorate's Report on the Thematic Review of the Disclosure of Unused Material (2000), Thematic Report 2/2000.

The CPIA was intended to restrict disclosable material to that which undermined the prosecution case or assisted the defence as set out in the defence statement. It was expected that the Act would reduce the number of situations in which the prosecution (or a third party) was obliged to make an application to the court not to disclose sensitive unused material in its possession on the grounds of PII. Respondents were therefore asked how the CPIA had affected the number of PII applications relating to disclosure. Most felt that the number of applications had stayed the same or increased.

Figure 20: Impact of CPIA on the number of PII applications



The impact of PII applications

PII was seldom an issue in summary cases: 91 per cent of justices' clerks said that PII applications were rare.

A range of questions asked about the impact of PII applications in the Crown Court. The responses suggested that the most likely effects were an extra pre-trial hearing after the PDH and lengthening of the trial. Even these effects were said to occur often by less than a quarter of respondents in all the groups surveyed.

See Figure 21, page 86.

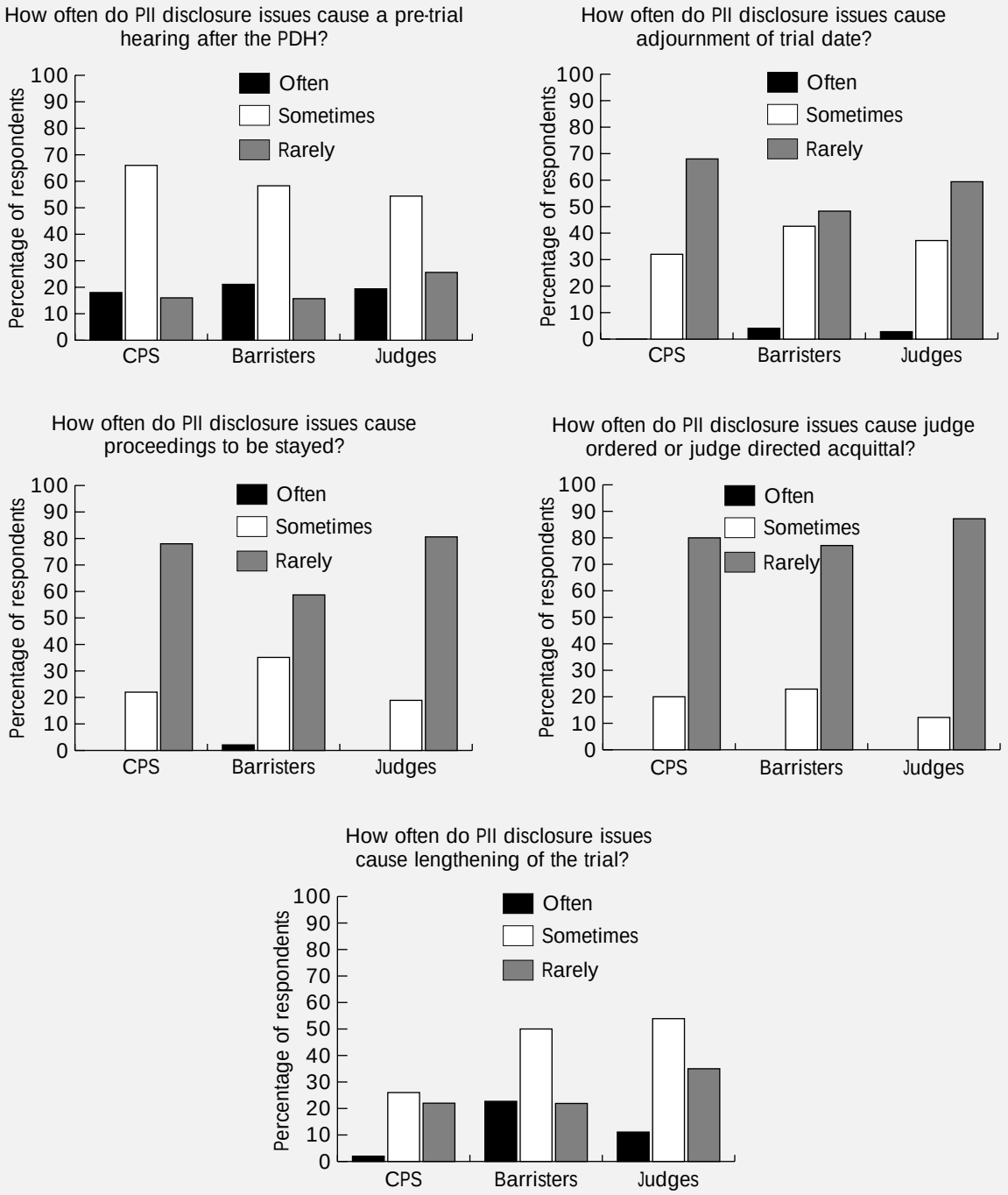
Respondents saw little difference between PII and other disclosure issues in terms of their impact on the case. PII was no more likely than other disclosure issues to be a factor in judge ordered or directed acquittals.

The basis of *ex parte* applications

In a review arising out of a Customs and Excise case, Judge Gerald Butler QC has criticised the procedure at PII by which documents are handed to the trial judge 'and sometimes left with him and sometimes not, and where there is no record of what the judge has been shown.'[96] He recommended several measures to tighten up the conduct of PII applications, including always giving the judge a schedule identifying the documents in respect of which PII is sought and why: 'It is extraordinary that the procedure in the civil courts is much stricter with regard to this than criminal proceedings.'[97] This recommendation has been accepted in principle by the government.

96 p. 151, Report of the Inquiry into the Prosecution of the case of Regina v Doran and others (April 2000), HM Customs and Excise.
97 p. 153.

Figure 21: Views on the impact of PII applications in the Crown Court



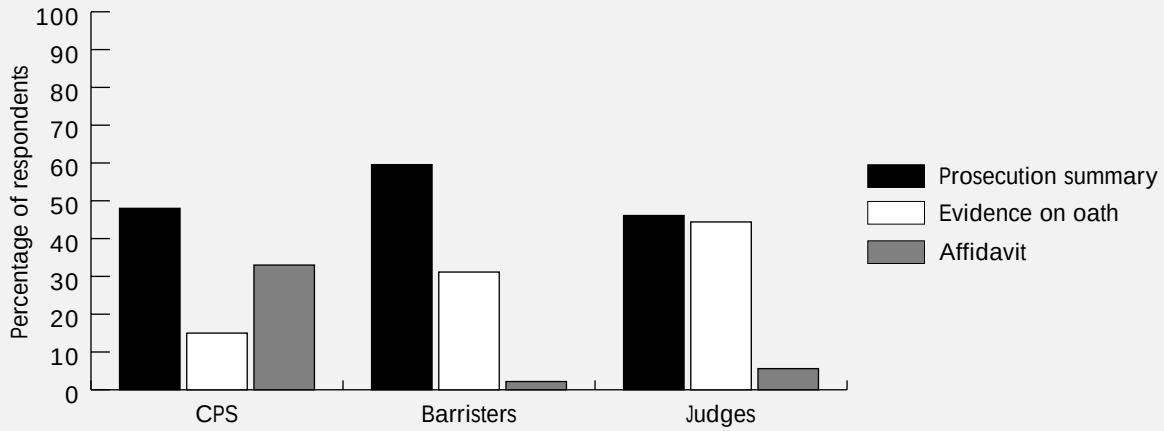
In a presentation to the British Academy of Forensic Sciences, solicitor David Corker expressed concerns that PII arrangements were 'insufficiently rigorous in order to ensure that the interests of the defendant are given proper weight.' He described 'alarmingly informal' PII hearings in which officers pass information to prosecution counsel 'which is then simply repeated to the judge without this information either first being verified by anyone or secondly being reduced into writing.'[98] Corker called for rules of procedure which require sworn evidence to be provided either from the witness box or in the form of an affidavit so that all the information relied upon in an *ex parte* hearing is clear and the maker of it is known:

98 The CPIA disclosure regime: PII and 3rd party disclosure, the defence perspective; in 'Disclosure under the CPIA 1996': papers presented at a seminar in Gray's Inn, 1 December 1999.

'One cannot have confidence in the fairness of such hearings if it is permissible for prosecution counsel simply to make oral submissions, albeit on instructions, to the trial judge.'

CPS respondents, barristers and judges confirmed that prosecution summaries formed the basis of most *ex parte* PII applications, rather than evidence on oath or affidavits.

Figure 22: Basis of ex parte applications



Ninety-four per cent of judges said they usually examined the material in question at an *ex parte* PII application.

Corker also referred to guidance from the Attorney General that PII claims should be contents-based, i.e. that applications for non-disclosure should be 'completely based on the contents of the individual item' and not simply 'because it falls within a particular class of material which, as a generality, should be withheld from the defence.'

Some judges thought it would be helpful on the grounds of consistency to have guidance about the type of material which must always, or almost always, be disclosed, subject to PII:

'In a substantial case, one local force and the CPS prosecutor were happy to disclose all the relevant parts of the police "Policy Book" in which all major investigative decisions were recorded. However, in another case a nearby force and CPS prosecutor was reluctant to disclose any material from a similar book. I insisted that they should, subject to PII. They were then surprised to discover that disclosure killed stone dead one of the main preliminary arguments which the defence had intended to advance.'

PII applications in the case file analysis

PII applications were one of the selection criteria in the case file analysis. An application had been made in 33 Crown Court cases, including two that were pre-CPIA; these constituted 24 per cent of the 140 Crown Court cases in which the prosecution file was examined. The PII application was made by the prosecution in 23 cases, by social services in nine cases and by the education department in one case.

In 17 (74%) out of 23 prosecution PII applications, the disclosure officer had scheduled sensitive unused material on an MG6D. In two cases the MG6D said there was no sensitive unused material and in the other four cases there was no MG6D on file.

The prosecutor's review of the MG6D was not a good indication that a PII application would be made. Prosecutors had marked items for court application in only one of the 17 cases with a PII application in which material was listed on an MG6D. In three cases, items from an MG6D were listed on an MG6E, including the single case in which items on the MG6D were marked for court application. In that case, the disclosure officer had listed 74 items from the MG6D on the E, of which the prosecutor marked eight items for court application on the MG6D.

In ten (30%) of the 33 PII cases, the application was made on the day the trial was scheduled to begin or during the trial. In some of these, the application caused an adjournment.

Table 29 indicates the types of applications found in the case file analysis.

Table 29: Types of PII application

Type of application	Percentage of PII applications
Inter partes	24%
ex parte with notice	49%
ex parte without notice	3%
unable to tell from file	24%

The bases of prosecution PII applications could be determined in 22 cases (percentages in Table 30 are of 22). Some applications had more than one basis.

Table 30: Bases of prosecution PII applications

Basis	Percentage of prosecution applications
protecting witnesses from reprisals	59%
keeping secret police methods	55%
Other basis	18%

There were four cases in the 'other basis' category. In a death by dangerous driving case, the application sought to protect a local authority report on a previous accident on a nearby stretch of road on the grounds that disclosure was contrary to the Data Protection Act. In another case involving an allegation of child sex abuse, the application related to the documentation of a decision not to prosecute following an earlier investigation. A third case involved the privacy of medical records and a fourth concerned a child's social services file.

Of the 33 PII applications, 12 (36%) were at least partially successful. Eight of these were made by the prosecution, four by social services and one by the education department. Ten applications (30%) were totally unsuccessful. They comprised six applications made by the prosecution and four by social services. In the remaining 11 cases, we could not discover the outcome of the application.

Ten cases in which no PII application was made had sensitive material scheduled on an MG6D and listed as disclosable on an MG6E. In only one of these cases had the prosecutor marked the items for court application. Sometimes, a planned PII application is avoided because the defendant enters an acceptable plea. However, this explanation did not apply in at least seven of the ten cases. Six came to trial and the seventh ended in a judge directed acquittal.

Social services third party material

The Code states that, if the OIC believes that other persons may possess relevant material, he should ask the disclosure officer to inform them of the investigation and invite them to retain the material in case they receive a request for its disclosure. The disclosure officer should inform the prosecutor that they have such material.[99] If records such as social services' case conference minutes are already in the possession of the police, they become unused prosecution material rather than third party material and fall to be disclosed under the CPIA unless the prosecution resists disclosure on PII grounds.

The study specification did not include a detailed examination of third party issues as these had recently been the subject of separate Home Office research.[100] However, in our survey of forces, we asked whether the police had developed protocols with local social services departments for the management of third party material.

Many force areas included a number of local authorities, making it difficult to develop consistent practice. Seventeen forces (40%) had agreed protocols with all local social services departments; a further four (9%) had protocols with some departments in the force area. The remaining 22 (51%) forces had no protocol or the interviewee was unaware whether one had been agreed. Protocols variously provided for review of records on behalf of the police by local authority lawyers or counsel, and occasionally by social workers. The reviewer flagged anything that they considered relevant from the information given by the defence. The judge then read the file paying particular attention to flagged information.

In one fieldwork area, a joint protocol had been developed between the police and social services as a result of a case which failed on disclosure grounds. The protocol states that the police will inform social services of the charges in the case of all joint police/social services investigations into allegations of child abuse. In return, social services will examine its records for material which might undermine the prosecution and provide such material to the police. It acknowledges that an exhaustive list of what might be undermining is not possible, but examples given are records or information:

- which have a direct bearing on the specific allegations under investigation
- of prior allegations by the witness/victim and, in particular, prior allegations which were withdrawn, not substantiated or found to be false
- which may cast doubt on the witness's truthfulness or otherwise
- regarding any history of mental illness or mental disorder
- which may have a capacity to give evidence in any criminal proceedings
- of the child having had a close relationship with another person, and in particular a child, who has made similar allegations.

Social services are asked to respond, if possible, within five working days by supplying such material or certifying that there is nothing on file which meets the criteria set out above. The protocol confirms that unless the police are notified to the contrary by social services, PII will be asserted in respect of any material released to them.

99 Para. 3.5.
100 Alan Mackie and John Burrows 'A study of requests for disclosure of evidence to third parties in contested trials' (2000), Home Office RDS Research Findings No. 134.

In response to the request for comments issued as part of this study, the Children and Families Committee of the Association of Directors of Social Services (ADSS) stated that, in its view, the CPIA had improved disclosure law from the local authority standpoint. However, some areas of concern remained:

- information relating to an individual should not be available to a criminal court simply because he or she has been a child in care
- there should be a right of appeal for a third party affected by an adverse decision on disclosure, and an ability to challenge the opinion of a Crown Court judge in chambers on reading social services files where this led to dismissal of the case
- the local authority should be entitled to make an application to the court on behalf of a child in its care on the grounds that the child's human rights had been breached.

The ADSS expanded on this last point as follows:

> *'If there is evidence on file going to the heart of whether a crime is committed, inarguably it should be disclosed. However, the parameters for disclosure are far wider. Some judges upon reading social services files take a view upon the credibility of child witness(es) and press the CPS to withdraw the case. This may be a breach of the Human Rights Act 1998 but there is still a procedural problem in that any application will have to be brought by the child. The local authority would probably not be able to challenge the court under the Act. Judges need training in understanding children and their reaction to abuse if they are to take decisions on whether or not a child witness is credible, particularly if there is no right of appeal against such a decision and in the light of the Human Rights Act 1998.*[101]

Case examples provided by the Children and Families Committee of the Association of Directors of Social Services

An authority recently received a summons from the Crown Court, mid trial, requiring disclosure of social services files. This came with no explanation, no warning and no supporting information. The files were delivered to court the next day, whereupon the judge ordered disclosure of 72 pages of the file, little or none of which appeared to be materially relevant. In a similar case, counsel was so concerned at the way the Crown Court ignored the law in relation to disclosure that he suggested that the only way of dealing with it was to refuse to deliver the files, place the Head of Legal Services in contempt, allow the court to make an order for contempt against him and then appeal in order to draw the overall situation to the attention of a higher court.

101 May 2000.

11 Other prosecuting agencies

'A recurring issue is, where the defence are given access to all unused material, do we also have to highlight what meets the two disclosure tests?' (Customs and Excise)

'No one person in our cases has knowledge of all the unused material – it is too vast. But the legislation expects me to sign something saying I have.' (SFO)

'The CPIA has created more work for this department because prior to the Act, the defence would trawl through boxes of unused documents which now have to be scheduled.' (DTI)

Introduction

Certain aspects of disclosure practice are unique to the prosecuting organisation. In order to capture information about prosecutions undertaken by departments other than the CPS, we interviewed representatives on the steering group from Customs and Excise, the DTI and the SFO and conducted surveys of their personnel. With the help of the steering group members, the survey questions were adapted to the language and practices of the target organisation. We also visited each agency to speak to practitioners and included ten Customs and Excise cases and five DTI cases in our case file analysis. The prosecution file was examined in all these cases. Four of the DTI cases were pre-CPIA and the other 11 cases were post-CPIA.

The surveys, interviews and case samples were on a smaller scale than for cases prosecuted by the CPS and the data do not support the same level of detailed analysis. Instead, we highlight in this chapter key issues that emerge. Because of the small sample sizes, we use numbers rather than percentages throughout this chapter.

Key findings in this chapter include:

- consultation between investigators and prosecutors in Customs and Excise was facilitated by the use of e-mail
- regionally based DTI disclosure officers are linked by e-mail with prosecuting lawyers in London. However, eight out of nine DTI disclosure officers said consultation with the prosecuting lawyer on unused material was rare
- around half of the disclosure officers in Customs and Excise and DTI said their schedules were reviewed as part of quality control
- the quality of descriptions of items on non-sensitive schedules was generally better than on police schedules
- only one out of ten Customs and Excise prosecutors said that investigators usually provided the previous convictions of prosecution witnesses with primary disclosure

- four out of ten Customs and Excise prosecutors, four out of seven DTI prosecutors and none of the three SFO prosecutors said that primary disclosure was often served at or just after committal
- practice varied, even within prosecuting agencies, on what was included in briefs to counsel and what instructions were given relating to disclosure
- routine revelation by the investigating officer to the prosecutor of key documents was apparently more common in Customs and Excise than in CPS prosecutions
- the SFO was the only organisation routinely scanning evidential and unused material and supplying material to the defence on a CD-ROM.

Agency specific practice

Customs and Excise recognises the special status of officers' notebooks and the draft witness statements of civilian witnesses. Witnesses are entitled to rely upon them to refresh their memory and counsel are entitled to cross-examine on their contents. Consequently, when the defence gives notice that it requires a witness to give evidence, the notebook or draft statement is disclosed, even if the reviewing lawyer has not identified the contents as either undermining or assisting. Customs and Excise advised us that this arrangement is working well.

Guidance notes on the CPIA and the completion of schedules, including examples of well-described items, are routinely sent to investigators by Customs and Excise lawyers at the start of a prosecution.

Standard language in Customs and Excise letters advises defence solicitors of its policy of providing only one set of papers per defendant free of charge. If legal representation of the client is transferred to another firm 'you are expected to pass on the set of papers served on you on your client's behalf as a matter of urgency. Please acknowledge receipt of this letter.' This practice has cut down significantly on requests for duplicate sets of papers.

The DTI has statutory powers to seize documents though much of this originates in non-criminal investigations. A number of practice issues emerged during the examination of the prosecution file in a very large pre-CPIA case with nearly 90 boxes of unused material. The DTI does not use a computerised system to manage such material and in this case, the lawyer prepared the schedules himself. The indictments were severed. Instead of separating out the unused material for each case, it was kept together as seized by investigators but items were colour-coded on the schedule according to which company was involved. The defence was kept up-to-date on disclosure and other issues through six 'news updates' circulated by the prosecuting lawyer. When prosecution counsel asked to inspect the unused material, the lawyer decided that he could not authorise the expenditure as it would have taken counsel 100 hours to inspect the boxes, plus a caseworker's presence, costing a total of around £11,750 including VAT.

Cases prosecuted by the SFO involve very large quantities of material. Their computerised Documentary Control System is used to record the receipt, description, storage, movement and return of all material held in relation to its investigations; sensitive status can be flagged where appropriate. Prior to data entry, investigators categorise and describe the material. When the data have been input to the system by data entry staff, investigators have password-controlled access to the information on the database. The SFO also uses technology to scan documents.

At the time of our visit to the SFO, only pre-CPIA cases had come to trial. In these, it was customary to give the defence a copy of all relevant documents on CD-ROM. There was uncertainty about the extent to which practice needed to change for post-CPIA cases. SFO case controllers (lawyers) act as disclosure officers and have seen the most relevant documents but not all of them. One lawyer thought it was too onerous a task to expect case controllers to identify what might be undermining or supporting; it was much less expensive simply to provide access. The SFO raised a question posed by other prosecutors in this study, namely, where the defence is given access to all unused material, is the prosecution still obliged to identify what is undermining or assisting?[102]

SFO investigators keep records of conversations with all witnesses and external organisations. The existence of this record is noted on the schedule of unused material provided to the defence.

Disclosure officers

The 11 Customs & Excise investigating officers who responded were drawn from different branches around the country and their seniority varied.[103] Six investigated fiscal offences and five dealt with drug trafficking. Their experience as disclosure officers ranged from one to four years; seven respondents were case officers (the equivalent of the OIC) as well as dealing with disclosure. The other four were appointed as disclosure officers at the start of the investigation. Only one of the four was not an investigator. Four respondents had been trained in the CPIA but in each case the training had lasted less than three hours. None had received specific training on the role of the disclosure officer.

All but one of the nine DTI investigating officers who responded were OICs. The other officer was also an investigator in addition to his disclosure responsibilities. Six acted in non fast-track cases, one in fast-track cases and one in both. Fast-track officers handled between 20 and 50 cases a year compared with three to 20 cases for non fast-track officers. All respondents were appointed at the start of an investigation and all had between two and four years' experience as disclosure officers. All officers had received between five and 25 hours training in the CPIA. For all but one, the training had addressed specifically the responsibilities of the disclosure officer.

In the SFO, disclosure officer responsibilities are executed by the case controller who is the prosecuting lawyer.[104] The SIO from the relevant police force certifies to the disclosure officer before transfer or committal that all the relevant material in the case has been correctly recorded and retained.[105] A single questionnaire which combined questions for disclosure officers and prosecutors was therefore developed for SFO prosecutors. Only three respondents had more than a year's experience of their role. These three acted in between two and five cases each year.

In the case file analysis, the disclosure officer was also the officer in charge of the investigation in nine of the ten Customs and Excise cases and in one of the five DTI cases.

Preparation and review of schedules

Disclosure officers in Customs and Excise complete non-sensitive and sensitive schedules and a disclosure officer's report. These are analogous to the MG6C, D and E used by the police. Each of the 11 Customs and Excise officers completed all three schedules but only six said that these were reviewed as part of quality control.

102 The Attorney General's Guidelines published on 29 November 2000 deal at paragraph 9 with the situation where the defence is allowed access to large volumes of unused material without an indication as to its potential to undermine or assist. However, this applies only where such material has not been examined by the investigator or disclosure officer.
103 They fell into pay bands 5, 6 and 7 on the national scale used by Customs and Excise.
104 Paragraph 30.4.1, Serious Fraud Office Staff Working Manual.
105 Paragraph 30.4.3.

Six of the ten Customs and Excise prosecutors worked in the Special Casework Division; three in the Central Case Unit and one did not indicate where he worked. Their views on the quality of schedules in drugs and fraud cases differed little: four and three respondents respectively said problems often arose. Five said material was often included in error on the non-sensitive schedule. Only two felt that non-sensitive schedules usually contained good descriptions of items listed. Descriptions on the sensitive schedule and disclosure officer's report were judged to be even poorer. Half felt that, overall, the quality of descriptions had improved during the previous six months.

Six of the ten prosecutors felt able to review schedules adequately in the time available. The four who could not do so gave as the reason the late receipt of schedules from officers and general pressure of work.

At the end of an investigation by the DTI, the investigating officer submits to the prosecuting lawyer a final report with various attachments. The final report should contain:

- a certificate that all retained material has been revealed to the prosecuting lawyer
- the investigating officer's opinion on whether any of the unused material is sensitive
- the investigating officer's opinion on whether any of the unused material undermines the case for the prosecution.

The final report should be accompanied by:

- the unused material or copies of it (where the volume of material permits)
- the schedule of non-sensitive unused material
- where appropriate the Companies Investigation Branch document log and list of material held by the Official Receiver or other referring agency.[106]

Instead of creating separate schedules analogous to the MG6D or the MG6E, the DTI uses the final report to draw the prosecutor's attention to sensitive or undermining material. All nine DTI disclosure officers were responsible for completing the schedule of non-sensitive material. Seven also identified any sensitive material for the final report and seven were responsible for the schedule of third party material that accompanies the final report. Only five of the nine said that their non-sensitive schedule and list of sensitive material were reviewed as part of quality control.

The seven DTI prosecutors agreed that they usually received schedules of unused material before a decision to prosecute was made. Satisfaction with schedule quality was generally high. No problem was thought to occur often, with the exception of two prosecutors who thought that non-sensitive material was often scheduled in error on the sensitive schedule. All thought that descriptions of items on schedules were good or adequate. Two of the seven said descriptions had improved in the last six months.

Only one DTI prosecutor felt unable to review schedules adequately in the time available. This prosecutor attributed the problem to general pressure of work.

Only three SFO prosecutors answered the questions about their role. All three felt unable to review schedules adequately because of time pressure and the quantity of material involved.

106 Para. 4.5, Operational Instructions for the Disclosure of Unused Material, Department of Trade and Industry, February 1997.

Consultation between disclosure officers and prosecuting lawyers

Not all Customs and Excise investigators routinely consulted prosecutors during schedule preparation: four said they consulted a prosecuting lawyer in most cases, five did so sometimes and two rarely consulted. The level of consultation was not related to whether fiscal or drugs offences were involved. At a policy level, six of the ten prosecutors said their teams routinely discussed disclosure problems with investigating officers.

Within Customs and Excise, investigators and lawyers were in e-mail contact. Schedules could also be e-mailed and in one case we examined, the lawyer changed schedule entries in response to the disclosure officer's answers to her questions. It was our observation that lawyers' questions about disclosure matters were resolved quickly. Corresponding requests from the CPS are usually faxed by the CPS to a police ASU which forwards them to the disclosure officer, a process which inevitably involves some delay.

DTI disclosure officers are in seven locations around the country. The lawyers are all in London. The DTI told us that communication between investigators and lawyers takes place by e-mail, fax and phone and there should be no difficulty in reviewing material. However, eight of the nine DTI disclosure officers said consultation with the prosecuting lawyer on unused material was rare. One DTI prosecutor pointed out the obstacles that exist to effective consultation:

> *'We do not see the unused material but in most cases rely on photocopies sorted out by the investigating officer. The CPIA seems to assume that the lawyer and disclosure officer are in the same building or nearby. Defence teams are local to the investigator's office but remote from the lawyer who has to avoid and settle disputes. That lack of "hands on" control is very dangerous when the greater part of the unused material might be excluded by the investigating disclosure officer and would never be seen by the lawyer by way of review of the investigator's decision. This is why I overrule the investigator's disclosure certificate (though I still serve it) and follow up with the "catch-all" category of voluntary disclosure.'*

Two of the seven prosecutors said disclosure problems were routinely discussed with investigators at a policy level.

The size of prosecution files in the 15 Customs and Excise and DTI cases examined ranged between one inch and 88 boxes. A schedule of non-sensitive unused material was on file in all but one case. The exception was a pre-CPIA case at the DTI. The greatest number of schedules in a single case was five; between five and 260 items were listed on these schedules. Four Customs and Excise files and one DTI file contained non-sensitive schedules without a date.

The quality of descriptions of items on non-sensitive schedules was generally better than in police schedules. As with police files, we classified as 'good' those schedules in which the source or author of the material was identified, its date was given, and there was a reasonable description of the contents. We described as 'poor' those descriptions on the non-sensitive schedule which would not have allowed the prosecutor to assess the nature of the material. In half of the Customs and Excise cases, descriptions were good; four had mixed descriptions and in the remaining case the quality of descriptions was poor. In DTI cases one set of descriptions was good, one was mixed and two were poor. The reviewing lawyer was named on the non-sensitive schedule in six of the ten Customs and Excise cases but in only one DTI case.

All ten Customs and Excise files contained schedules of sensitive material. The greatest number in a single case was three. Between four and 30 sensitive items were scheduled in individual cases. In seven cases, good reasons were provided for the sensitivity of all listed items; in the other three cases some reasons were

good but others were poor. The reviewing lawyer was named on the sensitive schedules in seven cases and in all these cases the lawyer had commented on the sensitivity status of the listed items. The reviewing lawyer had marked items for court application in four cases.

Nine of the ten Customs and Excise files contained a disclosure officer's report drawing the attention of the reviewing lawyer to items that undermined the prosecution case or assisted the defence. The disclosure officer was named in all these reports. No file contained more than two such reports. Reports in two of the seven cases indicated that there was undermining or supporting material to disclose. Copies of all the items identified for disclosure were supplied to the reviewing lawyer.

Where sensitive material is not scheduled

The Code requires that material believed to be sensitive be listed on a schedule of sensitive material or, in exceptional circumstances, revealed to the prosecutor separately (para. 6.4). In one study case, the disclosure officer was ordered by a senior officer not to place on the sensitive schedule notebook entries concerning intelligence recorded by another investigator. The reviewing lawyer was informed of this by e-mail at a late stage and asked the disclosure officer to bring the entries to court. The copy supplied was not in a form that could properly be considered by counsel or put before the trial judge. Counsel suggested that in future, the officer in possession of the intelligence should become the disclosure officer and that officers be reminded of their duty to present such material to the reviewing lawyer.

Information about prosecution witnesses

Only one of the ten responding Customs and Excise prosecutors said that investigators usually provided the previous convictions of prosecution witnesses with primary disclosure. None said cautions were provided but two said they received the record of disciplinary findings against officers. Adverse judicial comments were not notified to any respondent and none of the teams to which responding prosecutors belonged maintained its own record of such comments.

DTI Operational Instructions state that, under current practice, details of convictions are not available until shortly before the trial and that they should be disclosed as soon as they are received.[107] DTI disclosure officers were therefore not asked about the inclusion of previous convictions with primary disclosure.

In the case file analysis, three Customs and Excise files contained details of the disciplinary record of investigating officers. No file referred to the previous convictions or cautions of prosecution witnesses.

Primary and secondary disclosure and defence statements

Four of the ten Customs and Excise prosecutors said primary disclosure was often served at or just after committal. Only two felt that defence statements were often served within 14 days of primary disclosure and none thought this often occurred before or at the PDH.

Four of the seven DTI prosecutors had acted in five or more summary cases in the past year. Defence statements were rarely served in these summary cases even though primary disclosure was generally served more than 14 days before trial, in time for a defence statement to be served. Disclosure was seldom problematic. There was no agreement as to whether the prosecution allowed the defence sight of unused material without the need for a defence statement: one prosecutor said this often happened, one that it

107 Paragraph 4.22.

sometimes happened, one that it was a rare occurrence and one that it never happened. Where a defence statement was filed, two respondents said defence requests for unused material were often acceded to without the need for a section 8 application.

None of the responding DTI prosecutors thought that the bench or justices' clerks routinely enquired about the status of disclosure at a pre-trial review. In summary trials, disclosure issues seldom caused pre-trial delay, lengthening of the trial, or discontinuance of the prosecution case. Nor was it a common cause of difficulty in Crown Court cases, although non fast-track Crown Court cases were slightly more susceptible to disclosure problems than fast-track cases.

Four of the seven DTI prosecutors said primary disclosure was often served at or just after committal; two said this rarely happened. Most thought that service of the defence statement usually occurred after the PDH.

Two of the three SFO prosecutors said primary disclosure was rarely served at or just after committal or transfer; the third said this sometimes happened. None felt defence statements appeared within the statutory 14 days following primary disclosure; they sometimes appeared by the time of the Preparatory Hearing.

Prosecutors in all three organisations said defence applications for an extension of the time allowed for service of the defence statement were reasonably common; such requests were usually granted.

In the case file analysis, items were disclosed to the defence at the primary stage in seven cases, including all five cases prosecuted by the DTI. The number of items disclosed ranged from one to 66. In the other eight Customs and Excise cases, no material was disclosed at primary. In the single DTI case to which the CPIA applied, further disclosure was made prior to the service of the defence statement. No primary (or first) disclosure was served at or before committal or transfer. In ten cases, it was served between committal and the PDH and in five between PDH and trial. The latest that disclosure was first made was 138 days after PDH in a pre-CPIA case at the DTI.

A single defence statement was on file in seven of the ten Customs and Excise cases. Three of these statements were signed by the defendant. There was no defence statement on the file of the single post-CPIA case prosecuted by the DTI. Two defence statements contained only a denial of guilt and two more did not meet the requirements of the CPIA. Two statements were accompanied by a request for specific unused material.

We could calculate the length of time between primary disclosure and service of the defence statement in six cases. The statutory 14-day time limit was observed in only one of these cases. Other defence statements were served between 15 and 112 days after primary disclosure. An extension of time for service of the defence statement was requested in only one case. No defence statement was on file for this case.

Secondary disclosure letters were on file in four cases. Letters were dated between 21 and 25 days after service of a defence statement. Two letters said there was nothing to disclose and two identified two and five items respectively for disclosure. In both these cases, and in one of those where the letter said there was nothing to disclose, further unused material was disclosed voluntarily at a later date.

The timing of events was paradoxical in the single post-CPIA DTI case. Secondary disclosure took place 31 days after the defendant had entered a guilty plea to fraud charges. The judge treated the basis of the plea as the defence statement and ordered further disclosure in relation to proposed mitigation.

We could compare the disclosure officer's report with what was actually disclosed in nine Customs and Excise cases. In six, nothing was identified as undermining or assisting and nothing was disclosed. In one, three items were identified on the report and all were disclosed. In one, three items were listed on the report (including one item from the sensitive schedule) but none was disclosed. In the last case, nothing was identified on the report but one item was disclosed.

Judicial attitudes to defence statements

In the opinion of eight of the ten responding Customs and Excise prosecutors and all three from the SFO, most judges take no action in respect of a defence statement that does not comply with the statutory criteria. The seven DTI prosecutors were more equivocal: one agreed that judges take no action, two said judicial practice varied and the other four could not comment.

Section 8, PII and other disclosure issues in the Crown Court

Section 8 applications in the Crown Court were relatively uncommon in the experience of all prosecutors: 13 said such applications were rare and six said that applications were made sometimes. Five respondents said defence requests for disclosure of unused material were often acceded to without the need for a section 8 application and 13 said this sometimes happened; only one thought such requests were rarely granted.

No group of prosecutors thought PII applications caused significantly more problems than other disclosure issues in Crown Court cases. The impact was greatest on Customs and Excise prosecutions. Pre-trial hearings after the PDH, adjournment of trial dates, lengthening of trials and stays were often caused by PII applications and other disclosure matters in the opinion of some Customs and Excise prosecutors; none of the prosecutors from the other agencies said these were frequent occurrences. Two Customs and Excise prosecutors, but none of the others, had had cases stayed in the last year because of disclosure.

There was no consensus about the impact of the CPIA on the number of PII applications: among Customs and Excise prosecutors, one felt applications had increased, one that they had decreased and four that the number had stayed the same; among DTI prosecutors, three felt the number of PII applications had not changed and the rest did not offer an opinion. None of the three SFO prosecutors had noticed a change in the number of applications. There was a similar lack of agreement about the impact of the CPIA on the number of disclosure applications on issues other than PII although slightly more respondents had detected an increase.

The most likely basis for *ex parte* PII applications in Customs and Excise and SFO cases was a prosecution summary. There were too few DTI responses to draw any conclusions. No log of PII applications was kept by any of the Customs and Excise teams represented by respondents; two of the seven DTI prosecutors said their department kept a log.

A PII application was made by the prosecution in six Customs and Excise and two DTI cases. One application was made during the trial and all others were made well before the start of the trial. All the Customs and Excise cases involved drugs offences and all applications in these cases were made *ex parte*, two without notice. The bases of the Customs and Excise applications were the need to protect witnesses from reprisals, to keep secret police methods and issues of national security. The two PII applications in DTI cases were *inter partes.* They were based on the need to protect Official Receiver and other confidential investigative reports. Four of the six applications by Customs and Excise were successful, as were both made by the DTI.

The case file analysis included one Customs and Excise case in which a section 8 application was made. The application was granted.

The court ordered disclosure of unused material other than as result of a section 8 or PII application in four cases. Two were prosecuted by Customs and Excise and two by DTI, including the only one in this sample to involve a pre-trial hearing specifically on disclosure.

Relationship with the prosecution advocate

Five of the ten Customs and Excise prosecutors said all disclosure schedules were routinely included with the prosecution brief; four said no schedules were included and one that only the non-sensitive schedule was included. Six of the seven DTI prosecutors said all schedules and correspondence were routinely provided with the brief; one said only the non-sensitive schedule was included.

In the case file analysis, the brief to counsel was on file in half of the Customs and Excise cases and four out of five DTI cases. The decision on primary disclosure was included in the brief in two of the three cases in which the brief was served after the decision had been taken. Disclosure schedules were provided with the brief in three of the four cases in which they were available. The prosecutor at some stage asked counsel for advice on disclosure in seven cases.

Various other questions were asked about instructions given to prosecution advocates. The responses indicated that practice varied even within Customs and Excise and the DTI.

Table 31: Instructions to prosecution advocates

Number who routinely ask the advocates they brief to:	Customs and Excise (10 responses)	DTI (7 responses)	SFO (3 responses)
Advise on the compliance of defence statements with the statutory criteria	2	0	3
raise with the court the failure of a defence statement to comply with the statutory criteria	3	3	3
help in deciding what to disclose to the defence at the secondary stage	10	5	3
suggest to the court that an inference be drawn re missing defence statements or ones that differ from defence at trial	7	1	3

Nine of the ten Customs and Excise respondents said that a lawyer usually represented them when the prosecution advocate discussed disclosure with the investigator. However, none was represented at discussions between the prosecution and defence advocates. Three DTI respondents said they were represented at discussions between prosecution and defence advocates; two said the representative would be a lawyer and one said a caseworker. Two of the three SFO respondents said they were represented at such meetings, in one case by a lawyer and in the other by a caseworker.

Division of responsibilities

In contrast with some CPS responses, all Customs and Excise and DTI prosecutors indicated that the role of caseworkers was confined to administrative tasks such as sending out letters and making arrangements for the defence to view unused material.

Routine revelation

The routine revelation by the investigating officer to the prosecutor of key documents was apparently more common in Customs and Excise than in CPS prosecutions.[108] Nine out of ten Customs and Excise prosecutors said offence reports were routinely revealed at the primary stage, eight said officers' notebooks were revealed and five that SOCO original work records were revealed. Revelation did not imply automatic disclosure to the defence: officers' notebooks were routinely disclosed at the primary stage according to five respondents and one indicated SOCO work records were also disclosed. Only one DTI respondent indicated that routine disclosure took place at the primary stage: the material concerned was reports from the Companies Investigation Branch or the Official Receiver.

Training

Both Customs and Excise and DTI prosecution teams had been involved in training on disclosure subsequent to the initial rollout training when the CPIA was implemented. Nine out of ten Customs and Excise respondents said their team had trained investigating officers, four had trained support staff and two had trained other lawyers. Six of the seven DTI respondents said investigators and caseworkers had been trained and five that training had been provided for other lawyers.

108 The question was not considered appropriate in the case of DTI and SFO investigations.

12 Cases resulting in a stay of the prosecution, judge ordered or judge directed acquittal

'Unused material has become more important than the evidence.' (Disclosure officer)

Introduction

This chapter sets out respondents' estimates of the number of cases stayed for reasons of disclosure and, using examples from the case file analysis, illustrates the contribution of disclosure problems to the failure of prosecutions at court.

A stay is not an acquittal. The court may stay proceedings where the defence has proved abuse of process on a balance of probabilities. Its discretion to stay should be exercised only in exceptional circumstances.[109] A recent practice note requires the defence to give at least 14 days' written notice of such an application before the date of trial in the Crown Court. Where such an application is a possibility, the defence should raise it at the PDH.[110]

Broadly speaking, the judge orders an acquittal before the trial begins, usually, but not always, because the prosecution are unable or unwilling to offer any evidence for one reason or another. (Sometimes the prosecution offers no evidence before the court hears the defence's argument on abuse of process.) A directed acquittal occurs only after the trial has begun, often as the result of a submission from the defence but sometimes at the judge's own instigation. This is not a clear-cut distinction. A study for the Royal Commission on Criminal Justice demonstrated that some judges prevent cases from starting by indicating that prosecuting counsel should offer no evidence, leading to ordered acquittals even though counsel is, in effect, directed by the judge.[111]

The CPS includes judge ordered and judge directed acquittals in its category of adverse findings for statistical purposes.[112] In its Thematic Review of Adverse Cases, the CPS Inspectorate emphasised the public commitment of the CPS to scrupulous compliance with the statutory disclosure regime. It found that unused material caused or contributed to adverse findings in 5.8 per cent of cases in a sample of 381 cases with such a finding and 4.5 per cent of cases in the sample resulted in adverse findings because of a failure to comply with the disclosure regime: 'Though small in number, any failures in this important area must be a cause for concern.'[113]

In May 2000, the government asked the Law Commission to consider whether the prosecutor should have a right of appeal where the prosecution is terminated as a result of a finding that there has been an abuse of process.[114] In February 2001, the government published its ten-year plan *Criminal Justice: The Way Ahead*.[115] One issue to be considered is 'a new prosecution right of appeal against a range of judicial rulings, to reduce the number of cases which are dismissed prematurely.'

109 Attorney General's Reference (No. 1 of 1990) 95 Cr. App. R. 296.
110 Court of Appeal Practice Note, 3 All E.R. (2000) 384.
111 Brian Block et al, Ordered and Directed Acquittals in the Crown Court: A Time of Change? (1993) Crim.L.R. 95-106.
112 Adverse Case Results and JPM Monitoring Analysis form.
113 Para. 5.43-7, CPS Inspectorate's Report on the Review of Adverse Cases (June 1999), Thematic Report 1/99.
114 See also the recommendation made by Judge Gerald Butler QC: p. 151, Report of the Inquiry into the Prosecution of the case of Regina v Doran and others (April 2000), HM Customs and Excise. The Law Commission's final report on Double Jeopardy and Prosecution Appeals was published in March 2001.
115 p.11, Cm 5074.

Key findings in this chapter include:

- the CPS does not include stays in its statistics on adverse findings
- in the past year, 41 CPS respondents reported a total of 93 stays of summary proceedings
- 111 defence solicitors reported a total of 238 cases stayed
- 37 CPS respondents reported a total of 180 stays in Crown Court trials
- 94 barristers reported a total of 115 stays
- case studies indicated that disclosure problems were seldom the only reason why cases failed at court. They were often symptomatic of poor management controls, giving rise to evidential and other problems.

Cases resulting in a stay of prosecution

The 41 CPS respondents who provided figures reported that between zero and 15 of summary trials in their area had been stayed in the previous 12 months because of disclosure issues. A total of 93 stays were reported; this represented an average of 2.3 stays per CPS area.

The 111 defence solicitors who answered this question had succeeded in having between zero and 25 summary cases each stayed on grounds of disclosure, with a total of 238 (an average of 2.1 stays per defence solicitor).

CPS respondents were also asked approximately how many Crown Court trials in their area had been stayed in the last year because of disclosure issues. Thirty-seven answers were received from respondents in 32 CPS areas and two casework directorates. The total number of stays reported was 180. Answers ranged from none to 60 with an average of 4.9.

The 94 barristers who responded to this question reported a total of 115 stays in their trials during the last year. Numbers reported by individuals ranged from zero to 20 with an average of 1.2.

Two Customs and Excise prosecutors had had three cases in all stayed in the last year because of disclosure. No other responding prosecutor had experienced a stay for disclosure reasons.

Examples from the case file analysis

Our case file analysis was based largely on problem cases. It is therefore not surprising that the 139 completed post-CPIA Crown Court cases where we knew the outcome[116] included 26 (19%) judge ordered acquittals; 11 (8%) judge directed acquittals and 11 cases (8%) in which the court stayed the indictment. One of the stays was a Customs and Excise case in which a PII application was lost three days into the trial. The jury was discharged and the prosecution stayed the case under section 152(a) of the Customs and Excise Management Act 1979. This procedure is not available to the CPS.

Of the 33 post-CPIA summary cases, one (3%) was stayed and in eight (24%), the CPS offered no evidence. None of the 12 pre-CPIA cases resulted in a stay or a judge ordered or directed acquittal.

116 These included seven Customs and Excise cases and one DTI case.

Disclosure problems were rarely the sole reason why cases in our study failed at court; they were often symptomatic of poor management controls, giving rise to evidential and other problems. The following are examples of cases presenting disclosure issues and resulting in a stay:

Magistrates stayed the prosecution of a defendant charged with driving without due care and attention in which a pedestrian was killed. The MG6C was not provided to the CPS until the day of trial. It referred to a police phone message from a passer-by who did not see the accident 'but may have information re another vehicle which the driver may have been trying to avoid.' This had not been followed up. An expert's statement was also not served until the day of trial.

The defence argued successfully that documents seized when the defendant was arrested had not been disclosed. The prosecution then explored the possibility of a judicial review of the judge's decision on the grounds that, had the correct facts been placed before him, his decision would have been different. There was a complete absence of a disclosure audit trail. Prosecuting counsel directed the police to schedule fully what was in their possession and that an affidavit be provided of what had actually been requested and disclosed. This meant compiling a record based on transcripts of hearings, the defence's written requests to the CPS and the recollection of counsel on both sides.

The disclosure officer made enquiries to obtain the tapes of radio messages and an audio commentary made by a police driver in pursuit of the defendant. These had been destroyed after a six-week period. This did not emerge until the PDH when the defence argued that destruction of the tapes had prejudiced the preparation of its case. The prosecution argued that the defence had not previously taken issue with the officers' description of the defendant's driving.

The following are examples of cases presenting disclosure issues resulting in a judge ordered acquittal:

An off-duty officer reported an offence by phone and later attended the station to say the defendant was not the man he had seen. This was recorded on a message log but not on officers' notebooks. The prosecutor later said 'this appears to be a deliberate attempt to suppress evidence. I note the lack of police response to [disclosure] requests. It was only at court we were told the full truth.'

The MG6 said that the complainant was 'dealt with' in relation to an alleged assault on the defendant's mother and her complaint was listed on the MG6C and E. However, the MG6E did not reveal that the complainant had been informally warned for this assault, although he did not admit guilt. The CPS wrote to the police that 'the informal warning undermines our case because the defendant alleges that he acted in self-defence and therefore the complainant is lying… the decision to warn the complainant will be, in the eyes of the court, a clear indication that the police accepted the truth of the allegation and therefore believed that the statement of the complainant was to some degree dishonest. That information… was withheld from me and thus from the defence and the court. It has come to light due to the defence asking specific questions.'

The police could not trace the informant and therefore could not fully assess the risk in relation to disclosure. At a pre-trial conference, prosecution counsel said the material was so central that it must be disclosed in its entirety and was not suitable for a PII application. The police were unwilling to disclose the identity of the informant.

The following are examples of cases presenting disclosure issues resulting in a judge directed acquittal:

A condensed version of the force-wide incident note was supplied to the CPS with the MG6C but not the full version which referred to officers being told of a domestic incident between the complainant father and his son before the complainant was allegedly assaulted by the defendant. The full version was not mentioned on either MG6E submitted to the CPS. It was faxed to the court following a request by defence counsel. As a result two officers attended court and made statements. The defence submission that there was no case to answer was accepted at the end of the prosecution case, based on this and other issues.

The MG6C listed a video recording covering the exit of a nightclub through which an alleged rape victim said she left under duress with the defendant. The MG6E was completed as a nil return. The reviewing lawyer did not ask to view the video because the disclosure officer told him that the tape did not show the victim leaving. During the victim's evidence, the judge ordered the OIC and the defence solicitor to view the video. It showed the victim leaving the club with the defendant voluntarily. The prosecution then offered no evidence. This was described as a 'borderline' prosecution for other reasons.

13 Dissemination and training

'We don't often go to court and we seldom get any feedback about what happens to our cases.' (Disclosure officer)

'We need a more structured approach, with comprehensive training of all officers. Follow-up CPIA training during the last three years was non-existent. Many officers don't understand what evidence is and don't understand disclosure at all.' (Disclosure officer)

'A culture change needs to occur. The training we and the police received made everyone think they had to disclose very little other than schedules at the primary stage until the defence justified it.' (CPS lawyer)

Introduction

Implementation of the CPIA in 1997 was preceded by a programme of training for the police and CPS. This was a good faith effort to prepare practitioners for the Act but it is now widely accepted that the disclosure regime is more complex than initially envisaged. This chapter examines what has happened since implementation, both in respect of training and of opportunities to learn the lessons of cases which fail because of disclosure problems (for an indication of the numbers of such cases reported by respondents, see the previous chapter).

Key findings in this chapter include:

- 70 per cent of forces had a central point within the force for reporting back cases that failed for reasons relating to disclosure
- 81 per cent had formal mechanisms for disseminating lessons learned relating to disclosure
- 88 per cent had routine policy level meetings with the CPS at which disclosure issues could be discussed
- only two forces described the training on disclosure provided by their force as adequate
- since the training provided at the time the CPIA was implemented, 74 per cent of forces had trained probationer officers and 67 per cent had trained other groups, although most acknowledged that the targeting of such training had been patchy
- the average length of training received by disclosure officers across volume, major and serious crime was less than a day. Fewer than half the disclosure officers in all three categories had been trained specifically for their role
- since implementation training, 66 per cent of CPS areas had trained CPS lawyers and 62 per cent had trained caseworkers.

Learning the lessons of failed cases

Police officers and prosecutors referred to the need to learn lessons from cases that failed at court for reasons relating to the management of unused material (prosecution counsel routinely submit reports to the CPS with the reasons). In our survey, 30 forces (70%) had a central point within the force for reporting back such instances; the CPS was often instrumental in flagging up problems. The point for receipt of information within the force was generally the police criminal justice unit or meetings of crime managers. Only three forces named a specific individual with central responsibility; in some forces, failed cases were only reported to a divisional level. Other forces with no specific mechanism for reporting back said that they had no experience of cases failing because of disclosure problems.

Thirty-eight forces (88%) had routine policy level meetings with the CPS at which disclosure issues could be discussed. Some were meetings on Joint Performance Management which included a category for failed cases. Four forces had set up joint working parties on disclosure with the CPS.

Thirty-five forces (81%) had formal mechanisms for disseminating lessons learned relating to disclosure. Examples included disclosure focus groups with representatives drawn from relevant police departments and the CPS, team debriefs and memoranda to supervisors to be cascaded down to line personnel. Some posted bulletins on the force intranet. A few forces had revised their guidance or developed service level agreements with the CPS as a result of a 'post mortem' on failed cases.

Training

The CPS Inspectorate's Thematic Review identified a need for ongoing disclosure training for CPS prosecutors and caseworkers as well as for operational police officers who investigate and deal with disclosure issues. The Inspectorate recommended that this be undertaken jointly 'to reinforce the partnership approach.[117] As noted above, disclosure officers identified training as their most pressing need.

Only two forces (5%) in the force survey described the training on disclosure provided by their force as adequate. Since the training provided at the time the CPIA was implemented, 32 forces (74%) had trained probationer officers, though at least one force had discontinued this because the subject matter was thought to be too complex. Twenty-nine forces (67%) had trained other groups, although most acknowledged that the targeting of such training had been patchy, with detectives most likely to be included. Five of these forces had made training available to all operational officers, although one noted that participation was voluntary and two stated that supervisors were 'expected to cascade' the training. Only one force mentioned training for traffic officers who dealt with fatalities.

Initiatives to raise awareness included a PowerPoint presentation distributed across the force; a video; explanatory posters; and an aide-memoire sent out with personnel payslips and on the force intranet. However, several forces were reluctant to embark on the development of training programmes before further national guidance was issued.

A number of forces said that plans for disclosure training were underway but some pointed to systemic problems with training provision:

> *'Our training school is sinking under the weight of demands on it – disclosure would be at the back of the queue.'*

117 Para. 13.38, CPS Inspectorate's Report on the Thematic Review of the Disclosure of Unused Material (2000), Thematic Report 2/2000.

'Our training budget has been cut by half and we may close our training school.'

'We've requested a training programme from the Chief Constable as a result of complaints about disclosure from the Chief Crown Prosecutor but there are no training slots.'

'We will have a folder for supervisors which will include a disclosure aide-memoire for dealing with problems. But it's not the same as people going on half a day's training.'

'Our training is rubbish – you can't expect officers to grasp this subject in four hours. The shortfall is considerable.'

'It would be impossible to get all 2,000 officers trained. We're planning a leaflet on disclosure – it sounds pathetic but it's the only feasible solution.'

Disclosure officers were asked how many hours of training on the CPIA they had received and whether the training had specifically addressed their role. Those acting in serious crime cases had received the most training but the average length of training received across volume, major and serious crime was less than a day. Fewer than half the disclosure officers in all three categories had been trained specifically for their role.

Table 32: Training of disclosure officers

Type of case officer	Average training received	Proportion trained in role of disclosur
Volume	5.1 hours	48%
Major	7.1 hours	46%
Serious	7.5 hours	39%

CPS respondents were asked if they had provided any CPIA training since the initial implementation training in 1997. Sixty-six per cent had trained CPS lawyers and 62 per cent had trained CPS caseworkers. Respondents from 52 per cent of CPS areas said they had trained police officers, compared with 14 forces (33%) that said CPS had had an input into their disclosure training.

14 Costs and resources

'There is a big irony regarding costs. Excess defence demands were the reason for the CPIA but this was based on a tiny number of cases. Now we have more work in every contested case.' (Senior police officer)

Introduction

The stated aims of the CPIA disclosure provisions included improvements in efficiency. This chapter addresses the resource implications for investigators, prosecutors and defence lawyers of meeting their obligations under the Act in both magistrates' court and Crown Court cases. The effect of the time taken for disclosure on the organisation of court business is also considered.

In making these estimates, we were asked to compare the burden that the CPIA places on participants with that under the common law regime. In practice, we discovered that there was little information on the resource impact of disclosure, either before or after the Act came into force. The financial estimates made at the time the Bill was presented to Parliament were not based on direct measurement of workload. Since then, only the CPS has conducted any systematic assessment of the effect of the Act on resources.

Drawing on responses to our questionnaires and with the help of the agencies concerned, we have produced estimates for the costs of operating disclosure under the CPIA. However, comparisons with costs prior to the implementation of the Act have proved difficult, not only because of the absence of data but also because practice in the pre-Act era evolved significantly over time. Some resource-intensive features of disclosure under the Act, for instance the scheduling of unused material by investigators, were introduced by police forces well before the Act came into force. Moreover, none of the groups consulted during the research wished to abandon schedules, even if some would prefer more open access to unused material. Cost comparisons with pre-Act disclosure are therefore not only difficult, they are of doubtful value.

Key findings in this chapter are as follows:

- estimates made prior to the introduction of the CPIA suggested that its effect would be broadly cost neutral: additional CPS costs of between £6.6 million and £7 million would be balanced by savings for the police put at £6.7 million
- the CPS estimates the cost to the CPS of compliance with current disclosure provisions to be £6 million per annum. Achieving the improvements recommended by the CPS Inspectorate would cost an additional £3.63 million per annum
- examination of all unused material by CPS lawyers could require in excess of £30 million of additional resources
- 77 per cent of police forces felt their costs in relation to disclosure had increased as a result of the CPIA

- police training costs were hard to quantify. One force reported that its new CPIA training programme would cost around half a million pounds
- using conservative assumptions, the cost of the time spent by disclosure officers was estimated at £5.8 million
- if practised by all forces, the annual cost of routine revelation to the police would be in the region of £2.76 million
- no data were available on the impact on the legal aid bill of work done on disclosure. Our estimates suggest a figure of at least £3.9 million per annum in respect of payments to solicitors. Payments to counsel are likely to be similar
- we were unable to identify or quantify significant costs or savings to magistrates' courts or the Crown Court as a result of the implementation of the CPIA.

Cost estimates made when the legislation was introduced

The explanatory and financial memorandum published with the Criminal Procedure and Investigations Bill set out the anticipated financial impact of the disclosure provisions. Overall, the changes were expected to be cost neutral. Additional costs for the CPS were put at between £6.6 million and £7 million but these would be balanced by savings for the police estimated at £6.7 million. The memorandum also stated that the disclosure provisions would require the creation of a number of additional posts in the CPS.

The extra CPS costs arose from additional reviewing and preparation of primary and secondary disclosure. Police savings came from an expected reduction in the amount of disclosure in Crown Court cases. This would mean savings in administrative costs associated with photocopying of material and in the cost of police supervision of defence access to prosecution material. The expected savings were reduced by ten per cent to allow for some increased police costs resulting from the preparation of detailed schedules, application of the disclosure tests and including more information in the case report to the CPS. It was pointed out that this already represented good police practice in major enquiries so that increased costs would only affect other Crown Court cases.

In relation to the costs of the LCD, the memorandum noted:

> *'There are likely to be additional court and legal aid costs arising from the resolution of disputes in a proportion of cases; there may be offsetting savings resulting from the more effective management of trials.*

The LCD estimates were based on the assumption that 4,000 Crown Court cases per year would require an application to the court in respect of disclosure. Each would involve a full day's attendance and half the cases would involve two counsel. In the magistrates' court 558 extra applications were assumed. No additional costs were expected in relation to PII applications. The total extra costs were calculated to be £5.3 million in court costs and £2.1 million in legal aid costs.

There was disagreement between the LCD and the Home Office on the amount of savings to be anticipated from the Act's provisions. The Home Office expected that defence statements would produce an average reduction in trial length of half a day in between 50 per cent and 100 per cent of contested cases in the Crown Court. Any magistrates' court costs would be cancelled out by more efficient management of all either-way cases. The LCD thought there would be no cost savings.

CPS costs

The CPS develops and maintains an Activity Based Costing computer model that analyses data on the time taken by CPS staff to undertake specific tasks. No estimates were made of the cost of disclosure in the period before implementation of the CPIA. However, following the CPS Inspectorate's Thematic Review[118], the Activity Based Costing team undertook a study of disclosure costs based on an analysis of 500 files selected at random in four CPS branches from closed cases tried in the magistrates' court and in the Crown Court. The following estimates were made based on the results of that analysis:

- the cost of CPS compliance with current disclosure provisions is £6 million per annum
- improved performance (as recommended by the CPS Inspectorate) under existing procedures would cost initially £3.63 million per annum
- improved performance would also entail initial training and support costs of £2.4 million
- examination of all unused material by lawyers could require in excess of £30 million of additional CPS resources.[119]

The figure of £6 million for the current costs of disclosure work undertaken by the CPS is less than the estimate of the additional cost made when the Act was introduced. However, as the Inspectorate's report and our findings show, many aspects of CPS disclosure practice are unsatisfactory and the costs of improvements are likely to outstrip the estimates in the financial memorandum. We understand also that the additional funds provided to the CPS to meet the extra costs of operating the Act went directly into salary increases for existing staff rather than the creation of new positions as envisaged in the explanatory and financial memorandum published with the Bill.

Police costs

No force in our survey had estimated the costs of disclosure prior to or following the implementation of the CPIA. Senior officers in 34 forces (79%) thought that the CPIA had increased the administrative burden on the police and 33 (77%) felt costs had increased. Many of the comments suggested that predicted savings were not being realised:

'Time costs in particular have risen. Now you check around before things are asked for. There is a lot more copying.'

'Disclosure has resulted in eight additional staff in CJUs.'

'Everything we do in relation to disclosure now is in addition to what we did before. Even on major crime, savings have not materialised.'

'The CPS disclose everything so the savings are not there.'

'Each contested crime involves work concerning disclosure. This increases the length of time to prepare the case. In major crime there is a two-month wage bill for an extra officer. Doing the lawyer's job has made it more difficult.'

118 CPS Inspectorate's Report on the Thematic Review of the Disclosure of Unused Material (2000), Thematic Report 2/2000.
119 Unpublished information provided by the CPS Activity Based Costings Team.

Five forces in the survey (12%) thought that costs had decreased and five did not know the cost impact:

'We had disclosure officers on major incidents in 1993 – there was little change to costs when the Act came in.'

'Costs will not increase if we're dealing with cases properly.'

'Costs have balanced out.'

'We have not costed the new administrative arrangements. There are some savings in not copying. Constables are not collating unused material but there is more work in supervision. If you look at value for money and lost trials, there is a net saving.'

'My gut feel is the CPIA has saved money over the common law regime. We used to make huge amounts of copies. Some of this has stopped.'

Respondents did, however, report significant increases in the cost of retaining and storing unused material while cases are pending and in warehousing it afterwards (some forces felt unable to supply cost details concerning commercial contractors):

'There are huge retention issues. We have not responded to the implications. We may not be retaining material in volume crime for as long as we should. Before, we disposed of material after an appeal.'

'Retention of used and unused material has increased costs. We are looking at archiving on CD ROM for volume crime but forensic evidence has been expensive to retain.'

'CID administration is looking at the costs of external storage of unused material and exhibits but at present we are still using our own premises. The CPIA was ludicrous as a cost-saving exercise.'

'Our review is looking at costs of storage, whether to outsource or do it internally. The estimate is £12,000-£18,000 if we go outside, with our administrative costs on top.'

'Our chief superintendent is looking at storage. It is an increasing problem on divisions. Our cellars are full.'

Greater Manchester Police plans major expenditure on IT support to ease the problems of retaining used and unused material after court proceedings have ended. Its in-house IT branch is developing software scheduled for completion in 2001. A budget of £33,000 had been earmarked for the purchase of computers to run the software. One computer will be located in the administrative unit of each division. It will be connected to the force-wide Crime Reporting System which will download to each division court results relating to their cases. Specially recruited clerks in each division will then retrieve the case file and enter onto the system a list of material relating to the case and the location where it is stored. The information will come from a form completed previously by the OIC and kept with the case file. The software will generate a letter for each location where material is stored informing the keeper of the outcome of the case and the length of time for which the material must be retained. The recipients are required to acknowledge receipt of this letter. The acknowledgement is noted on the computer and stored in the case file. When all acknowledgements have been received, the computer confirms that the case file can be archived.

Training, whether provided by national police training or by individual forces, is a large budget item. However, we were unable to estimate the cost of a national police training initiative of the kind conducted at implementation of the CPIA or more recently for the implementation of the Human Rights Act. The approach of individual forces to disclosure training in the period since the CPIA was implemented is described in the previous chapter on dissemination and training. Investment in training varied widely: some forces had seen a general cutback in training, while others contemplated significant future expenditure in relation to disclosure. One force, which described its scheduling as 'totally inadequate' reported that its new training programme would cost around half a million pounds.

In its submission to the Lord Justice Auld's Review of the Criminal Courts, ACPO was sceptical about the savings predicted when the Act was introduced:

> *'Set against this [projected saving in police costs] the presumption was that the Act might reduce the likelihood of ambush defences, limit the concoction of plausible defences based upon fishing expeditions and provide a more economic regime. So far as we know there has been no systematic calculation of whether any of these benefits has derived. Nonetheless, as we are dealing with many cases on a daily basis, we are not without an ability to gain an informed impression. As defence statements almost never reveal anything of the defence case, unless obvious from the outset, the defence is still a surprise to the prosecution. Although to some extent fishing expeditions have been reduced, the defence have frequently achieved a reversion to common law disclosure by putting arguments in correspondence to the CPS and before the court to judges. In many cases the mischief is evidently not cured. Further, there has been an unintended consequence which has had staggering implications for the police. In cases where there is considerable unused material (and this is so in nearly all homicide and serious crime cases), the task now falling to officers in reviewing copious amounts of material against the defence statement, however vague it is, has transferred a burden to us which is, at least in some forces, taking away as much as 20 per cent of their serious crime investigative effort. We can refer to cases where teams of detectives have worked for well over 12 months in simply reviewing material irrelevant to the prosecution and of little conceivable interest to anyone… There seems to be no evidence of the financial gains anticipated.*[120]

Estimating the cost of disclosure officers' time

In order to calculate the cost of police time spent on disclosure, we asked disclosure officers to estimate the time in hours that they spent on disclosure duties in their last three cases. The data were used to calculate figures in Table 33 for the average time spent on disclosure by type of case. We give both the mean and the median of the times provided to demonstrate the wide disparity between them. The mean is severely skewed by the responses of a small number of officers who reported spending large amounts of time on disclosure. The median avoids this but takes no account of the disproportionate time spent on disclosure in a small percentage of cases.

Table 33: Time in hours spent on disclosure in respondents' last three cases

Type of case	Mean time	Median time	Number of cases used to calculate average
Volume	9.26	1.00	376
Major	263.93	36.00	147
Serious	64.08	8.00	144

120 Paras 7.6-7.7, ACPO (2000) A submission to Lord Justice Auld's Review of the Criminal Courts.

In each category, the mean is around eight times the median. Adopting a conservative approach, we have used the median in the cost calculations that follow.

The ranks of disclosure officers responding to our survey are shown in Table 34.

Table 34: Ranks of responding disclosure officers

Type of case	Civilian	Constable	Sergeant	Inspector	Chief Inspector	Super-intendent
Volume	12%	72%	15%	1%	0%	0%
Major	6%	57%	29%	5%	2%	1%
Serious	11%	62%	23%	4%	0%	0%

Using these figures and hourly rates provided by a force represented on the project steering group, we calculated a weighted average for the hourly rate for disclosure officers acting in each category of case. The following rates emerge:

- Volume crime: £19.13
- Major crime: £21.09
- Serious crime: £19.83

In order to complete the estimate for the annual cost of officers' time in carrying out their disclosure duties[121], figures for the number of cases prepared for trial by type of offence was provided by the CPS. Its Corporate Information System records the number of contested cases and the number of late guilty pleas. The figures for the year ended in June 2000 are given in Table 35.

Table 35: Cases prepared for trial in the year to June 200

Court hearing case	Contested cases	Late guilty pleas
Magistrates' court	59,074	38,198
Crown Court	20,116	15,389

Contested cases and late guilty pleas do not account for all cases prepared for trial. Prosecutions can fail at a late stage for many other reasons such as failure of witnesses to appear or the failure of an application for PII. The CPS Activity Based Costing team estimates that the figures in Table 35 should be increased by nine per cent to reflect these other cases. Its estimate is supported by the Merseyside CPS branch which has monitored the number of cases prepared for trial. The adjusted estimates of the annual number of cases prepared for trial are therefore 106,026 in the magistrates' court and 38,700 in the Crown Court.

121 This does not include work done by disclosure officers in investigations that do not result in prosecution or those in which an early guilty plea is entered. In this respect, the cost estimates presented here should be regarded as conservative.

All cases prepared for trial in the magistrates' court are classed as volume crime. For a breakdown by category of Crown Court cases, we have used figures from the CPS Activity Timing Management Information System (ATMIS).[122] These suggest that around 73 per cent of Crown Court cases involve volume crime[123], seven per cent are major crime and the remaining 20 per cent are serious crime.

Our calculations of police disclosure costs were therefore completed in Table 36.

Table 36: Annual police disclosure costs

Type of case	Cases prepared for trial	Hourly rate	Median time spent	Total cost based on median
Volume	134,277	£19.13	1.00	£2,568,719
Major	2,709	£21.09	36.00	£2,056,781
Serious	7,740	£19.83	8.00	£1,227,874
Total	144,726			£5,853,374

The total cost is of the same order as the savings to the police predicted when the Act was implemented. We stress again that the true figure may be considerably higher because of the large disclosure effort required in a small percentage of cases and other conservative assumptions built into the calculations. Also, the figure does not include training or other costs associated with disclosure such as photocopying, editing, and storage of material.

Costs of routine revelation

During 1999, ACPO sought responses from all forces to the suggestion that the quality of disclosure would be improved if the police routinely revealed to the prosecution some items of unused material. Twelve forces (28%) provided us with estimates of the likely annual cost of routine revelation produced in response to the ACPO request. The figures varied widely from £3,500 in the case of a Home Counties force to £170,000 for a large metropolitan force (not London). Most respondents stressed the 'rough and ready' methods used to produce their estimate. The average of the 12 figures provided was £64,300 per annum. If this is an accurate average of the cost to all forces, the total annual cost of routine revelation to the police would be £2.76 million. However, this figure includes the resources committed by the 30 per cent of forces that already routinely reveal crime reports and message logs to the CPS.

Legal aid costs

Data were hardest to find in relation to the proportion of legal aid bills accounted for by work on disclosure. This is not identified separately on legal aid bills and neither the LCD nor the Legal Services Commission (LSC) could provide us with any relevant information. The LCD told us:

> *'We have had a further look at whether it is possible to work out the impact on legal aid of the present disclosure regime but I am afraid we have drawn a blank. There seems no way in which the documentation would record what was paid under legal aid specifically in respect of work in connection with disclosure. It would inevitably be wrapped up with other work in the course of pre-trial preparation.'*[124]

122 ATMIS data are based on an exhaustive content analysis of completed CPS cases. ATMIS is the source of information used to determine CPS applications for costs in court and also for CPS input to the Home Office model of costs and flows in the criminal process. A sample of around 6,000 magistrates' court and 2,500 Crown Court cases is constantly maintained.
123 For these purposes, sex offences have been classed as volume crime.
124 Letter to the researchers from the LCD Criminal Justice Division, 16 June 2000.

The LSC had a similar story to tell. Moreover, they were unable to estimate the impact on the legal aid bill of any change in current disclosure practice:

> *'Our only general observation would be that, if it is the case that the defence are spending more time on cases as a result of the difficulties experienced with the current regime, then this will almost certainly impact on criminal legal aid expenditure. However, we suspect that it would not be possible to quantify this figure.'* [125]

The Bar has expressed concern about the lack of specific provision in the standard fee structure to pay counsel for drafting defence statements:

> *'There is nothing unprofessional about counsel drafting or settling a defence case statement, although it must be appreciated that there is no provision in the current regulations for graduated fees allowing for counsel to be paid a separate fee for this work. This most unsatisfactory situation (which has arisen as a result of the 1996 Act, since the graduated fee regulations were negotiated) is being addressed urgently by the Legal Aid and Fees Committee. A barrister has no obligation to accept work for which he will not be paid. The absence of a fee will justify refusal of the instructions by counsel who are not to be retained for the trial and are simply asked to do no more than draft or settle the defence case statement. Where counsel is retained for the trial, rule 502(b) of the Code of Conduct deems instructions in a legally aided matter to be at a proper fee and counsel would not be justified in refusing to draft or settle a defence case statement on the sole ground that there is no separate fee payable for this work.*[126]

In order to get some estimate of defence disclosure costs, we asked barristers and solicitors responding to our surveys to indicate the proportion of their time spent on disclosure in a typical case.

Table 37: Defence solicitors' estimates of the proportion of their time spent on disclosure

Type of case	Minimum	Maximum	Mean	Median
Volume	1%	60%	14.4%	10%
Murder and serious violence	1%	80%	22.3%	20%
Serious sexual assaults	1%	70%	22.6%	20%
Fraud	1%	80%	28.6%	20%
Serious drugs offences	1%	90%	22.8%	20%

Table 38: Barristers' estimates of the proportion of their time spent on disclosure

Type of case	Minimum	Maximum	Mean	Median
Volume	0%	50%	11.5%	10%
Murder and serious violence	0%	70%	16.9%	15%
Serious sexual assaults	1%	75%	21.9%	20%
Fraud	1%	75%	18.9%	15%
Serious drugs offences	1%	60%	20.0%	20%

125 Letter to the researchers from the LSC Policy and Legal Department, 11 April 2000.
126 12-99a, Guidance on the Duties of Counsel, General Council of the Bar Professional Conduct and Complaints Committee, September 1997.

To convert these figures to costs, we needed estimates of the average legal aid bill submitted in each type of case. The Legal Services Research Centre is conducting ongoing work on criminal case profiling on behalf of the LSC. As part of that work, it has compiled statistics on solicitors' bills in the Crown Court using a sample of around 300 cases. We have been given access to these figures for the purpose of this report. Drawing on their data, we arrive at the figures in Table 39 for solicitors' legal aid profit costs[127] in the Crown Court.

Table 39: Defence solicitors' profit costs in the Crown Court

Type of case	Minimum	Maximum	Mean	Median
Volume	£49.94	£18,109.27	£1,142.88	£407.16
Murder and serious violence	£85.19	£13,806.90	£1,261.34	£530.20
Serious sexual assaults	£146.44	£35,695.96	£2,671.65	£1,416.59
Fraud	£2,400.00	£18,109.27	£7,941.60	£3,316.31
Serious drugs offences	£59.70	£9,206.65	£1,526.99	£611.46

Combining figures from Table 35 (increased by nine per cent as before), Table 37, Table 41 and the ATMIS breakdown of Crown Court cases by type of offence[128] gives the following estimate (Table 40) for the cost to the legal aid bill of solicitors' time spent on disclosure in Crown Court cases. As before, medians rather than means have been used to eliminate the skewing effect of a small number of high figures.[129]

Table 40: Solicitors' disclosure costs in Crown Court cases

Type of case	Cases prepared for trial	Median percentage of time spent	Median bill	Total cost based on median
Volume	23,607	10%	£407.16	£961,183
Murder and serious violence	2,709	20%	£530.20	£287,262
Serious sexual assaults	4,644	20%	£1,416.59	£1,315,729
Fraud	774	20%	£3,316.31	£513,365
Serious drugs offences	6,966	20%	£611.46	£851,886
Total	38,700			£3,929,425

As before, the figures used may underestimate the true cost. Variations in bills are large, even within offence types, and cases prepared for trial are likely to have higher than average bills. If means rather than medians are used throughout, the estimated total cost would be £11.6 million rather than £3.9 million. The true cost may lie somewhere between these two figures. We also have not estimated disclosure costs in the magistrates' courts. However, the results of our study and that carried out by the CPS Inspectorate suggest that defence statements are rare in the magistrates' court and disclosure generates much less work for the defence than in the Crown Court.

127 This refers to the legal aid bill less disbursements.
128 These suggest that volume crime accounts for roughly 61 per cent of Crown Court cases, murder and serious violence for seven per cent, sex offences for 12 per cent, fraud for two per cent and drugs for 18 per cent. In the calculations of police costs above, sex offences were counted as volume crime.
129 The Legal Services Research Centre suggests that almost 80 per cent of payments to solicitors in Crown Court cases are for less than the average amount.

The Legal Services Research Centre could not provide corresponding figures for counsel's legal aid costs. However, total legal aid payments to counsel in the Crown Court are of the same order of magnitude as those to solicitors. The proportion of time spent on disclosure reported by barristers in our survey was also similar for both groups. It is therefore reasonable to assume that disclosure work accounts for a similar sum in legal aid fees paid to counsel.

As indicated above, the CPS estimates that if its lawyers were required to examine all unused material, the extra costs would exceed £30 million. There is no reason to suppose that the costs to the legal aid bill would be any less if defence solicitors and advocates were to undertake this task.

Court costs

Data on the impact of disclosure on court costs were also elusive. In the magistrates' court, justices' clerks, prosecutors and defence solicitors agreed that defence statements were rare and disclosure was seldom a problem. There were few PII applications in summary cases and the most likely disruption caused by disclosure issues other than PII was an adjournment of the trial date. Even here, fewer than 15 per cent of justices' clerks and no prosecutors described this as a frequent occurrence. It therefore seems unlikely that disclosure has a significant impact on court costs in cases tried summarily.

In the Crown Court, it seems that Home Office expectations that defence statements would reduce the length of Crown Court trials[130] have failed to materialise. The average length of Crown Court trials in recent years is shown in Table 41.

Table 41: Average length of Crown Court trials

Year	Average trial length in hours
1996	9.8
1997	9.8
1998	9.4
1999	9.8

Of course, there have been far-reaching changes in Crown Court procedure over this period and any impact due to the CPIA may have been masked by other unrelated factors. Nonetheless, a majority in all the categories we surveyed felt that defence statements had not narrowed the issues dealt with at trial in the Crown Court. Indeed, there was more support for the view that disclosure issues under the CPIA had lengthened trials.

Disclosure issues are often raised at PDHs and a certain amount of court time is spent discussing them. However, these are usually short, focussed hearings covering a number of matters. Although some hearings were needed after the PDH to deal specifically with disclosure matters, they were not common either in the opinion of those surveyed or in the sample of cases examined during the study.

PII matters were often dealt with on the day of trial. This might reasonably be expected to cause some lengthening of the trial but there was little evidence of a dramatic change in the number of such applications as a result of the CPIA. No figures are kept on the number of PII applications although a figure of around

130 See 'Cost estimates made when the legislation was introduced' above.

2,000 a year has been suggested. Section 8 applications are even rarer. Some thought that the number of PII applications would fall when the CPIA was implemented as, in contrast to the pre-existing regime, applications would be required only for sensitive material that met the statutory criteria for disclosure. In practice, most respondents to our survey felt that the number of applications had increased or stayed the same. Only among CPS prosecutors was there support for the view that the number had fallen.

Overall, we were unable to identify or quantify significant costs or savings to the court as a result of the implementation of the CPIA.

Third party PII costs

The Children and Families Committee of the Association of Directors of Social Services considered that, anecdotally, there appeared to be no great difference in terms of cost so far as the local authority is concerned between the CPIA and the common law regime. It estimated the cost to one county social services department which dealt with 30 PII applications during the financial year 1999/2000 as £55,260.

15 Perceptions of the CPIA

'The CPIA provisions are working, by and large, although there are always exceptions.' (Judge)

'Nothing short of complete repeal will do. The Act has caused major miscarriages of justice. The problem is knowing when they will come to light.' (Barrister)

Introduction

This chapter analyses responses to a number of specific questions concerning the CPIA disclosure regime and also views expressed in open-ended questions.

The key findings in this chapter are as follows:

- 88 per cent of barristers, 87 per cent of defence solicitors, 84 per cent of CPS respondents, 61 per cent of judges and 44 per cent of justices' clerks were dissatisfied with the way the CPIA was operating
- in free-form answers, revoking the Act and giving the defence access to most or all non-sensitive unused material was favoured by 12 per cent of CPS respondents, 35 per cent of barristers, 21 per cent of solicitors, 19 per cent of judges and seven per cent of justices' clerks
- 79 per cent of forces thought that the CPIA had increased the administrative burden on the police
- 82 per cent of judges, 38 per cent of CPS respondents, 30 per cent of senior police officers and 27 per cent of disclosure officers felt that it was unrealistic to expect police officers to identify undermining material
- many respondents with concerns about the inability or disinclination of police officers to discharge their disclosure responsibilities also had misgivings about the quality of CPS review of police disclosure decisions. They wanted more resources for the CPS and better co-ordination between the police and CPS. Some also wanted the Bar to be more involved in disclosure decisions
- most judges, barristers, CPS respondents, and defence solicitors agreed that defence statements had not narrowed the issues at trial. No judge commenting on defence statements found them useful in their current form
- around 80 per cent of barristers and defence lawyers, and around 40 per cent of judges and CPS respondents thought that the 14-day period for submission of defence statements was too short

- three-quarters or more of judges, barristers, defence solicitors and justices' clerks believed that statutory disclosure time limits should be imposed on the prosecution; however, only 36 per cent of CPS respondents agreed
- in free-form comments, nine per cent of judges and 21 per cent of justices' clerks said more effective sanctions were needed to deal with breaches relating to disclosure.

Satisfaction with the CPIA

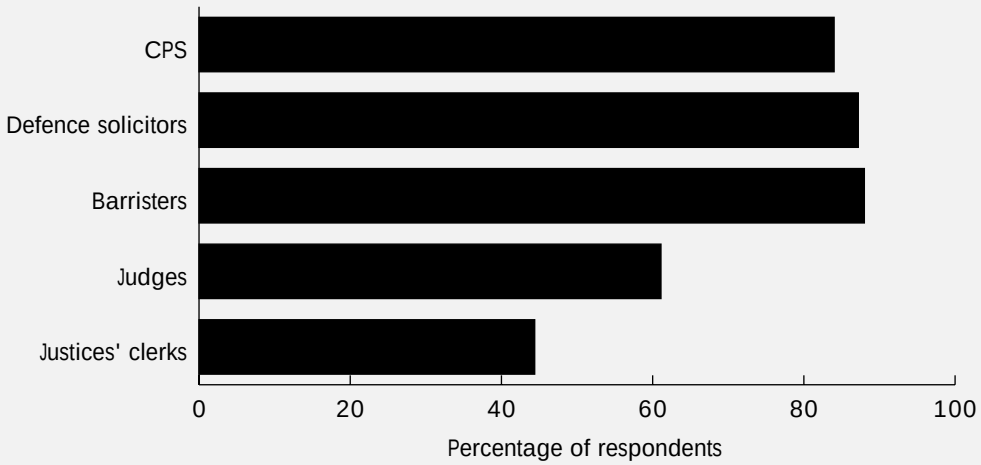
Some legal respondents[132] were satisfied with the operation of the CPIA, for example:

'Broadly speaking, I am satisfied with the Act: legislative change is not needed.' (Judge)

'If the judge is proactive, issues are sorted out without disruption to the court timetable.' (Judge).

On the other hand, 88 per cent of barristers, 87 per cent of defence solicitors, 84 per cent of CPS respondents, 61 per cent of judges, 44 per cent of justices' clerks and the majority of prosecutors at Customs and Excise, DTI and SFO expressed dissatisfaction with the operation of the Act.

Figure 23: Those not satisfied with how the provisions of the CPIA are working



Responses from other prosecuting agencies showed a similar pattern. Six out of 10 prosecutors at Customs and Excise, five out of six at DTI and four out of four at the SFO were dissatisfied with the way the CPIA was working.

At the end of each questionnaire, all categories of respondent ---(judges, barristers, defence solicitors, CPS respondents, justices' clerks, senior police officers and disclosure officers) were asked to suggest in a free-form answer how the operation of the CPIA could be improved. Revoking the CPIA and giving the defence access to most or all non-sensitive unused material was mentioned by six CPS respondents (12%), 85 barristers (35%), 25 solicitors (21%), 35 judges (19%) and six justices' clerks (7%). Several respondents in each category believed the Act's disclosure provisions were incompatible with the European Convention on Human Rights. Those commenting on resource implications were overwhelmingly of the view that the Act was more costly to administer. Despite these criticisms, no one wished to dispense with the scheduling of unused material.

132 This question was not put to police officers.

'The provisions should be repealed. They give statutory force to a culture of non-disclosure which has been grasped with alacrity. The Crown should simply disclose what they have instead of engaging in cost cutting.' (Barrister)

'The pre-CPIA provisions were fair. The Act has created more paperwork and everything is more complicated. If the intention was to simplify, clarify and lead to less time being spent on disclosure, then the legislation has failed.' (Barrister)

'The legislation is wrong.' (CPS lawyer)

'The disclosure regime cannot survive the Human Rights Act. I have had a number of rape cases abandoned because of failure to disclose.' (Judge)

'The CPIA has been wrong in principle and, far from reducing costs and time, has increased both.' (Judge)

'Material undermining the prosecution case is being withheld. The legislation uses the excuse of regulating disclosure to force the defence to lay their cards on the table. The pre-CPIA procedure was more just and protective of defendants, but excessively burdensome to the judiciary. Some statutory code is necessary to preserve the judiciary from weeks of reading all unused prosecution material, but not one whose primary result is to load the disclosure process against the defence and in favour of the prosecution.' (Judge)

'The system should return to full disclosure. Equality of arms should be fundamental to the system.' (Defence solicitor)

'Under the old law I disclosed everything I lawfully could. Now I disclose virtually to the same degree but I have to rely on voluntary disclosure gateways. The defence rarely believes that I let them see the lot and always suspect there is more. Prosecutors cannot always know whether material is undermining or relevant to the defence – only the defence really know their case. The risk of a prosecutor under the current regime sitting on undisclosed vital material is a high one.' (DTI lawyer)

'The CPIA should be abolished as serving no useful purpose. It is often acknowledged in the breach. It is often too onerous a task in complex cases for either officers or prosecution lawyers to determine at the primary stage what might undermine.' (Customs and Excise lawyer)

SFO lawyers felt that the CPIA was unworkable in its present form and, like other prosecutors, some raised the question of human rights law compatibility. One favoured a 'two-tier' approach:

'CPIA works well for simple cases but not for complex cases. Far better to have a category of cases where CPIA does not apply (or leave this to the discretion of the judge) and operate disclosure on a wide basis using scanned images.'

Suggestions from the judiciary on how to improve the disclosure regime included:

- incorporating the 'Keane' tests into statutory form, in order to clarify the duty of the prosecution on what should be disclosed

- putting the onus on the defence to inspect and make them pay for copies to stop them making unjustified requests
- a practice direction from the Lord Chief Justice on disclosure, following consultation
- a system of criminal pleadings to resolve issues for the court and the jury
- requiring disclosure schedules to be lodged with the court for the PDH hearing
- pre-trial procedural hearings with a new position of 'criminal district judge'
- IT for the delivery of contemporaneous copies of court orders
- a 'tougher approach' on case management by the judiciary, backed up by the Court of Appeal.

The disclosure officer's responsibility to identify undermining material

Judges, CPS respondents, senior police officers and disclosure officers were asked whether it was realistic to expect police officers to identify undermining material. Most police officers were adamant that not only was it realistic, the initial task would be impossible for anyone without knowledge of the investigation:

> *'To be able to disclose undermining material you must have a full knowledge of the evidence either as the investigator or case reviewer. You cannot certify the material does not undermine until you have read all the evidence and considered what impact it is likely to have.'*

> *'An investigation involves collating information which can be either beneficial or potentially detrimental to the prosecution. Police officers are best placed to identify and explain all material obtained which, when disclosed, confirms that a fair and thorough investigation has taken place. A person who has no knowledge of the enquiry can't carry out this role.'*

Others agreed, for example:

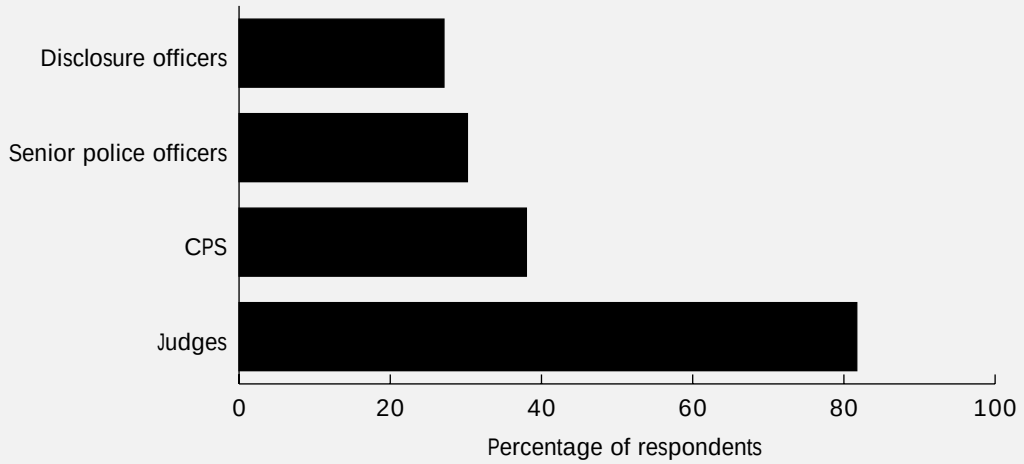
> *'Officers are aware of the provisions of CPIA as part of their basic training. They are aware of the details of the prosecution case and they have access to all the material produced in the case. I therefore think that they are in a good position to make this decision.' (Customs and Excise investigating officer)*

> *'In my role as investigating officer, I have an overall intimate knowledge of the enquiry and examine material held by all witnesses.' (DTI investigating officer)*

> *'Police officers and investigators know the case inside out and are therefore best placed to assess the impact of material.' (SFO prosecutor)*

However, a significant proportion of respondents took a different view. Eighty-two per cent of judges, but also 38 per cent of CPS respondents, 30 per cent of senior police officers and 27 per cent of disclosure officers felt that it was unrealistic to expect police officers to identify undermining material.

Figure 24: Those who thought it was unrealistic to expect police officers to identify undermining material



All DTI officers and seven out of ten Customs and Excise officers thought that it was realistic for them to identify undermining material. Four out of nine Customs and Excise lawyers thought it was unrealistic and six DTI prosecutors were evenly split on the question.

In free-form comments, respondents expressed a lack of confidence in police decision-making about disclosure. Thirty-four defence solicitors (29%), 63 barristers (26%) and five justices' clerks (6%) (groups which had not been asked a specific question on this issue) thought that responsibility for decisions about the status of unused material should be removed from the police. Typical criticisms included:

'A police officer being the main arbiter of disclosure material simply doesn't work.' (Barrister)

'Officers don't understand relevance at trial because they don't see trials, even the ones in which they give evidence. They don't understand undermining material and cannot make decisions like this. We should list everything and let CPS decide what to disclose.' (Disclosure officer)

'The premise of the Act is fundamentally flawed in that it expects the police to have a cast of mind in which they look out for ways in which material may assist the defendant.' (Judge)

'Whilst many police disclosure officers act appropriately, it is clear that a number do not. Their reasons vary from too close a personal involvement to sheer incompetence and a failure to appreciate their position. The whole issue of disclosure should be removed from the police. It is a nonsense to expect the police, who regard their function as pursuing and prosecuting criminals, to be instinctively fair on the issue of disclosure. Frankly, the system evolved prior to the CPIA was more satisfactory although it took up more judge time.' (Judge)

Many respondents critical of the police were concerned also about a lack of CPS review of police disclosure decisions. If the CPS was more involved in disclosure, they believed a fairer interpretation of the tests would result. An injection of resources would enable CPS lawyers (not caseworkers) to scrutinise schedules more rigorously, view unused material more often and comply with timetables and court orders. Most CPS respondents and many others felt resource shortfalls prevented CPS staff from discharging their disclosure responsibilities:

'Provide the CPS with proper resources. The current system barely survives on a wing and a prayer.' (Judge)

'Disclosure should be the responsibility of the case lawyer at CPS and the CPS budget should be increased to cope with disclosure. The extra costs would be more than saved elsewhere.' (Judge)

'Often the file is dealt by a CPS caseworker. A lawyer has little to do with assessing the disclosure made by the police or, as importantly, taking the initiative and asking the police disclosure-related questions.' (Barrister)

'Analysis of material is a task beyond the competence of the police in many cases. It ought to be executed by the CPS in every case, recognising that competent discharge of the task is a time-consuming exercise.' (Barrister)

Other prosecutors had similar problems:

'We need more resources. We prosecute cases up and down the country. Officers are stretched as it is. They go out on operational duties, conduct cases in the magistrates' court and attend as witnesses in the Crown Court. Lawyers are expected to stay at their desks.' (Customs and Excise)

Another concern about police decision-making was the perceived lack of co-ordination between the police and prosecution. Most justices' clerks identified this as a problem in the magistrates' courts:

'Links between the police and CPS need to be strengthened as they blame each other and justice suffers. They rarely disclose within the time allowed and both need more resources to comply with their aspects of disclosure.'

Similar views were expressed by some lawyers in the other prosecuting agencies:

'Lawyers and investigating officers should meet as a matter of routine. There should also be discussion on the compilation of schedules.' (DTI)

Some respondents – 43 barristers (18%) and ten judges (6%) – saw a need for advocates to assume more responsibility for disclosure. Many said this should be recognised in advocates' remuneration:

'It is expecting a miraculous state of detachment in a disclosure officer to discharge his or her duties towards the defence under the CPIA. Unless and until the prosecuting advocate has personal responsibility for disclosure decisions, he cannot demand that all those involved with the material should notify him of all of it, nor will they volunteer it.' (Barrister)

'Ultimately, the only person with the knowledge and skill to determine what should be disclosed under the Act is prosecuting counsel. Until proper provision is made for counsel to be paid to do this work, it won't be done, with a risk of injustice or successful appeal.' (Judge).

Perceptions of judicial attitudes to defence requests for disclosure

In free-form comments, actions taken by the court were identified as undermining the Act by 20 CPS respondents (40%) and 11 senior police officers (26%) and also by some non-CPS prosecutors:

'I see little point in police officers correctly completing MG6C schedules with good descriptions if the intention is to let the defence see what they chose. We may as well return to the old method of providing copies of everything.' (Senior police officer)

'There is no support from the judiciary (or Bar) for the legal position that non-sensitive material should only be disclosed if "undermining" or "assisting". We're often ordered to disclose all MG6C material.' (CPS lawyer)

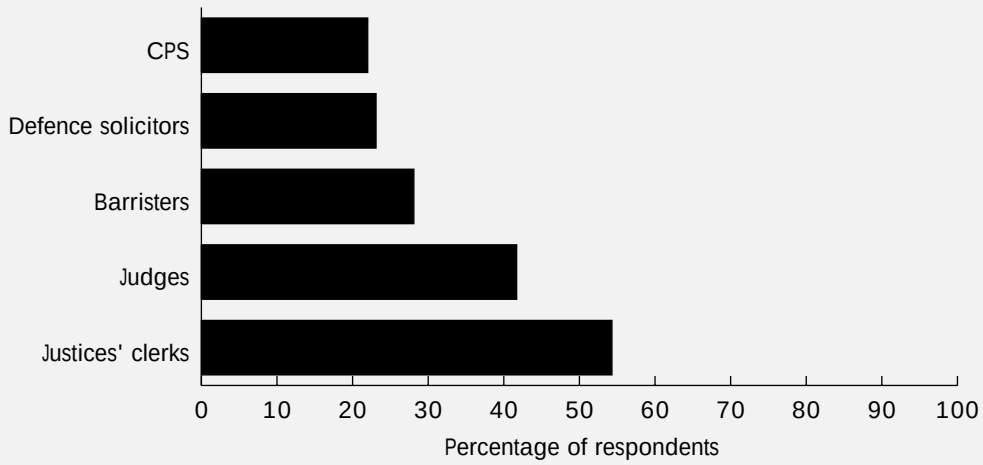
'We need a system which is embraced by the Crown Court and not ignored.' (CPS lawyer)

'A difficulty has arisen over PDH judges directing the prosecution to disclose all the non-sensitive material. Clearly, this entirely subverts the whole rationale of the legislation.' (Customs and Excise lawyer)

Defence statements

One of the primary reasons for a defence disclosure requirement in the CPIA was to enable early identification of the issues and narrow those to be dealt with at trial.[133] We asked judges, barristers, CPS respondents, justices' clerks and defence solicitors whether these objectives had been achieved. Justices' clerks were the only group in which a majority thought they had although, as discussed in chapter 8, defence statements were rarely served in summary proceedings.

Figure 25: Those who think that defence statements have narrowed the issues dealt with at trial



Most non-CPS prosecutors were equally sceptical. Only two out of nine Customs and Excise prosecutors, two out of six at the DTI and one of three at the SFO thought defence statements had narrowed the issues at trial.

In their free-form comments, none of the judges who mentioned defence statements found them useful in their current form:

'Defence statements, given the presumption of innocence are, quite properly, meaningless in the majority of small cases and serve only to trigger the obligation to make secondary disclosure, which is usually of things the defence ought to be told about or provided with in any event to ensure that the defendant has a fair trial.'

133 Col. 477, Lord Taylor, House of Lords Second Reading, 27 November 1995.

'Defence statements appear to be a complete waste of paper.'

'Either abolish requirements for defence statements or find some way of greatly tightening up requirements.'

Suggestions from judges to improve the utility of defence statements included:

- demanding strict compliance with the statutory requirements
- a proforma defence statement in 'volume crime' which focuses the defence on specific potential issues to which they must give a clear answer
- amending the CPIA to require defence statements to be more detailed in defining areas of dispute and issues to be determined ('Mere denials and/or statements putting the Crown to proof should be stated to be inadequate')
- adverse inference sanctions
- a requirement to put in an amended defence statement to deal with issues raised by additional evidence
- a statutory requirement that defence statements be signed by the defendant and a declaration that they are admissible in evidence
- requiring the defence statement to be discussed at the PDH or, if not yet filed, at an adjourned PDH
- the replacement of defence statements with a system of criminal pleadings to resolve issues for the court and jury.

Twenty-one disclosure officers commented on their frustration in carrying out the secondary disclosure exercise based on pro forma defence statements lacking in substance:

'A more co-operative attitude from defence teams would assist the courts. If we were provided with realistic defence statements at an earlier stage, then we would be in a position to provide the defence with the information they require, if it is available.'

Three solicitors said that defence statements should be dispensed with and four said that secondary disclosure should not be contingent on provision of a defence statement. Although the number expressing such sentiments was small, it should be remembered that 25 other solicitors were in favour of jettisoning the CPIA regime altogether (see 'Satisfaction with the CPIA' above).

Four justices' clerks thought that defence statements should be made mandatory in summary cases.

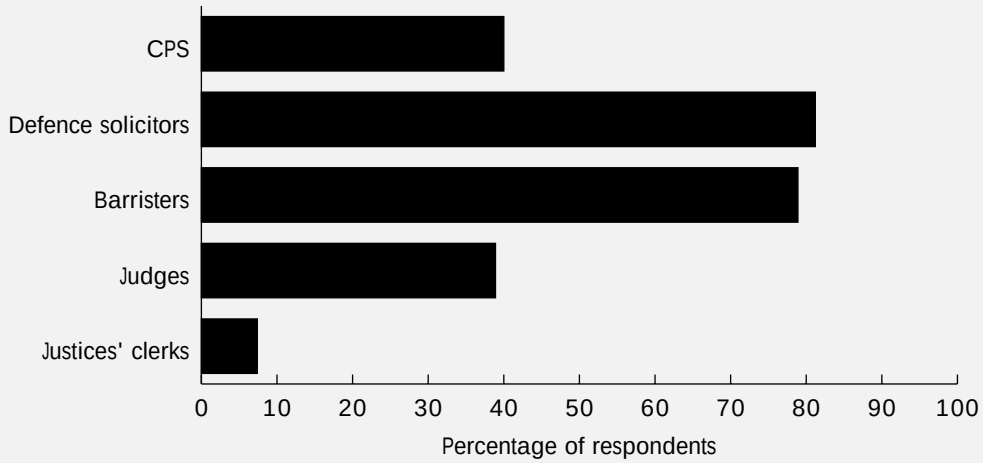
Statutory time limits

At present, defence statements are the only aspect of the CPIA disclosure regime subject to a specific time limit: they must be made within 14 days from the day when the prosecutor gives, or purports to give, primary disclosure.[134]

134 Regulation 2, CPIA 1996 (Defence Disclosure Time Limits) Regulations 1997.

Around 80 per cent of barristers and defence lawyers, and around 40 per cent of judges and CPS respondents thought that the 14-day period was too short.

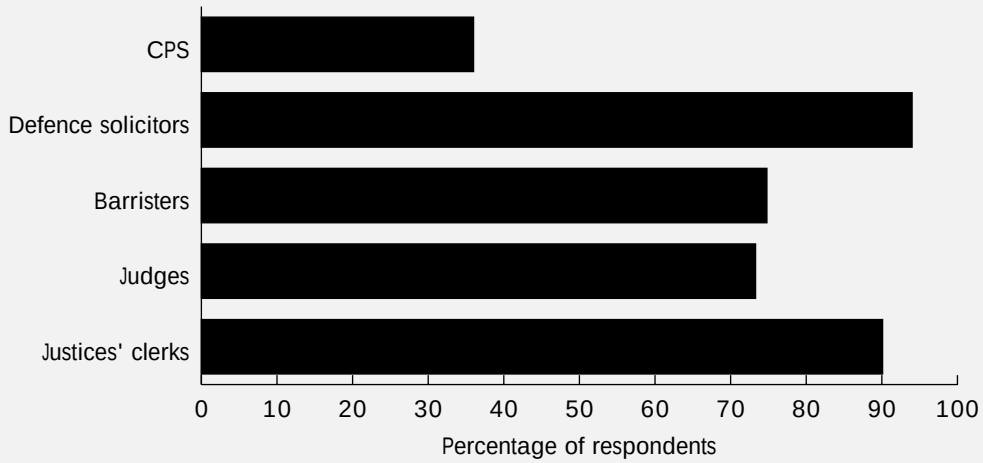
Figure 26: Those who feel the 14 days allowed for service of the defence statement is not adequate



Some non-CPS prosecutors were sympathetic to the view that the defence should be allowed more time for service of the defence statement. All four SFO lawyers who responded to this question, four out of six at the DTI and two out of ten at Customs and Excise felt that 14 days was not adequate.

In contrast to the stringent constraint on the defence, the prosecution is obliged to make primary and secondary disclosure only 'as soon as is reasonably practicable. Three-quarters or more of judges, barristers, defence solicitors and justices' clerks believed that statutory time limits should be imposed on the prosecution; however, only 36 per cent of CPS respondents agreed.

Figure 27: Those in favour of statutory time limits for prosecution disclosure



One of four SFO lawyers, four of ten at Customs and Excise and four of six at the DTI felt that statutory time limits for prosecution disclosure should be introduced.

Sanctions

In their free-form comments, 17 judges (9%) mentioned the need for greater scope to impose sanctions, and in particular their inability to impose sanctions on the police:

> *'I would like some simple sanction which brooked no argument and did not require the elaborate investigation required for wasted costs orders which do not compensate for wasted court time. A system of fixed automatic financial penalties to be paid into central funds would be ideal.'*

> *'Many of the worst decisions about disclosure are taken by the police against whom no court sanction is available. If the court could make a wasted costs order against the police they might take their disclosure duties more seriously.'*

> *'The CPS here is in a state of crisis – indeed near breakdown. Costs orders sometimes make things worse. Often the real fault is that of the police rather than the CPS. The police are largely sanction-proof. This must change.'*

Seventeen justices' clerks (21%) said more effective sanctions were needed, including authority to stay proceedings where disclosure was not made:

> *'Courts should be better able to award costs against the prosecution for failing to comply with disclosure requirements, and ultimately have a specific power to stay proceedings where the prosecution's failure to disclose causes the trial to be delayed. Alternatively, timescales should be imposed which result in an automatic discontinuance if not met.'*

> *'Either the CPS should be responsible for providing disclosure or there should be provision for sanctions against the police.'*

16 Conclusions and recommendations

Introduction

The Home Office specification for this study called for an examination of whether the CPIA disclosure provisions had met the objectives of:

- effectiveness in bringing about the acquittal of the innocent and the conviction of the guilty
- efficiency in focusing on the key issues at trial, and
- fairness towards all those affected.

In this final chapter, we draw together the study findings, assess how well these objectives have been met and consider what improvements are needed. The issues that arise are of two types: matters relating to practice in the operation of the CPIA disclosure regime and questions concerning the principles upon which the legislation is based. The two are related inasmuch as examples of poor practice tend to reinforce opposition to the Act on the part of those who disagree with its philosophy.

Both the CPS Inspectorate's Thematic Review and our fieldwork revealed that poor practice in relation to disclosure was widespread. At the same time, the legal community made no secret of its dislike of one of the Act's underlying principles, namely that in contested cases defence access to some relevant unused material should be linked to a statement revealing the nature of the defendant's case. As a result, defence statements were often bland affairs containing little of substance about how the evidence against the defendant would be challenged at trial. There was little incentive for the defence to act otherwise. Many judges were as uneasy about the CPIA as the defence and were reluctant to resist defence disclosure requests, regardless of the quality of defence statements. Their attitude was reinforced by examples of poor disclosure practice that emerged at court, sometimes leading to judge ordered or directed acquittals or prosecutions stayed on abuse of process grounds.

Both the CPS Inspectorate and this report suggest a range of improvements in practice. These will not, in themselves, go far enough in meeting the Home Office objectives. Success is also predicated on the achievement of a working consensus in England and Wales on how to operate a disclosure regime. No such consensus currently exists.

We focus in this chapter on cases investigated by the police and prosecuted by the CPS. However, most of our comments apply equally to other investigating and prosecuting agencies.

Effectiveness

The examples of poor practice encountered during the study demonstrate that, taken as a whole, the current operation of the CPIA provisions is ineffective. We discuss below the main findings concerning discharge of disclosure responsibilities.

Police practice

A central feature of police practice was the range of approaches to the completion of disclosure schedules, even within forces: nearly a quarter reported that such practice varied among divisions. Policing structures have been reorganised as a result of successive pressures in recent years – delegation of authority and budgets to divisions, the Narey reforms, realignment with local government boundaries, intelligence-led policing, and the government's commitment to halve the time from arrest to sentence for persistent young offenders – have all had an impact on how police functions are carried out. In particular, police file preparation arrangements are driven by the requirements of the Crime and Disorder Act 1998 and these do not necessarily facilitate the completion of disclosure schedules. It is therefore not surprising that, in some forces, performance of the duties of 'the disclosure officer' is more complex than that envisaged by the JOPI, which was of course issued prior to implementation of the Act.

In around a fifth of forces, responsibility for schedule completion in volume crime did not lie with the OIC and sometimes did not even rest with a single individual. Some critics argue that disclosure officers should be completely independent of the investigation. However, independent disclosure officers in our survey felt constrained by their lack of knowledge of the investigation and expressed concern about their ability to discharge their responsibilities. Across most forces, the scheduling of sensitive intelligence material was particularly problematic, with some disclosure officers lacking the authority to access the information concerned. Only six forces had special arrangements for the scheduling of sensitive material.

We recognise that the differing arrangements have arisen in response to differing policing environments. However, such diversity of approach makes it difficult for the police service to monitor performance, devise appropriate training for disclosure officers and others, and to develop transferable skills within forces. The importance and complexity of the task is undermined by the JOPI, which describes the disclosure officer as responsible for handling 'the administrative side of disclosure.[135]

The quality of schedules left much to be desired. We classified descriptions of items on MG6Cs as 'poor' in 73 per cent of cases. In 37 per cent of cases with an MG6C and in 40 per cent with an MG6D, schedules were undated. This inevitably raises concerns about the care devoted to schedule preparation in general. We found that schedules did not reliably reflect the changing status of unused material, for instance when decisions were made to include or exclude witness statements in the prosecution case. Respondents expressed a widespread lack of confidence in the ability of the police to produce accurate and complete schedules. Nor were effective quality assurance structures in place to detect lapses. Although 27 forces (63%) conducted quality assurance checks on schedules, these were often limited to ensuring that schedules were present on the file and that the MG6E had been signed by the disclosure officer. Joint Performance Management criteria do not specifically address disclosure.

Another worrying aspect of police practice concerned the decision as to what material was relevant to an investigation and should therefore be retained and recorded. Disclosure officers identified better guidance on categorising unused material as their second most pressing need, after training. In our surveys, barristers, defence solicitors and justices' clerks agreed that the most widespread problem with schedules was the failure to include relevant material. In the case file analysis, failure to retain or schedule unused material was a problem in one-third of all cases. Unused material that had not been scheduled was disclosed to the defence at some point in 54 (45%) out of 121 Crown Court cases and in six (24%) out of 25 cases tried summarily. The potential sources of unused material are proliferating: relevant information may exist in many locations

135 Para. 2.98.

without becoming part of a prosecution file. In recognition of this problem, ACPO plans to pilot a standard system for recording the conduct of investigations to 'provide a reference point from the investigation to any other material that is considered' which 'would make disclosure issues easier for disclosure officers and prosecutors.'[136]

The unevenness of police practice relating to disclosure was exemplified by the attitudes to adverse information about prosecution witnesses. Only four forces had systematic procedures to ensure that disciplinary findings against police officers were forwarded to the CPS. Only 16 per cent said adverse judicial comments as defined by the Court of Appeal in R v Guney were reported to the CPS. Checks on the previous convictions of civilian witnesses were also unsatisfactory. Just over half of all forces said the results of such checks were revealed to the CPS at the primary stage. In the case file analysis, MG9 witness entries were endorsed to confirm that appropriate checks had been carried out in only 24 per cent of cases. The JOPI suggests that communicating such information to the CPS is the responsibility of the disclosure officer: in practice, these functions are often carried out by others within the force.

Automated support is an invaluable tool in improving quality. Dates can be inserted automatically and on-line prompts can help to ensure that specific items of unused material are not forgotten. Yet we found that forces were making relatively little use of such tools. Major crime was best served with 23 forces (53%) indicating they had software support for disclosure in such investigations, mostly from HOLMES or HOLMES 2. However, only nine had such support for serious crime and seven for volume crime. PC-based packages such as that developed by the Metropolitan Police can provide an excellent tool for supporting the work of the disclosure officer in all classes of crime.

Apart from the SFO, there was little scanning of unused material, even in the largest cases where it is most likely to be cost-effective. E-mail between investigators and prosecutors has significant potential to facilitate and expedite resolution of disclosure questions. However, e-mail was available in only two of our fieldwork sites.

Although an extensive training programme was undertaken when the Act was introduced, this had not been followed up with refresher courses and training geared to the specific needs of disclosure officers. Only two interviewees in the force survey felt that the disclosure training provided by their force was adequate. The average disclosure training received was less than a day and fewer than half of our disclosure officer respondents had received specific training on the role.

Prosecution practice

Poor quality police work in relation to disclosure can, to a limited extent, be detected and remedied by the reviewing CPS lawyer. Two-thirds of CPS respondents said their lawyers were unable to review schedules adequately in the time available. The main obstacle to doing so was the general pressure of work. The prosecution files we examined provided evidence of the problems. Across the six fieldwork areas, reviewing lawyers had not signed MG6Cs in 30 per cent to 52 per cent of cases. MG6Ds were unsigned in 43 per cent to 100 per cent of cases. Reviewing lawyers had commented on the sensitivity status of items listed on the MG6D in only 28 per cent of cases.

Consultation between disclosure officers and reviewing lawyers might resolve some of the problems with schedule quality, yet fewer than one in five disclosure officers said such consultations took place in most cases. There was clear evidence that CPS lawyers regularly disagreed with the disclosure officer's view on

136 p. 109, A submission to Lord Justice Auld's Review of the Criminal Courts (2000), ACPO.

what should be disclosed. Indeed, in only one out of 54 cases with items listed on the MG6E were these precisely the items disclosed. This suggests either that the police are using the MG6E inappropriately or that they and the CPS are interpreting the legislative tests in different ways. It also gives the lie to claims that CPS lawyers accept without question the police view of what should be disclosed. However, it is surely a cause for concern that police judgments of disclosability are so consistently different from those of the reviewing lawyer. Implementation of the Glidewell recommendation on co-location of police and CPS was at an early stage at the time of the study. The majority of forces and CPS respondents thought that co-location would facilitate communication on disclosure issues but many areas had no immediate plans to co-locate. In the area we visited where co-location had taken place, we were advised that additional resources would be required before the benefits extended to disclosure matters.

Prosecution counsel are expected to take an overview of the case, including disclosure, promptly on receipt of CPS instructions. The responsibility for the conduct of the case from this point onwards is shared between counsel and the CPS. The Inspectorate suggested that in every case counsel 'specifically consider whether he or she can satisfactorily discharge the duty of continuing review on the basis of the material supplied by the CPS, or whether it is necessary to inspect further material.'[137] The new Attorney General's Guidelines on Disclosure, published in November 2000, anticipate a more active disclosure role for prosecution advocates. The study shows that they are not routinely consulted or do not advise on questions of disclosure. In the case file analysis, prosecution counsel's advice on disclosure was sought in 32 per cent of cases. Sixty-five per cent said that they did not routinely advise on the compliance of defence statements and 90 per cent of CPS respondents said they would not ask counsel for such advice. Seventy-five per cent of prosecution barristers said their instructions rarely contained an adequate description of the reasons for primary disclosure decisions and only 58 per cent thought that schedules were usually included with the brief. Seventy-two per cent of defence barristers, but only 45 per cent of prosecution barristers, often discuss disclosure with those instructing them. Many at the Bar do not support the underlying principles of the CPIA: 78 per cent of prosecution barristers said they would allow the defence access to non-sensitive material, even if it fell outside the statutory criteria. The Bar was the group most critical of the Act: 88 per cent of barristers expressed dissatisfaction with its operation.

Who should apply the CPIA tests for disclosure?

As our findings demonstrate, there are real concerns about the effectiveness with which disclosure responsibilities are being carried out. Many critics saw the remedy as relieving the police altogether of the responsibility for identifying unused material that undermined the prosecution case or assisted the defence. These arguments were acknowledged in the commentary accompanying the new Attorney General's Guidelines but were rejected on the grounds they 'would involve a significant departure from the scheme laid out in the Code and could not be justified in the absence of evidence.' The commentary noted that a review of the disclosure scheme would follow submission of our research report.

Our findings provide ample evidence of shortcomings in the schedules produced by disclosure officers. Nevertheless, we believe that it would be a backward step to remove responsibility from the police for decisions on disclosability. ACPO has acknowledged that it is a police priority to 'reconsider the proper requirement for professional investigators and put in place a career structure which emphasises professional knowledge, investigative competence and expertise.'[138] The Code sets out for the first time the investigator's responsibility to pursue all reasonable lines of enquiry whether these point towards or away from the suspect.

137 Para. 7.9, CPS Inspectorate's Report on the Thematic Review of the Disclosure of Unused Material (2000), Thematic Report 2/2000.
138 p. 121, A submission to Lord Justice Auld's Review of the Criminal Courts (2000), ACPO.

The ability to recognise material which may undermine the prosecution or support the defence is fundamental to this duty. Understanding relevance is crucial in deciding what items should be retained and recorded in the first place, surely a task that will fall to the police whatever disclosure regime is in place.

A culture that absolves the police of the responsibility for identifying undermining material is likely to produce more rather than fewer miscarriages of justice, irrespective of the rules governing disclosure. Instead, the judgment of trained police personnel should be subject to checks and balances in the form of proper quality assurance within the force, meaningful review by the CPS and scrutiny in the courts. Officers, most of whom have little experience of trials, should receive formal feedback when things go wrong and training regimes should rectify poor practice when it appears.

Routine revelation

The CPS Inspectorate advocated a realignment in which the CPS would assume greater responsibility for deciding whether material should be disclosed to the defence. In the first instance, this would be achieved through routine revelation of crime reports and message logs, which may be relevant to the 'realistic prospect of conviction' test as well as potentially containing information that undermined the prosecution case.[139] The Inspectorate also considered a more drastic realignment in which far more potentially disclosable material 'is scrutinised by a member of the prosecution team who has a full and up-to-date knowledge of the issues in that particular case.'[140] The Inspectorate drew back from recommending this second step, acknowledging that this would require 'significant additional resources.' Instead, they suggested that in our study, we should carry out an assessment of the likely volume of material involved.

As discussed above, it has not proved possible for us to make such estimates. In any case, we are not convinced that wholesale revelation of unused material is a sensible or cost-effective option at this stage.

The discrepancies observed in this study between what disclosure officers and reviewing lawyers consider to be disclosable provide strong support in favour of the CPS routinely seeing more of the unused material in the case. Some reassessments are always likely when the application of the statutory tests by a disclosure officer is reviewed by a lawyer, but the extent of the changes we observed raises serious doubts about the present level of police competence. Routine revelation of certain basic documents would help to allay such concerns. An increasing number of forces, including the Metropolitan Police, have already gone down this route but national guidance is needed to avoid the inconsistency of approach that has resulted. We therefore support the Inspectorate's Recommendation 6, that crime reports and message logs be supplied to the CPS along with the MG6C. Rather than a realignment of police and CPS responsibilities, we see this as enhancing the checks and balances in the system. Revelation should be a means of validating police assessments of what should be disclosed, not rendering them unnecessary. There is an inherent danger in the construction put on revelation at the launch of the Pan London Agreement, where a CPS spokesman said: 'We are asking the police to concentrate on gathering and revealing instead of assessing.' Such sentiments discourage the police from scrutinising documents in the manner required by good investigative technique.

In recommending limited routine revelation, we recognise that there are two legitimate police concerns that need to be addressed. The first is that some prosecutors will automatically pass revealed material to the defence irrespective of whether it meets the statutory tests for disclosure. Over a third of CPS respondents to our survey said that in their area crime reports, message logs and police officers notebooks were disclosed to the defence as a

139 Recommendation 6, CPS Inspectorate's Report on the Thematic Review of the Disclosure of Unused Material (2000), Thematic Report 2/2000.
140 Paras. 13.5-7.

matter of course. The second concern relates to editing: where the prosecutor decides that revealed material should be disclosed to the defence, it is important that any sensitive content should be edited out first. Among those forces that routinely revealed crime reports and control room message logs, 56 per cent and 44 per cent respectively did not edit them first. The adoption of routine revelation as standard practice must be accompanied by a written protocol, such as the Pan London Agreement, which identifies procedures that meet these concerns.

Routine revelation should be accompanied by systematic monitoring of police decisions on what to include on the MG6E. This would provide a meaningful measure of the performance of disclosure officers. Where such monitoring highlighted issues of particular concern, these could be discussed at local inter-agency meetings on disclosure and remedial action could be taken. This might include, for instance, increasing on a temporary basis the quantity of unused material revealed to the CPS. For these reasons, we support the Inspectorate's Recommendation 14, that the Trials Issues Group develops arrangements for monitoring the quality and timeliness of disclosure schedules, while emphasising that this should include monitoring the quality of the decision to include items on the MG6E.

Even on the limited scale envisaged, routine revelation will involve increased costs for the police and the CPS. However, a return on the investment will come not only in the form of increased confidence in the process but also through improvements in police performance from the feedback obtained through the monitoring process. An estimate of the extra costs involved is indicated in chapter 0.

There is one further issue associated with the practice of routine revelation. As an assurance mechanism, it is only effective if those involved have a shared view of the meaning of the tests for disclosability. The conflicting perspectives revealed by our findings highlight the fundamental differences that exist between the key participants. We return to the need for a shared view of disclosure later in this chapter.

Defence practice

Defence cynicism about the CPIA was reflected in the failure of defence statements to address the issues set out in the legislation. In the magistrates' court, working practices have developed which, in effect, allow the defence access to the material they want without the need for a defence statement. In the Crown Court, judicial reluctance to resist late service or defence disclosure requests has done little to encourage timely or meaningful defence statements. None of the judges who commented on defence statements found them useful in their current form.

In our case file analysis, two-thirds of defence statements were served more than the statutory 14 days after primary disclosure. We considered that 40 per cent of defence statements in post-CPIA cases contained only a denial of guilt while a further 14 per cent fell short of CPIA requirements in other respects.[141] Seventy-four per cent of CPS respondents said that prosecution advocates were not briefed to raise non-compliance with the court; 78 per cent of prosecution barristers said they did not do so and 77 per cent of judges agreed this rarely happened. The majority of judges, CPS respondents, barristers and defence solicitors concurred that defence statements had not resulted in narrowing the issues at trial. This represents a failure to achieve one of the main objectives of the CPIA.

In commenting on a draft of this report, some have questioned the absence of recommendations addressed to the defence. The lack of such recommendations should not be interpreted as an endorsement of defence practice encountered during the study. The CPIA envisages that the defence may not comply with the defence statement requirements and provides remedies for such failures. We consider that proper application of these remedies is the appropriate mechanism to influence defence practice.

141 These figures include all post-CPIA study cases irrespective of prosecuting agency or the court in which the case was heard.

Judicial practice

It is beyond question that judicial attitudes have proved a major stumbling block to the effective operation of the Act's provisions. Our survey revealed the extent of judicial concerns. Sixty-one per cent of judges were dissatisfied with the way the Act was working; 82 per cent, more than any other group, felt it was unrealistic to expect police officers to identify undermining material. Even some of those who were more sanguine about the legislation complained about the lack of sanctions if its provisions were not complied with. There were specific complaints about the inability to impose sanctions against the police.

Against this background, most judges were clearly reluctant to deny the defence access to unused material. Fifty-nine per cent of judges said they would order a non-compliant defence statement to be amended although only four per cent of CPS respondents and barristers agreed that most judges would do so. Fifty-six per cent of judges said they would order disclosure if a defence statement requested specific unused material, provided it was not sensitive. Faced with such judicial practices, it is not surprising that some prosecutors see little point in resisting defence attempts to access unused material. It is hard to see how any legislation can operate effectively if there is little judicial appetite to enforce its provisions.

A further issue is the scope of judicial powers to intervene in the disclosure process. Outside of section 8 and PII applications, judges differed as to what judicial action was appropriate in order to expedite disclosure. Many judges pointed to the need for a practice direction to clarify the matter. During a previous project to evaluate piloting of the transfer of indictable only cases to the Crown Court, we found that judges took different views about whether it was appropriate to address disclosure at preliminary hearings. The Court Service advised us that individual court centres will develop their own checklists for preliminary hearings. The risk of further diversity of local practice underlines the need for a practice direction and discussion of disclosure at Judicial Studies Board seminars.

Failures in the operation of the disclosure regime contributed to judge ordered and directed acquittals and to stays of the prosecution on the grounds of abuse of process.[142] Disclosure problems are not recorded as a separate category of reasons why cases fail at court. The CPS includes judge ordered and judge directed acquittals in its category of adverse findings for statistical purposes but stays are not separately recorded. CPS respondents, defence solicitors and barristers reported a total of over 600 magistrates' court and Crown Court cases which were stayed because of disclosure problems in the previous year. Even allowing for some duplication, this suggests a sizeable problem which is not currently reflected in statistics.

Taken together, these findings indicate that the CPIA disclosure provisions are not sufficiently effective in bringing about the acquittal of the innocent and conviction of the guilty.

Efficiency

It was the government's expectation when the CPIA was introduced that 'the overall effect will be at least cost-neutral and should produce net savings.'[143] It was predicted that reductions in cost would come chiefly from three sources. Firstly, there would be cost savings to the police who would no longer spend time supervising inspection of unused material by the defence. Secondly, court time would be saved as a result of fewer applications for the non-disclosure of sensitive material. Thirdly, defence statements would narrow the issues to be dealt with at trial and lead to fewer interruptions to resolve disputes in the absence of the jury. Trials would therefore be shorter and less costly.

142 In February 2001, the government promised to consider a new prosecution right of appeal against a range of judicial rulings to reduce the number of cases which are dismissed prematurely: p.11 Criminal Justice: The Way Ahead (Cm 5074).

143 Para. 82, Home Office (May 1995) Disclosure: A Consultation Document (Cm 2864).

The CPS Inspectorate's Thematic Review observed that:

> *'The expectation at the time the CPIA was passed would undoubtedly have been that resources would be saved. It is, however, clear that, even under the new regime, the burden on both police and prosecutors is far greater than that which existed before the common law development of the mid-1990s.'*[144]

We also found little evidence that the predicted savings had materialised: it seems likely that costs associated with disclosure have risen since the CPIA was introduced. Unfortunately, it has not been possible to produce figures to support this claim as none of the agencies involved, including the Legal Services Commission, had estimated the cost of disclosure prior to the Act's introduction. We have had to rely instead on the perceptions of those who responded to our surveys. In place of the anticipated reduction in police costs, senior officers in 33 forces (77%) felt that costs had increased. Most of this increase was attributable to the extra time spent by officers on disclosure, a factor that the financial memorandum to the Bill made little allowance for. There have also been additional training costs.

In the Crown Court, the average length of trials has not fallen as expected in the period since implementation of the CPIA. As noted above, the majority of respondents felt that defence statements had failed to narrow the issues at trial and judges showed little inclination to penalise bland defence statements. Some respondents thought that disclosure issues under the CPIA had lengthened trials. No national statistics are kept on the number of PII applications but most respondents to our survey felt that the number of applications had increased or stayed the same. Only among CPS prosecutors was there support for the view that the number had fallen. Even if this is the case, the number of applications involved, and hence any cost impact, is relatively small.

There is ample evidence that the cost of improving disclosure practice under the CPIA would be considerably higher than current budgets allow. We estimated that if routine revelation of key documents was adopted as standard practice, the additional police costs would be £2.76 million. The cost of a new police training programme would also be significant. CPS estimates indicate that improved performance under existing procedures would cost initially £3.63 million per annum and the associated training and support would cost £2.4 million. If CPS lawyers took responsibility for examining all unused material, the additional manpower costs would exceed £30 million. The cost of copying, transporting and storing the material would also be considerable.

The political commitment to provide resources for the hidden work in ensuring effective and efficient operation of the disclosure regime has been questioned by ACPO and from the defence perspective, as much of the political debate continues to revolve around the visible presence of 'bobbies on the beat.[145]

It appears that the CPIA has not produced the efficiency savings that were hoped for. Nevertheless, a more open disclosure regime also involves costs. If defence lawyers examine much or all of the unused material, the cost to the legal aid fund would be at least as great as the estimated £30 million required for CPS prosecutors to do so. Copying and transportation costs would also rise.

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144 Para. 13.7, CPS Inspectorate's Report on the Thematic Review of the Disclosure of Unused Material (2000), Thematic Report 2/2000.

145 p. 109, A submission to Lord Justice Auld's Review of the Criminal Courts (2000) ACPO; David Corker , The CPIA disclosure regime: PII and 3rd party disclosure, the defence perspective; 'Disclosure under the CPIA 1996': British Academy of Forensic Sciences seminar, Gray's Inn, 1 December 1999.

Some costs will apply irrespective of the prevailing disclosure rules. The CPS will always need to examine unused material as part of the proper review and preparation of the case. The scheduling of unused material by the police is good practice under any disclosure regime and none of the groups we spoke to expressed a wish that it should be abandoned.

In summary, the vast quantity of unused material generated in police investigations will have to be examined by someone in the course of prosecutions. The costs associated with different disclosure regimes may vary at the margins but many of the most significant costs are common to them all.

Fairness

The government's Consultation Paper on Disclosure argued strongly that its proposals would not degrade fairness:

> *'This scheme will not increase the risk of a miscarriage of justice. By clarifying the issues before the trial starts, these proposals should help to ensure that those who are guilty are convicted, without prejudicing the acquittal of the innocent. If the defendant is telling the truth in the line of argument he discloses, that will trigger prosecution disclosure of any material which tends to support that defence, and thereby enable the defence to run its case more effectively.'*[146]

The central new feature was a staged disclosure process in which material that might undermine the prosecution case was disclosed at the primary stage and further disclosure was contingent on a written defence statement being submitted within a prescribed period. The linkage of secondary disclosure to the content of the defence statement has given rise to many charges of unfairness. It is, perhaps, not surprising that most defence lawyers are opposed to this aspect of the disclosure regime. However, support for their view has also come from members of the judiciary and the Bar. Moreover, the Director of Public Prosecutions has consistently expressed the view, both before and since his appointment, that he did not favour the notion of linkage:

> *'My only objection to [the CPIA] then – and I was by no means alone – was that the linking of the disclosure process to the new and revolutionary concept of the defence case statement was wrong in principle and may not in any event have had the effect that was desired. The Crown's duty to secure a fair trial is a separate duty from any duty imposed upon the defence to disclose its case in advance of trial.'*[147]

He has instead encouraged prosecutors to take a generous view of disclosure at the primary stage:

> *'In most cases it should be possible to disclose all necessary material in primary disclosure. The defence is usually known and there is little material which "might assist the defence" which might not by the same token undermine the prosecution. Resist the temptation to wait until the defence is known before carrying out the disclosure exercise.'*[148]

A generous prosecution approach to primary disclosure is also a key feature of the new Attorney General's Guidelines, but in this document it is combined with a continuing emphasis on the importance of linkage. For example, in introducing a list of material that should be considered for secondary disclosure, paragraph 40 states:

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146 Para. 27.
147 David Calvert-Smith QC, paper for JUSTICE seminar on disclosure, 12 June 2000.
148 David Calvert-Smith QC, The prosecuting authority's role: 'Disclosure under the CPIA 1996', British Academy of Forensic Sciences seminar, Gray's Inn, 1 December 1999.

'Following delivery of a defence statement and on receipt of a request specifically linking the material sought with the defence being put forward, such linked material should be disclosed unless there is good reason not to do so.'

The status of linkage has been the subject of comment in the legal press in respect of 'Points for Prosecutors', produced by the Legal Secretariat to the Law Officers, which deals with the compatibility of the domestic disclosure regime with the European Convention on Human Rights. This guidance states that 'disclosure of material that assists the defence is not contingent upon a [defence] statement being provided.'[149] This apparent severing of the linkage between the defence statement and secondary disclosure has been described as being 'news to many prosecutors' and 'of assistance to the defence.[150] However, the Secretariat points out that disclosure continues to be made after primary disclosure even if no defence statement has been served, and that 'Points for Prosecutors' is therefore not inconsistent with the position on linkage in the Attorney General's Guidelines.

The potential impact on disclosure law of the Human Rights Act 1998 (HRA), implemented in England and Wales on 2 October 2000, was outside the scope of this study. Guidance for prosecutors stated that 'the domestic regime for disclosure of unused material is compatible with the Convention.'[151] The Criminal Bar Association takes the view that human rights challenges to the CPIA are unlikely:

'Any appeal to the higher courts based on insufficient disclosure will inevitably be based on post first instance trial discovery of unused material which would be argued to cause the conviction to be rendered unsafe. There would be little point in applying for a declaration that the CPIA's disclosure provisions are incompatible with the Human Rights Act and Article 6 of the ECHR in a case where post trial discovery of material which rendered the conviction unsafe enabled the appeal court to cause justice to be done by quashing it.'[152]

Nevertheless, we feel bound to observe in this discussion on fairness that many commentators have expressed doubt as to whether the CPIA is compatible with Article 6 of the European Convention on Human Rights.[153] Challenges were predicted following implementation of the HRA:

'…of all existing UK legislation, it is the CPIA which is possibly the best example of legislation not being wholly compliant with European Jurisprudence.'[154]

At the time of writing this report, we are aware of only one such challenge, which has so far been unsuccessful.[155]

149 p. 28 'Points for Prosecutors' (September 2000), Legal Secretariat to the Law Officers. The Legal Secretariat to the Law Officers points out that this document has a very different status to the statute, Code and Guidelines.
150 Ed Cape (November 2000) The Human Rights Act: points for defence lawyers, Legal Action.
151 p. 28 'Points for Prosecutors' (September 2000), Legal Secretariat to the Law Officers.
152 A. Heaton-Armstrong, Criminal Bar Association (8 February 2001), letter to the authors.
153 See, for example, Ben Emmerson, The CPIA and The Human Rights Act, 'Disclosure under the CPIA 1996', British Academy of Forensic Sciences seminar, Gray's Inn, 1 December 1999.
154 David Pickover (3 November 2000) Revealing Rights, Police Review.
155 In the case of R v Macaluso and others at Kingston Crown Court in 2001, the defence argued that the requirement to serve a defence case statement under the CPIA to trigger secondary disclosure and to obey any order under s5 Criminal Justice Act 1987 breaches Article 6 and the privilege against self incrimination. HM Customs and Excise successfully argued at the preparatory hearing against this challenge.

Developing a working consensus on disclosure

Introducing this study of the CPIA, the then Home Office minister Charles Clarke emphasised the government's central aim to 'dispense justice fairly and efficiently and promote confidence in the rule of law.'[156] Like the CPS Inspectorate before us, we found that the CPIA did not command the confidence of criminal practitioners.[157] We share the Inspectorate's concern that disclosure is not working as parliament intended: practice in many areas as influenced by the judiciary and the Bar has departed from the statutory regime so significantly that, as the Inspectorate put it, what is disclosed is 'dependent on geography.[158]

An effective disclosure regime requires those involved to exercise their judgment according to shared principles. One of the themes of the new Attorney General's Guidelines on Disclosure is the:

> *'inter-relationship between the differing responsibilities of the participants in the trial process… The scheme relies on each participant fulfilling their obligations at each stage of the process. This interdependence will ensure that disclosure takes place in a fair and timely way.'*[159]

The Introduction and Commentary on the Guidelines refer to the responsibilities of the police, prosecution, defence and advocate. Although the judiciary was consulted at a senior level prior to publication of the Guidelines, these do not address the judicial role for constitutional reasons. Nevertheless, the success of any disclosure regime is dependent on judicial willingness to apply its rules and sanctions.

The CPS Inspectorate's Thematic Review called for a wide consultation exercise involving the judiciary in order to develop a consensus about what degree of personal checking of material is needed and is feasible: 'There needs to be a clear view as to how this is to be undertaken in the full range of offences in terms of seriousness, case weight and complexity.'[160]

It is not our intention to express a view as to the relative merits of the various viewpoints on the fairness of the principles upon which the CPIA is based or on how the tests in the legislation should be applied. However, it is appropriate to consider the effect on the disclosure process of the radically differing participant perspectives. The Attorney General's Guidelines are acknowledged to be an interim measure only. They skilfully attempt to reconcile conflicting views on how to apply the primary and secondary tests. But there is a crisis of trust in the system: police officers and CPS prosecutors do not trust the courts to resist defence disclosure requests in the absence of a defence statement that meets the statutory criteria; the CPS does not trust the police to use the generous interpretation of the primary disclosure test which they prefer; judges and lawyers do not believe in the ethos of defence disclosure and do not trust the police to apply disclosure tests without prejudice. If each participant interprets the new Guidelines in light of his or her views on the principles on which the Act is based, the difficulties experienced to date are bound to continue. Improvements in practice will help but they cannot completely answer the concerns that have been expressed. It is time to debate whether the foundations on which the Act is based remain sound. Without a working consensus on the principles enshrined in the legislation, there will be no commitment to apply and work within its provisions.

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156 Home Office/ government perceptions, past and present: 'Disclosure under the CPIA 1996', British Academy of Forensic Sciences, Gray's Inn, 1 December 1999.
157 Para. 1.6, CPS Inspectorate's Report on the Thematic Review of the Disclosure of Unused Material (2000), Thematic Report 2/2000.
158 Paras. 1.13-14.
159 Commentary, pp 1 and 4, 29 November 2000.
160 Paras. 13.36-37, CPS Inspectorate's Report on the Thematic Review of the Disclosure of Unused Material (2000), Thematic Report 2/2000. ACPO has also called for a discussion of proportionality: p. 109, A submission to Lord Justice Auld's Review of the Criminal Courts (2000).

Recommendations

Drawing on the study findings, we make the following recommendations. References to the relevant chapters of the report appear in parentheses.

Government

1. A majority of respondents to this study expressed dissatisfaction with the way the CPIA is operating. In their freeform comments, participants in all categories expressed fundamental concerns about the legislation itself. A criminal justice system consultation exercise should be undertaken in order to develop a working consensus on the principles underpinning the disclosure regime. The CPS Inspectorate also called for such a consultation. In addition to matters identified by the Inspectorate, the scope should include:

    - the link between the defence statement and secondary disclosure (chapter 9)
    - the length of time allowed for service of the defence statement and whether statutory time limits should be set for prosecution disclosure (chapter 15)
    - guidelines on what constitutes an adequate defence statement (chapter 15)
    - the presentation of information at hearings on PII applications and the recording of what happens at such hearings (also the subject of recommendations by Judge Gerald Butler QC[161]) (chapter 10)
    - the range of sanctions available to the court for non-compliance with the disclosure regime, and whether powers are needed to impose sanctions on the police (chapters 8, 9 and 15)

2. The funding required to deliver an effective disclosure regime was underestimated when the CPIA was introduced. Disclosure work has become a fundamental part of the criminal justice process, although it is not in the public eye. Resources should be committed to support disclosure work, including the delivery of a national training package for investigating and prosecuting agencies, routine revelation of key documents by the police to the prosecution and provision of technology to improve the management of unused material (chapter 14).

Joint police and CPS issues

3. A nationally-agreed training programme on disclosure is required to improve the quality of police and CPS practice. Police training should address all categories of personnel with CPIA responsibilities, including senior officers. Consideration should be given to the development of examination and certification of disclosure officers (chapter 15).

4. Joint Operational Instructions governing the disclosure regime need to be updated and made accessible to all practitioners. There is already a commitment to do this in light of the Inspectorate's findings and the new Attorney General's Guidelines. Consultation on the revised guidance should address:

    - procedures for the completion of disclosure schedules which take account of file preparation arrangements designed to accommodate the requirements of the Crime and Disorder Act 1998 (chapters 3 and 4)
    - the provision of examples of categories of unused material and the level of detail required in schedule entries (chapter 14)

161 Report of the Inquiry into the Prosecution of the case of Regina v Doran and others (April 2000), HM Customs and Excise.

- the scope of the disclosure officer's responsibilities, making clear that it is not simply an administrative role (chapter 4)
- how disclosure officers who are not part of the investigation can discharge their responsibilities effectively (chapter 3)
- safeguards where schedule preparation and other disclosure officer responsibilities are shared (chapter 3)
- documenting the identity of the disclosure officer throughout the life of the case, including where responsibilities are shared or transferred (chapter 3)
- completion of the MG6D sensitive schedule by an officer with knowledge of the material in question where this is not the disclosure officer (chapter 4)
- co-ordination of disclosure in cases involving unused material, and in particular intelligence information, from more than one force or organisation (chapter 4)
- co-ordination of disclosure in linked cases (chapter 4)
- the authority of the disclosure officer to require compliance from investigators in handing over all relevant unused material (chapter 4)
- the responsibility of disclosure officers to compare the content of officers' notebooks with their statements and highlight inconsistencies or certify consistency on the MG6C. If they cannot make the comparison, for instance because they do not have access to the notebooks, they should make this clear on the MG6C (chapter 4)
- the provision of an audit trail in police and prosecution files indicating which unused material has been inspected by the defence/ prosecution and by whom, and what copies have been supplied (chapter 12)
- the scheduling of unused statements (chapter 4)
- whether Forensic Science Service schedules should contain descriptions of items instead of checklists, in order to assist in the identification of material which may undermine the prosecution or assist the defence (chapter 4)
- whether separate schedules, in particular MG6E forms, are required in multi-defendant cases (chapter 4)
- the distinction between what should be recorded by the OIC on the MG6 form (for transmitting in confidence his views about the case to the CPS) and by the disclosure officer on the MG6E (chapter 4)
- CPS notification to the police of its decision on what to disclose, especially where this differs from material listed by the police on the MG6E (chapter 4)
- whether reviewing lawyers should be authorised to amend schedules, provided they inform the disclosure officer (chapter 6).

5. Disclosure officers do not routinely have access to adverse witness information, even though this is often disclosable. Alternative mechanisms are needed to ensure that:

- checks are made on prosecution witness convictions and cautions (chapter 5)
- independent checks are made on whether investigating officers have disciplinary findings (chapter 5)
- there is reporting back to the police and recording of judicial decisions where convictions were quashed or cases were stopped or discontinued 'on the express basis of misconduct or lack of veracity of identified police officers' (the criteria set out in R v Guney) (chapter 5)
- such information is communicated to the prosecution in a timely manner (chapter 5).

6. In line with the CPS Inspectorate's recommendation and practice in an increasing number of police force and CPS areas, crime reports and message logs should be provided by the police in every case where an MG6C is supplied to the CPS (chapter 5). This practice should be governed by a written protocol which includes safeguards against revealed material being disclosed inappropriately to the defence (chapter 7).

7. E-mail communication between the police and CPS will facilitate decision-making on disclosure and should be established as quickly as possible (chapter 4).

Trials Issues Group

8. In accordance with the CPS Inspectorate recommendation, Joint Performance Management criteria should be extended to include the quality and timeliness of disclosure schedules. This should cover the quality of decisions to list items on the MG6E. The Group should consider how the criteria can reflect performance throughout the life of the case, not just at an early stage (chapter 4).

9. The design of MG forms should be amended to include:

- the categories of material 'required to be supplied under section 7.3 of the Code' on the disclosure officer's report MG6E (chapter 4)
- the date of the CRO check on prosecution witnesses on the MG9 (chapter 5)
- a two-part schedule concerning the examination of vehicles, for the recording of non-sensitive and sensitive information (chapter 4).

CPS

10. CPS guidance on disclosure should address:

- requesting further details in response to inadequate defence statements (chapter 6)
- disclosure aspects of the brief to the prosecution advocate, including the reasons for primary disclosure decisions; instructions concerning inadequate defence statements and drawing of adverse inferences; the content and editing of standard language; and the attachment of schedules (chapters 6 and 9)
- consultation with the prosecution advocate on disclosure issues, and who should attend on behalf of the CPS (chapter 6)
- caseworkers' involvement in the management of the disclosure regime (chapter 6)
- the wording of primary and secondary disclosure letters in light of current practice. Letters should specify whether or not material being disclosed or made available for inspection meets the statutory disclosure tests (chapter 9)
- standard language in letters to the defence, as used by Customs and Excise, advising that only one set of papers per defendant is supplied without charge and practitioners are expected to pass these on if representation changes (chapter 9)
- logging the number, type, basis and outcomes of PII applications (as recommended by the CPS Inspectorate) (chapter 10)
- the date stamping of schedules on receipt by the CPS, not just the MG20 cover sheets (chapter 4).

11. CPS quality assurance should address:

- the inclusion in the brief (or soon as available afterwards) of the CPS decision on primary disclosure and the attachment of schedules and unused material (chapter 6)
- file management of unused material and associated correspondence (chapter 2).

12. The CPS should consider including stayed prosecutions in adverse case reports and documenting when disclosure problems are wholly or partly responsible for adverse outcomes (chapter 12).

Police forces

13. Forces should review how the role of the disclosure officer is addressed throughout the force. The impact of Narey case progression arrangements on the work of disclosure officers should be assessed. Variations between divisions should be minimised (chapter 3).

14. Forces should review how they monitor and assure the quality of work relating to disclosure:

- quality assurance should be applied to schedules prepared in volume, major and serious crime throughout the life of the case, not just at file preparation (chapter 4)
- those reviewing the quality of decision-making should have access to all necessary information, including unused material, in order to determine what is relevant and whether items have been omitted from schedules (chapter 4)
- a cadre of personnel skilled in disclosure should be created to assist in monitoring, training and providing advice throughout the force (chapter 3).

15. The NSPIS case preparation package will not be available in the near future and its support of schedule preparation is limited. In the interim, forces should consider evaluating the benefits of using of packages already in existence (chapter 4).

16. Forces should also consider investing in software support for managing the storage of material after court proceedings have ended (chapter 14).

Local police and CPS consultation

17. Issues on which local agreements could usefully be developed include:

- the handling and review of sensitive unused material (chapter 4)
- disclosure officer access to CPS lawyers for advice (chapter 4)
- the management of third party material, in conjunction with local authorities (chapter 10)
- a central point within the force for feeding back information on failed cases (chapter 13)
- training (chapter 13)
- systematic monitoring of police decisions on what to include on the MG6E (chapter 9).

18. The CPS should provide routine feedback to the police about the adequacy of descriptions and other disclosure-related problems (chapter 4).

ACPO

19. An evaluation should be conducted of the disclosure implications of the ACPO pilot project on standard recording of the conduct of investigations (chapter 16).

Justices' clerks

20. Guidance should emphasise the need to enquire routinely about the status of primary disclosure at pre-trial reviews (chapter 8).

The judiciary

21. A judicial practice direction is needed to clarify the scope of judicial case management in respect of disclosure. This should address what judicial action in relation to disclosure is appropriate at preliminary hearings in indictable only cases and other hearings (chapters 9 and 15).

22. Approaches to managing disclosure should be discussed at seminars organised by the Judicial Studies Board (chapter 16).

Court Service

23. Case progression officers in the Crown Court should monitor compliance with disclosure orders (chapter 9).

Appendix A: Glossary

ACPO	Association of Chief Police Officers
CPIA	The Criminal Procedure and Investigations Act 1996
CPS	Crown Prosecution Service
Code of Practice	The Code prepared by the Secretary of State in accordance with section 23 of the CPIA
Continuing duty to disclose	The duty of the prosecutor under section 9 of the CPIA to keep under review whether there is any prosecution material which meets the primary or secondary tests for disclosure. If there is such material, the prosecutor must disclose it to the defence as soon as is reasonably practicable
Crime report	A compilation produced by the police of the various steps in the case, starting with the initial complaint
Criminal investigation	An investigation conducted by police officers or members of another investigating agency with a view to determining whether a person should be charged with an offence, or whether a person charged with an offence is guilty of it
Defence statement	A written statement provided by the defence under section 5 or section 6 of the CPIA setting out in general terms the nature of the accused's defence, the matters on which the accused takes issue with prosecution and the reason why the accused takes issue with each matter
Disclosure officer	The person responsible for examining the records created during the investigation, revealing material to the prosecutor during the investigation and any criminal proceedings resulting from it, disclosing it to the accused in some circumstances and certifying where necessary that action has been taken in accordance with the requirements of the Code of Practice
DTI	Department of Trade and Industry
ECHR	The European Convention on Human Rights
FSS	Forensic Science Service
HRA	The Human Rights Act 1998
Joint Performance Management (JPM)	A scheme operated by the police and CPS to assess the timeliness and quality of case files

JOPI	Joint Operational Instructions on the disclosure of unused material aimed at assisting police officers and CPS prosecution teams in operating the disclosure provisions of the CPIA
HOLMES	Home Office Large Major Enquiry System, a computerised investigation management system used by UK police forces
Investigator	Any police officer or member of another investigating agency involved in the conduct of a criminal investigation. All officers have a responsibility for carrying out the duties imposed on them by the Code of Practice including recording information and retaining records of material and other information
Log of messages	A composite list of messages about the reporting of the offence and the police response (usually on a computer)
Major crime	Offences at the upper end of the scale where the investigation is reactive, such as murder
Material	Material of any kind, including information and objects, which is obtained in the course of a criminal investigation and which may be relevant to the investigation
MG6	A form on which the police can record confidential information about the case, including witness information, for transmission to the CPS. This form is not disclosed to the defence
MG6B	A form on which to record a police officer's disciplinary record for transmission to the CPS. This form is not disclosed to the defence
MG6C	The police schedule of non-sensitive unused material for transmission to the CPS. This form is disclosed to the defence at the primary stage and thereafter whenever it is updated or amended
MG6D	The police schedule of sensitive material for transmission to the CPS. This form is not disclosed to the defence
MG6E	The disclosure officer's report for transmission to the CPS recording unused material which might undermine the prosecution case or assist the defence. This form is not disclosed to the defence
MG9	The police list of witnesses for transmission to the CPS which includes a tick-box to indicate whether a PNC check has been carried out to establish whether the witness has a criminal record
Narey	Procedures to expedite the passage of cases through magistrates' courts, introduced by the Crime and Disorder Act 1998
NCS	National Crime Squad
NSPIS	National Strategy for Police Information Systems

OIC	Officer in charge of an investigation. The police officer responsible for directing a criminal investigation. The OIC is also responsible for ensuring that proper procedures are in place for recording information and retaining records of information and other material in the investigation
PDH	Plea and Directions Hearing
PII	Public Interest Immunity
PNC	Police National Computer
Primary prosecution disclosure	The duty of the prosecutor under section 3 of the CPIA to disclose material which is in his possession or which he has inspected and which, in his opinion, might undermine the case against the accused
Secondary prosecution disclosure	The duty of the prosecutor under section 7 of the CPIA to disclose material which is in his possession or which he has inspected and which might reasonably be expected to assist the defence disclosed by the accused in a defence statement
Relevant material	Material which, in the opinion of the OIC, SIO, other investigator or disclosure officer, has some bearing on any offence under investigation or any person being investigated or to the surrounding circumstances of the case, unless it is incapable of having any impact on the case
Routine revelation	The police practice by which copies of specific documents (typically the crime report and log of messages) are automatically provided to the CPS
Sensitive material	Material which the disclosure officer believes, after consulting the OIC, it is not in the public interest to disclose
Serious crime	Proactive intelligence-led investigations such as significant drug supply, large scale fraud, paedophile enquiries and serious robbery
SFO	Serious Fraud Office
SIO	Senior Investigating Officer. The name given to the officer in charge of an investigation into serious offences
SOCO	Scene of crime officer
Unused material	Material obtained in the course of a criminal investigation which the prosecutor does not intend to rely on at trial. Unused material may or may not have to be disclosed to the defence
Volume crime	Offences that are towards the lower end of the scale of seriousness, for instance deception, theft, ABH, public order

Appendix B: Disclosure flowcharts

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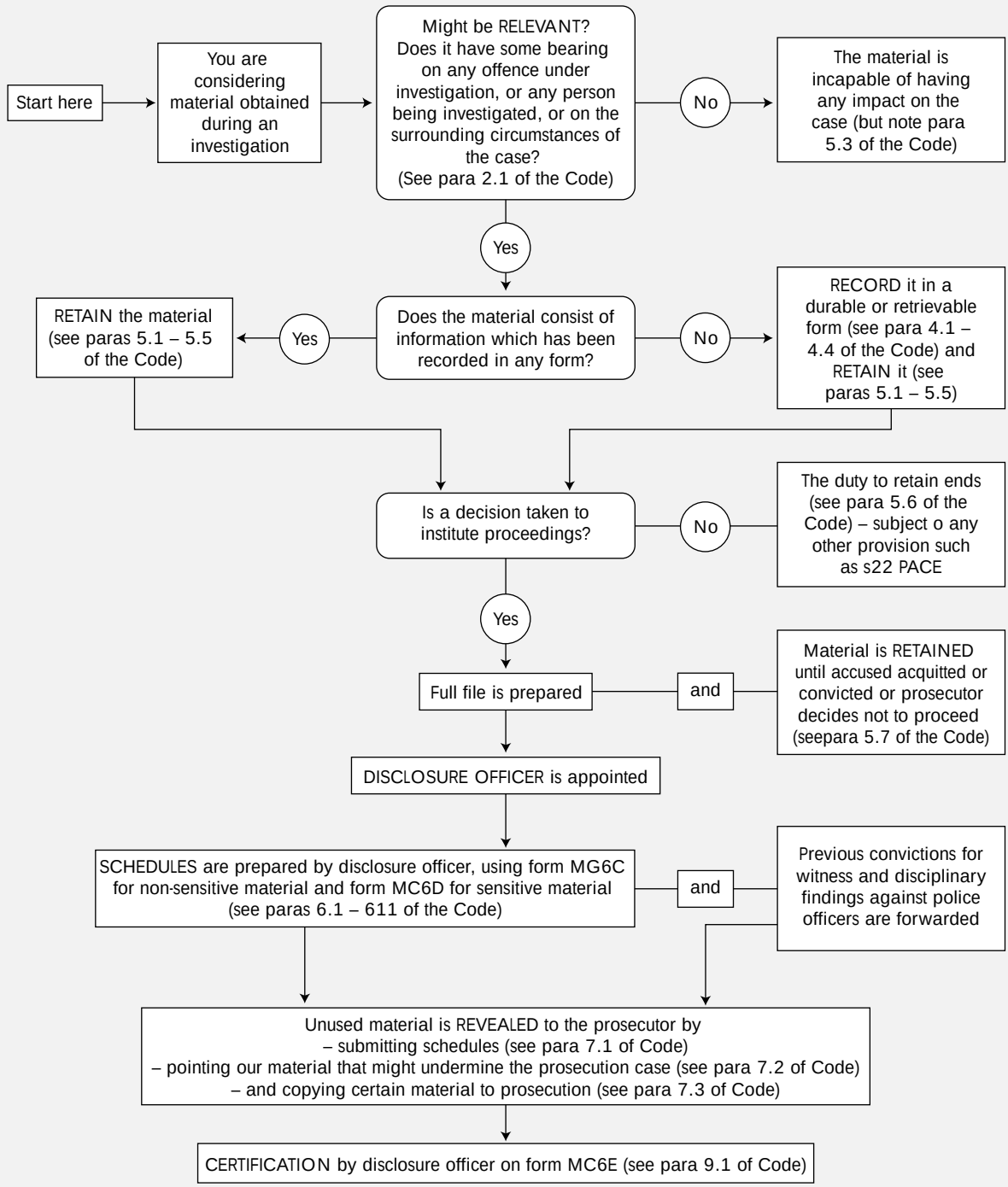
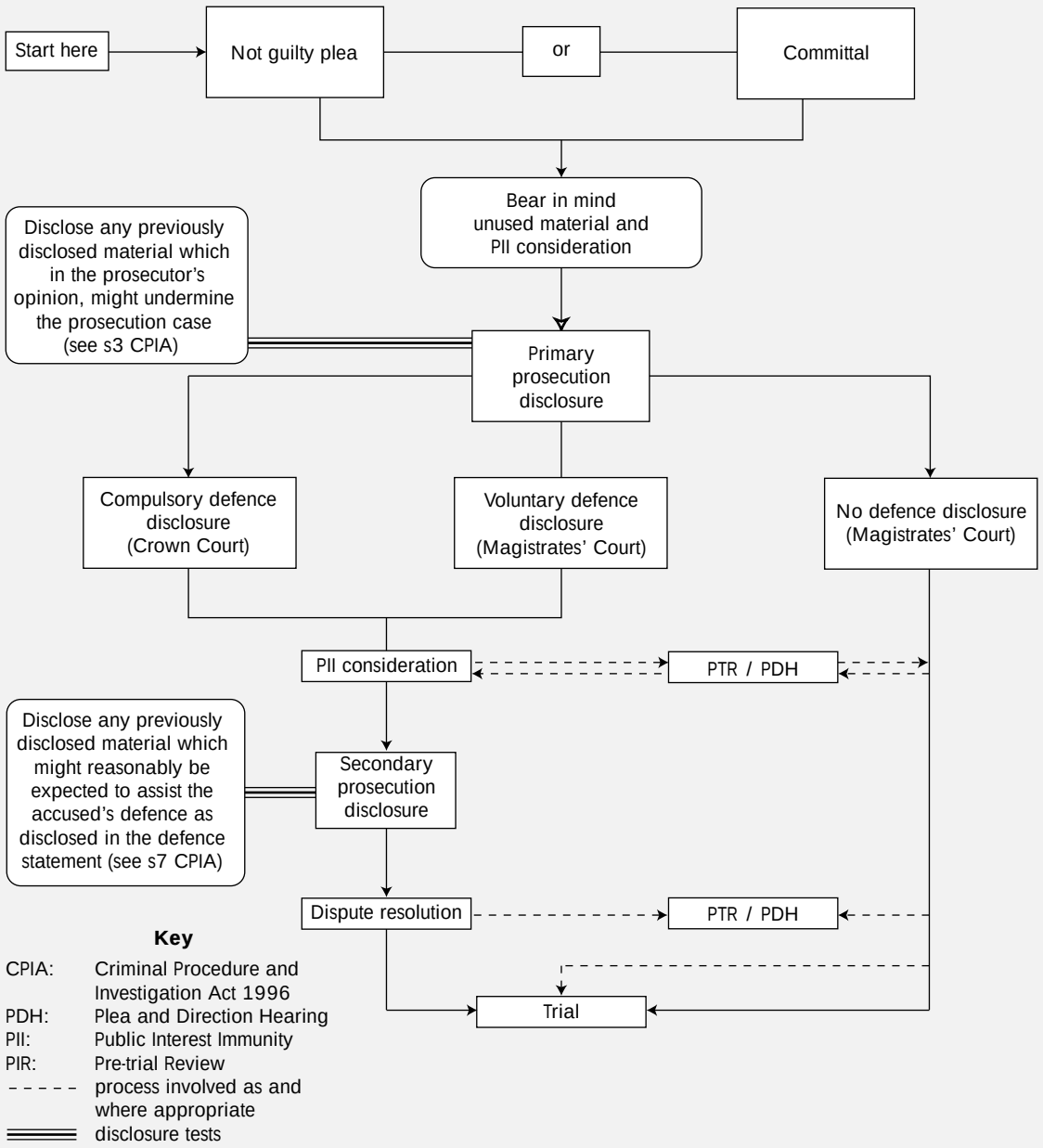
Recording, Retention and Revelation of Unused Material



Flowchart 1

Regime for Disclosure of Unused Material



Flowchart 2

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