



OUTLINE NOTE CONCERNING 'DISCLOSURE: A PROTOCOL FOR THE CONTROL AND MANAGEMENT OF UNUSED MATERIAL IN THE CROWN COURT' ('THE DISCLOSURE PROTOCOL')

1. Introduction

- 1.1 The Disclosure Protocol applies to all trials on indictment, including Very High Cost Cases [VHCCs], and will be effective from its date of publication (20 February 2006).
- 1.2 It was drafted by a team led by Mr Justice Fulford and Mr Justice Oppenshaw, which included representatives from the CPS, SFO and RCPO.
- 1.3 This outline note provides a basic guide to the Disclosure Protocol. There is an initial overview of the document, followed by the headline messages for each of the key CJS agencies, namely:
 - police/investigators and disclosure officers;
 - prosecutors;
 - defence practitioners;
 - courts;
 - judges

2. Overview

- 2.1 The Disclosure Protocol is concerned with the management of issues relating to unused material in the Crown Court. Its main feature is a requirement for strict compliance with the disclosure provisions of the Criminal Procedure and Investigations Act 1996 (the Act), and the statutory Code of Practice laid under section 23 of the Act, where they apply to the proceedings.
- 2.2 In brief, the Act and Code together regulate the disclosure of unused prosecution material in cases which relate to a criminal investigation which commenced on or after 1st April 1997 (there are modified provisions which apply to investigations commencing on or after 4 April 2005).
- 2.3 The Disclosure Protocol sets out the "overarching principle" in paragraph 4. The effect of the principle, in cases where the Act applies, is that material will fall to be disclosed if, and only if, it satisfies the statutory test for disclosure. Unless the material is capable of undermining the prosecution case or assisting the case put forward by the accused, it will not fall to be disclosed.
- 2.4 The protocol, consistent with the need for strict compliance with the Act, requires an end to free-standing orders for disclosure by judges otherwise than those properly made in the context of hearings conducted under section 8 of the Act and r25.6 of the Criminal Procedure Rules, following service of a defence statement by the accused. This means that ad hoc disclosure orders

at 'mention' hearings and "blanket" disclosure orders should no longer be made.

- 2.5 Regarding defence statements in particular, the Disclosure Protocol describes these as a "really critical step" in the disclosure process and requires judges to conduct a "full investigation" where they have not been served by the time of the PCHM.
- 2.6 The protocol also provides guidance on PII hearings and applications for 'third party disclosure', and provides an important additional source to the Attorney General's Guidelines in relation to the treatment of Government/Crown material.

3. Police/Investigators and Disclosure Officers

- 3.1 The Disclosure Protocol stresses the need for rigorous compliance with the provisions in the Code of Practice for the gathering of material, the assessment of it for 'relevance' (using the test in paragraph 2.1 of the Code), and the scheduling of material satisfying the latter test. **(Paragraphs 13, 14, 16)**
- 3.2 Schedules must be prepared timeously, so as to ensure that the prosecutor's duty to make disclosure under section 3(1) of the Act can be discharged "as soon as practicable" after the matter has been committed or transferred to the Crown Court, or cases papers have been served following a section 51 Crime and Disorder Act 1998 'sending'. **(Paragraph 15)**
- 3.3 Where there are problems with providing case papers and/or disclosure schedules to the prosecutor within the normally permitted timescales, this information should be communicated promptly to the prosecutor so that an appropriate variation of the standard directions can be sought at the magistrates' court (or subsequent Crown Court hearing). **(Paragraph 23).**

4. Prosecutors

- 4.1 CPS duty prosecutors advising pre-charge at police stations should consider making a preliminary review of the unused material, where this is practicable. **(Paragraph 17).** There may be a need to provide early disclosure to the defence where R v DPP ex parte Lee (1999) applies. **(Paragraph 19).**
- 4.2 The prosecution cannot abdicate its statutory responsibility to apply the statutory test for disclosure by simply disclosing all non-sensitive unused material, irrespective of whether it satisfies that test. **(Paragraph 30).** This is particularly important in large and complex cases, where such disclosure may add considerably to the cost of proceedings. **(Paragraph 31).** Documents from a defence 'list' should only be disclosed if they satisfy the test for disclosure.
- 4.3 Where the prosecution seek an extension of time to serve papers, an appropriately detailed explanation must be given. **(Paragraph 28).**
- 4.4 Where the defence have defaulted on disclosure obligations, the prosecution should bring this to the attention of the court and seek an inference under section 11 of the Act, subject to any views expressed by the judge **(Paragraph 42).**
- 4.5 The prosecution must be mindful of its continuing duty to review disclosure. **(Paragraph 43).**

4.6 Guidance for prosecutors making PII applications is provided. **(Paragraph 51).**

5. Defence practitioners

5.1 Service of a defence statement on behalf of the accused is a “really critical step” in proceedings. They are mandatory under section 5(5) of the Act, within 14 days of the prosecution making or purporting to make section 3(1) disclosure. **(Paragraph 32)** Applications for an extension of time must be made in compliance with the applicable regulations **(Paragraph 33).**

5.2 The defence need to be aware that the judge will undertake a full investigation, posing searching questions, where the mandatory requirement has not been properly complied with by the time of the PCMH **(Paragraphs 38 – 41).**

5.3 It will not be sufficient for the defence to say that insufficient instructions have been taken. The court will need to know why not, and what arrangements can be made to address the default **(Paragraph 28)**. A PCMH may have to be put back for the defence statement to be served **(Paragraph 33).**

5.4 The defence statement cannot amount to a simple reiteration of the not guilty plea. There must be compliance with the formalities required by the Act **(Paragraphs 34 – 36)**. There has to be a complete culture change in this respect **(Paragraph 37)**. The accused should be warned of the real risk of a direction to the jury regarding a section 11 ‘adverse inference’, where there is no justification for the defence default in disclosure. **(Paragraphs 39 and 42).**

5.5 Where the defence seek further disclosure of specific material, and the prosecution declines to make this, they will need to make an application under section 8 of the Act, complying with r25.6 CPR (written application, detailing grounds and giving the prosecution 14 days in which to respond and request a hearing). The defence need to be aware of any cut-off date set at the PCMH for such applications **(Paragraph 44)**

5.6 Regarding third-party disclosure, the defence should not sit back and expect the prosecution to make the running and must comply with any timetable set by the judge **(Paragraph 58)**. The defence will need to prove that the material is admissible as evidence in the proceedings **(Paragraph 60)**. The court will make a wasted costs order where applications are clearly unmeritorious and ill-conceived **(Paragraph 59).**

5.7 Unused material which has been gathered during the course of a criminal investigation and disclosed by the prosecution is received by the defence subject to a prohibition not to use or disclose the material for any purpose which is not connected with the proceedings for whose purposes they were given it, although neither statute nor the common law prevents use of such material if it has been displayed or communicated to the public in open court unless a reporting restriction is in place **(Paragraph 8).**

6. Courts

- 6.1 Guidance is given regarding the listing of PCMHs (**Paragraphs 47 – 49**).

7. Judges

- 7.1 Judges must seize the initiative regarding disclosure issues, driving the case along to an efficient, effective and timely resolution, having regard to the CPR Part 1 overriding objective. It is the duty of every judge actively to manage disclosure in every case (**Paragraph 63**).
- 7.2 Judges should examine defence statements with care to ensure they comply with the formalities required under the Act (**Paragraph 37**). They must conduct a full investigation if no defence statement, or no sufficient one, has been served by the time of the PCMH (**Paragraph 38**). They must be ready to pose searching questions to the parties where either is in default and explore any reasons given before making appropriate directions (**Paragraph 41**).
- 7.3 Judges should set a timetable for matters such as section 8 applications and applications for 'third party disclosure' (**Paragraphs 43, 56, 58**). In respect of the latter, the judge should question whether inquiries with a third party are appropriate and, if so, identify who will make them (**Paragraph 56**). The judge should specifically inquire at the PCMH whether the defence intend to apply for a witness summons (**Paragraph 58**).
- 7.4 Where the defence seek material such as confidential medical records concerning the complainant, judges must balance the rights of victims against the real and proven needs of the defence. They must ensure that any interference with the victim's article 8 ECHR right to privacy is in accordance with the law and necessary in the pursuit of a legitimate public interest (**Paragraph 62**).

For further information concerning the Disclosure Protocol, please contact the Judicial Communications Office: 020 7947 6438.

February 2006