JUDICIARY OF
ENGLAND AND WALES

Magistrates' Court Disclosure Review

May 2014

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Foreword

By Lord Justice Gross, Senior Presiding Judge of England and Wales

The correct approach to disclosure is crucial to a fair trial. The process must be managed intelligently if it is not to overwhelm the system. This applies equally to cases in the magistrates' courts as it does to those in the Crown Court, even if the volume of material is usually much smaller.

It is essential that the principles of disclosure are clearly understood and applied by all concerned in both the magistrates' and Crown Courts. As noted in my 2011 Disclosure Review:

> *'Improvements in disclosure must be prosecution led or driven, in such a manner as to require the defence to engage - and to permit the defence to do so with confidence. The entire process must be robustly case managed by the judiciary. The tools are available; they need to be used.'*

This review was commissioned by me to ensure that the disclosure process was dealt with proportionately in summary proceedings. Interested parties were consulted throughout and the result represents a comprehensive analysis of the process, concluding with practical and sensible recommendations as to how to make it more efficient.

The recommendations have been endorsed by the Lord Chief Justice and, I have no doubt, if implemented, will produce a very significant improvement in the system. The heavy "front loading" burden placed upon the prosecution (both Police and CPS) must be acknowledged but, if applied correctly, the benefit to all, prosecution, defence and court, should not be underestimated.

I do not shy away from highlighting the burden, albeit by its nature more responsive, resting upon the defence and the court. The defence must communicate with the prosecution and court, ensuring that matters of concern are not left until the day of trial, leading to applications for an adjournment and delay. The judiciary must be robust in their case management and ensure that cases are progressed.

The recommendations require a change in emphasis from the outset, with much earlier consideration of both the case and of disclosure by the prosecution. The implementation process is already underway. The police and CPS have undertaken to restructure their procedures to meet these demands. If cases can be considered sooner and channelled into specific lists with papers provided to the defence beforehand, then the first hearing will be effective and this exercise will have achieved its immediate aim.

However, the system must not be allowed to stagnate or fall into bad habits. History

has shown that this is too often the outcome of well meaning initiatives which start promisingly. A governance structure will be established to minimise this risk and the Consolidated Criminal Practice Direction will make express reference to the new listing recommendation, providing it with greater force.

I am most grateful to HHJ Kinch QC, to the Chief Magistrate Howard Riddle, and to Sara Carnegie for their excellent work on this review. This was not a straightforward task and I thank them for delivering it in an impressive and timely manner.

Sir Peter Gross
Senior Presiding Judge

Background and terms of reference

1. This is a review conducted for the Lord Chief Justice at the request of the Senior Presiding Judge, Lord Justice Gross, following the publication of his disclosure reviews in 2011 and 2012. The first review was concerned with disclosure considerations in cases generating a substantial amount of documentation (in paper or electronic form) which would in almost all instances be heard in the Crown Court. It considered the practical operation of the Criminal Procedure and Investigations Act 1996 ("the CPIA") disclosure regime and its legislative framework in relation to such cases.

2. The first review made clear at paragraph 167 that the operation and proportionality of disclosure in the magistrates' courts was beyond its remit, but may warrant consideration by others in the future.[1]

3. The second review conducted by Lord Justice Gross and Lord Justice Treacy considered the topic of sanctions for disclosure failure[2]. The review made no reference to the position in magistrates' courts, save for a short analysis on the development of case law, notably *R v Newell*[3] which distinguished the different position regarding disclosure in a magistrates' court and in the Crown Court, (see paragraphs 120 to 121 of that review).

4. One of the first questions that we must ask when addressing this subject is 'what is disclosure?' When considering the answer we must also have in mind what is not disclosure; both questions may appear to be elementary, however, we have found that the answer is not always apparent to many of those who play a key part in the system.

Terms of Reference

5. The terms of reference are almost identical to those agreed for the original 2011 disclosure review, but aimed at the Magistrates' Court regime:

The review was established to consider the practical operation of the CPIA disclosure regime in criminal cases in the magistrates' courts, with a particular focus on the proportionality of the time and costs involved in that process.

Accordingly, if appropriate, the review is to make recommendations:

- For the improved operation of the CPIA disclosure regime in the Magistrates' Court;

- As to whether specific guidance should be issued;

1 http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/disclosure-review-september-2011.pdf
2 http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/disclosure_criminal_courts.pdf 'Further Review of Disclosure in Criminal Proceedings: Sanctions for disclosure failure' November 2012
3 *R v Newell* [2012] EWCA Crim 650; [2012] 2Cr.App.R 10

- As to areas of the existing statutory framework that would benefit from consideration by Government.

6. The scope of the review is confined to disclosure in criminal cases and does not consider civil or family matters.

7. This review has been conducted by the Senior District Judge (Chief Magistrate), Judge Riddle and His Honour Judge Kinch QC, Resident Judge, Woolwich Crown Court, assisted by Sara Carnegie, barrister, Legal Secretary to the Senior Presiding Judge.

Summary

8. The meaning of disclosure, in simple terms, is the obligation of the prosecution to serve on the defence unused material which may reasonably be capable of undermining the prosecution case or assisting the defence. This must be done in a timely manner to assist the defendant in preparation for trial and the court in case management of the issues. It is not a one way process. The defence must play their part, by identifying the issues in dispute, thereby helping the prosecution to make informed decisions.

9. In accordance with the terms of reference, this review has focused on the operation of disclosure in the magistrates' courts and has not revisited matters covered in the 2011 review. Accordingly, we do not explore the history and development of the present disclosure regime as now set out in the CPIA. In Annexes A and B we set out in brief the key responsibilities of the parties and the disclosure process from pre-charge to trial. Further information in this regard can also be found in parts I and II of the 2011 review. [4]

10. We do not make a direct call for a change in legislation and our focus during discussions has been on making the present system work more effectively. Our position in this regard has been influenced by the observations made about the CPIA in Lord Justice Gross' 2011 review and a desire to make practical recommendations that can be implemented quickly. We do however make limited observations about legislative change in paragraphs 203 to 206 and within our recommendations at paragraph 232.

11. The main aim of our recommendations is to bring consideration of disclosure forward, encouraging the prosecution to deal with it at an earlier stage and to be prepared at the first hearing. It is hoped that this will lead to a more efficient system by reducing the number of delays caused by late or inadequate disclosure.

12. We consider that a change to the listing practice may lead to greater efficiency in the process. This would involve anticipated guilty plea cases being listed more quickly than, and separate from, anticipated not guilty plea cases.

13. We recommend further training for all parties (which could include joint events) to ensure that there is a common understanding as to the meaning of disclosure and what it entails and requires of the parties and the court. This will include a need for all parties to use the same terminology and for there to be greater awareness of what the procedure requires. This will assist courts in making orders that comply with CPIA requirements, rather than going beyond them, or in apparent ignorance of the regime. Specific guidance should be available to benches to ensure consistency of approach.

14. We were interested to hear about processes in place in other Commonwealth countries. We did not think that there were any additional aspects of these systems which were readily transferable or which would necessarily benefit our own. We also note that many raised concerns about certain elements of their practice that caused similar problems and delays to those with which we are familiar.

4 http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/disclosure-review-september-2011.pdf

Methodology

15. This review has been undertaken through a combination of individual meetings and discussions with representatives from across the criminal justice system. We are very grateful to all those who have taken the time to meet us and, in some cases, provide papers which set out useful contributions and proposals. A full list of those with whom we consulted can be found at Annex D.

16. References to practice and procedure in this report are based upon our own experience and information received from those we consulted. The consultees represent key parties within the system and have provided their views in both an individual and collective capacity. This is the evidence base from which we have reached our conclusions and made specific assertions.

17. We acknowledge that in addition to the consultation feedback, there is specific data on disclosure failures collected by both CPS and HMCTS. We have some reservations about the reliability of these statistics, as they do not reflect what we have heard from those who contributed to this review, notably the judiciary, defence community and Justices' Clerks' Society.[5]

18. We are conscious that, following the establishment of this review, the Government published a paper in June 2013 entitled, 'A Strategy and Action Plan to Reform the Criminal Justice System.'[6] This paper contained a number of actions aimed at improving processes and increasing efficiency in the magistrates' courts.

19. The actions include work undertaken for the purposes of this review. There are a number of linked areas of work which are summarised in paragraphs 207 to 208. Detailed consideration of these actions is beyond our scope. However, it is still important to identify and make reference to them, as they link to recommendations which are made in this review.

20. We are clear that the disclosure process works best when the prosecution takes the initiative and leads a case forward. This does not mean the defence can sit back and abdicate all responsibility for making the procedure work, but there is universal acknowledgement that it imposes a far greater burden on the prosecution.[7] That is the basis for the whole system. Correct case management from the outset provides the optimal foundation for making the system function well.

5 HMCTS data for quarter 2, (2013/14) indicates that 21 of 8,553 magistrates' court trials were ineffective due to prosecution having 'failed to disclose unused evidence.' The CPS records reasons as to why cases are unsuccessful and the 2013 figures show that disclosure failures account for less than 0.5% of cases that are stopped. These figures do not reflect cases which are adjourned due to disclosure delay/failure. We also understand that disclosure delays may lead to an ineffective trial, but the reason may be recorded in a different way, eg. defence not ready. There are many categories available and these can sometimes disguise the underlying reason, so we approach the figures with very real caution.

6 http://www.official-documents.gov.uk/document/cm86/8658/8658.pdf

7 Also acknowledged in the 2011 Disclosure Review at paragraph 8(vii) "Improvements in disclosure must – and can only – be prosecution led or driven."

21. We acknowledge that the existing disclosure process arguably creates a disproportionate burden on the prosecution for most minor cases; however we took an early decision not to focus on potential changes to the legislation. Subject to our observations at paragraphs 203 to 206 and our recommendation at paragraph 232 we consider our remit to be consideration of the present system.

What is and what is not disclosure?

22. Before considering the law and relevant guidance, it is important to set out what is meant by disclosure. We have heard and seen for ourselves that both the meaning and purpose can be misunderstood by many of those who are integral to the correct operation of the system.

23. The meaning of disclosure, in simple terms, is the obligation of the prosecution to serve on the defence unused material which may reasonably be capable of undermining the prosecution case or assisting the defence.

24. The misunderstanding of terminology and, therefore, the misapplication of the disclosure procedure was raised with us by several groups with whom we consulted. This leads to confusion, especially among magistrates who may entertain and allow applications for specific disclosure, without the 'trigger' of a defence statement, in contravention of the CPIA statutory requirement.

25. Material is generated during the course of an investigation. Some of it will be evidential, some will not. The material which is not used in evidence is simply called 'unused material.' The disclosure regime set out in the CPIA 1996 and associated Code of Practice applies in respect of unused material. When using the term 'disclosure' within the context of the CPIA, it must be understood that this means the consideration of, and decisions in relation to, the unused material, in accordance with the legislative regime.

26. Unused material is material collected during the investigation but is not evidence against the accused, i.e. it does not form part of the prosecution case, which is why it is termed 'unused.' Nevertheless, it is important to retain this material, as it may contain information which may undermine the prosecution case, or assist the defendant.

27. In terms of both the prosecution duty and the unused material, reference should be made to the prosecution's '**initial duty**' to disclose (section 3 CPIA) followed by their '**continuing duty**' to disclose (section 7A CPIA[8]).

28. Material provided to the defence before or at the first hearing, which includes the essential information and evidence in the case, is colloquially known as the 'IDPC' (Initial Details of the Prosecution Case[9]). A list of what is typically contained in the IDPC as provided by the police to the CPS, (in both anticipated guilty and not guilty plea cases) can be seen in the table at Annex B.

8 Both sections 3 and 7A were amended by the Criminal Justice Act 2003. The recently amended effective trial preparation form defines disclosure according to the Criminal Procedure and Investigations Act 1996, as amended by the Criminal Justice Act 2003: initial duty [s3 (1) (a)] and continuing duty [s7A (2)] of the prosecutor to disclose prosecution material that might reasonably be considered capable of undermining the case against the accused or of assisting the case for the accused.

9 Part 10 of the Criminal Procedure Rules 2013 refer. (SI 1554/2013)

29. A common complaint we have heard is that the IDPC is often referred to as 'initial disclosure', or 'advance disclosure', neither of which is correct and both only serve to confuse.

30. IDPC information should be sufficient to enable pleas to be taken or to inform allocation decisions for either way cases. It is also expected to be sufficient to enable satisfactory, detailed completion of the effective trial preparation form (more on which later, see paragraphs 119 to 127).

31. The prosecution's initial duty to disclose will arise following the entry of a not guilty plea, whereupon the prosecutor is usually directed to disclose to the defence within a non-statutory set period (often 28 days), **any material which might reasonably be considered capable of** (i) **undermining the case for the prosecution;** and/or (ii) **assisting the case for the accused**. If there is no such material, this must be confirmed to the defence. This time frame is one ordinarily set by the court, as the CPIA does not prescribe a specific period, but requires that the prosecutor must act 'as soon as reasonably practicable.'

32. In addition, the prosecution has a **continuing** duty (applying the same test as for its initial duty) to consider and disclose unused material as necessary, until the trial takes place or any sentence hearing takes place post trial.[10] This is regardless of whether the defence provides a defence statement. If such a statement is served, then the prosecution must respond within 14 days.

33. Annex A contains a brief summary of the main disclosure responsibilities of each party in the criminal justice system.

34. Clarification and use of the correct terms is essential to promote a common understanding of the process. This will need to be incorporated as a starting point in any training on magistrates' court procedure and disclosure.

10 Section 7A CPIA

Present regime

The law and relevant guidance

35. As previously stated, we do not propose to set out the provisions of the CPIA in detail, as they appear in the 2011 disclosure review.

36. It is important to reiterate that the same disclosure test applies to all criminal prosecutions, whether they take place in a magistrates' or Crown Court. The defence are entitled to expect that the prosecution will have complied with its CPIA obligations regardless of venue. If the prosecution has failed to discharge its obligations by the date of trial, the prosecutor will not be entitled to continue, if s/he is satisfied that a fair trial cannot take place.[11]

37. In relation to unused material, the trial process is governed by a legal regime consisting of the CPIA, the linked Codes of Practice, the Criminal Procedure Rules, the Attorney General's Guidelines on Disclosure and the Judicial Protocol on the Disclosure of Unused Material in Criminal Cases. The police and CPS have agreed procedures to enable them to fulfil their disclosure duties and these are set out in the Director of Public Prosecution's Guidance on Charging (fifth edition 2013), the National File Standard and the CPS/ACPO Disclosure Manual.

38. It is noted that there is limited reference to disclosure in the Adult Court Bench Book for magistrates. We understand that the Book is a reference tool and deliberately does not deal with evidential matters in detail. It may however be useful if there were a simple, but more detailed explanation of disclosure within the Book, in addition to further targeted training in this regard, which will be considered further on in this review.

Common law

39. It may be helpful to set out a short précis of the disclosure obligations that exist outside of the CPIA, namely, common law disclosure obligations, colloquially known as '***ex parte Lee***' obligations. These were not considered in the previous reviews.

40. It is apparent in section 3 of the CPIA that the initial duty of the prosecutor to provide disclosure envisages the possibility that some disclosure will have already taken place as s.3(1) reads:

> *"The prosecutor must—(a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which*

11 The CPS/ACPO Disclosure Manual states, "If the prosecutor is satisfied that a fair trial cannot take place because of a failure to disclose which cannot or will not be remedied, including by, for example, making formal admissions, amending the charges or presenting the case in a different way so as to ensure fairness or in other ways, he or she must not continue the case."

might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused or (b) give to the accused a written statement that there is no material of a description mentioned in paragraph (a)"

41. *R v DPP, ex parte Lee*[12] makes it clear that the CPIA did not abolish common law duties regarding the disclosure of material prior to committal proceedings. The prosecutor must consider the possible need to make disclosure at an early stage. The position was helpfully set out by Kennedy LJ at paragraph 9, notably sub paragraph (v) as follows:

"(v) The 1996 Act does not specifically address the period between arrest and committal, and whereas in most cases prosecution disclosure can wait until after committal without jeopardising the defendant's right to a fair trial the prosecutor must always be alive to the need to make advance disclosure of material of which he is aware (either from his own consideration of the papers or because his attention has been drawn to it by the defence) and which he, as a responsible prosecutor, recognises should be disclosed at an earlier stage. Examples canvassed before us were—(a) previous convictions of a complainant or deceased if that information could reasonably be expected to assist the defence when applying for bail; (b) material which might enable a defendant to make a pre-committal application to stay the proceedings as an abuse of process; (c) material which might enable a defendant to submit that he should only be committed for trial on a lesser charge, or perhaps that he should not be committed for trial at all; (d) material which will enable the defendant and his legal advisers to make preparations for trial which may be significantly less effective if disclosure is delayed (eg. names of eye witnesses who the prosecution do not intend to use)."

The position with which we are concerned is that which arises for cases remaining in the magistrates' court.

42. The procedural position has changed since 1999 when this judgment was delivered. The abolition of committals came into force in May 2013 so any reference to this element of the process is now obsolete. We are of the view that *ex parte Lee* still has relevance and the principles set out by Kennedy LJ at (a) and (d) must still apply to the period before duties under the CPIA arise.

43. We therefore underline the need for the prosecution to have in mind their common law/*ex parte Lee* duties, particularly in cases where there is a lengthy period between arrest and charge. Such duties should be considered from the point of arrest, particularly in cases where there may be a need to disclose unused witness details/statements, which may be critical to the defence.

12 *R v DPP, ex parte Lee* (1999) 2 Cr App R 304

44. We acknowledge that this is not likely to arise frequently in cases tried summarily; however it must still be considered. We envisage that any such material should be disclosed to the defence in advance of the first hearing.

CPIA 1996 Defence position

45. The crucial difference with regard to what takes place in a summary only or either way case which remains in the magistrates' courts, is that by virtue of section 6 CPIA, the defence are *not* obliged to serve a defence statement; provision of such is voluntary. A defence statement is mandatory for cases being heard in the Crown Court. Nevertheless, service of a defence statement in a magistrates' court is a prerequisite if the defence seek to make an application for the disclosure of specific unused material under section 8 CPIA.

Code of Practice: Provision of the unused schedule

46. The Code of Practice[13] assists as to what material falls to be included on the unused schedule and how the schedule should be used. In a somewhat convoluted manner, the combined effect of sections 4 and 24(3) CPIA and the Code is to require the prosecutor to provide a document to the defence, setting out the unused material, at the same time as compliance with section 3 occurs. Relevant extracts of the Code appear below and provide the following guidance in this area:

Paragraph 6.2

47. Material which may be relevant to an investigation, which has been retained in accordance with this code, and which the disclosure officer believes will not form part of the prosecution case, must be listed on a schedule.

Paragraph 6.6

48. The disclosure officer must ensure that a schedule is prepared in the following circumstances:

(i) the accused is charged with an offence which is triable only on indictment;

(ii) the accused is charged with an offence which is triable either way, and it is considered either that the case is likely to be tried on indictment or that the accused is likely to plead not guilty at a summary trial;

(iii)the accused is charged with a summary only offence, and it is considered that he is likely to plead not guilty.

13 Requirement for a Code of Practice as set out in Part II, section 23 CPIA 1996

Paragraph 6.7

49. In respect of either way or summary offences, a schedule may not be needed if a person has admitted the offence, or if a police officer witnessed the offence and that person has not denied it.

Paragraph 6.8

50. If it is believed that the accused is likely to plead guilty at a summary trial, it is not necessary to prepare a schedule in advance. If, contrary to this belief, the accused pleads not guilty at a summary trial, or the offence is to be tried on indictment, the disclosure officer must ensure that a schedule is prepared as soon as is reasonably practicable after that happens.

Paragraphs 7.1 and 7.2

51. The disclosure officer must give the schedules to the prosecutor. Wherever practicable this should be at the same time as he gives him the file containing the material for the prosecution case (or as soon as is reasonably practicable after the decision on allocation or the plea, in cases to which paragraph 6.8 applies).

52. The disclosure officer must also draw a prosecutor's attention to any material that satisfies the test for disclosure and include a copy if possible.

Observations on these parts of the Code

53. It is noted that 'wherever practicable' the officer must provide the prosecutor with the unused schedules at the same time as s/he provides the case file. There is some concern that the CPS National File Standard waters down the meaning of 'wherever practicable' such that it deletes it in practice. This is a concern because the requirements of the National File Standard must be subordinate to the legal requirements of the CPIA Code.

54. We would recommend that the police and CPS amend the National File Standard to reflect the requirement of the Code. We consider that it should be the norm for the prosecutor to be in possession of the unused schedule at an early stage and certainly in advance of the first hearing. This is perhaps more practicable in the less complex cases - the typical business of magistrates' courts - which are the subject matter of this review.

55. The requirement to serve the unused scheduled on the defence is also set out in Chapter 7 of the CPS/ACPO Disclosure Manual at paragraph 7.1:

"Non-sensitive unused material should be described on the MG6C[14]. This form will be disclosed to the defence."

56. This practice is also referred to detail in chapter 12 of the Manual which sets out the process. It has grown up over time as a means for demonstrating the status of material and is referenced in three joint CPS/Police guidance areas: (i) CPS/ACPO Disclosure Manual; (ii) Manual of Guidance – joint ACPO/CPS document in which all MG forms can be found; and (iii) National File Standard Guidance – which states that it should be part of the file served on the defence.

57. We are concerned about what we have been told by a number of defence representatives, who report that in practice it is not uncommon for no schedule (or any written confirmation as to the prosecution having complied with their disclosure obligations) to have been served on them by the date of the summary trial.

58. The CPS National File Standard does not allow for unused schedules to have been submitted to the CPS prior to the first hearing because of the belief that a staged and proportionate approach to file building is optimally efficient.

59. We consider that the police and CPS should ensure that in **contested** cases the unused schedule (or a report that states the exercise has taken place, together with any disclosable material, if applicable) should be provided to the prosecutor as soon as possible, such that it can be served at the **first hearing**, once the not guilty plea has been confirmed. If the schedule is not available, trial preparation case management must still take place, with as much as practicable being achieved at this first hearing, including giving directions for disclosure. Therefore, even without it the case must be properly case managed.

60. The current wording of section 13 CPIA states that in the magistrates' court this should be done, '*as soon as is reasonably practicable after the defendant pleads not guilty*.' Notwithstanding the flexibility of this formulation, we strongly believe that for pragmatic reasons of case management, the unused schedule should be available and provided to the defence at court at this stage.

61. In maintaining this discipline, the first hearing can be meaningful and the court will be greatly assisted in its case management duties.

Criminal Procedure Rules

62. Part 22 of the Criminal Procedure Rules deals with disclosure and applies in both the magistrates' and Crown Court. It sets out the procedural requirements of the CPIA and the notes at pages 126 to 129 of the 2013 Rules set out relevant sections of the Act.

14 The MG6C is the police form in which the disclosure officer lists and describes all relevant, unused material.

2013 Criminal Practice Direction

63. The 2013 Criminal Practice Direction refers to Part 22 of the Rules, the Judicial Protocol on the Disclosure of Unused Material in Criminal Cases and to the Attorney-General's Guidelines on Disclosure.[15] It performs a useful sign-posting function as its purpose is not to offer any additional guidance or explanation.[16]

Judicial Protocol on the Disclosure of Unused Material in Criminal Cases

64. The Judicial Protocol was published on the 3rd December 2013 and was issued following recommendations in the 2011 disclosure review, also taking into account the further review in 2012. The relevant paragraphs applicable to disclosure in the magistrates' court are paragraphs 30 to 37. We make no contrary observations on this, save with regard to paragraph 31 where it states,

> *"Cases raising disclosure issues of particular complexity should be referred to a District Judge (Magistrates' Courts), if available."*

This merits further consideration which we will address at paragraphs 133 to 144.

15 See page 38 of the 2013 Criminal Practice Direction. http://www.justice.gov.uk/courts/procedure-rules/criminal/rulesmenu

16 http://www.judiciary.gov.uk/publications/protocol-unused-material-criminal-cases/

Concerns about the present system

65. There are a number of reasons behind disclosure inefficiencies, for example: blanket requests for disclosure on the part of some defence practitioners, compounded by a lack of understanding on the part of the magistracy as to the requirements of disclosure and a decision or direction to disclose material that does not meet the test that the prosecution must apply to it. It appears to us however that these matters are secondary causes or effects. What we have heard from almost all consulted is that the primary cause of the **majority** of disclosure problems lie at the door of the prosecution.

Prosecution

66. A common theme that has arisen at our meetings is the prevalence of prosecution late or non-compliance with its initial and/or continuing disclosure obligations. This frequently leads to ineffective trials, delay and the incumbent costs in both financial and human terms.

67. Many practitioners observe that there is a procedural rather than substance difficulty in most cases. The material listed on the unused schedule (and often any items disclosed) frequently has limited, if any, bearing on the outcome of cases tried summarily. With that in mind, it is all the more frustrating for procedural failures in the disclosure process to lead to a case collapsing, or suffering delay.[17]

68. We conclude from our discussions with all those we consulted that one of the principal reasons for disclosure failure stems from an inability to organise and serve material within the requisite time. This appears to be due to poor time and file management, and/or ineffective strategies in place to allow work to be conducted in the timeframe allowed.

69. It is appreciated that resource implications play a significant part in what is happening within the prosecution agencies, both police and CPS, and the effect that this is having on performance. Both have been and continue to be required to make significant savings and we understand that restructuring and prioritising specific areas is essential to cope with the reduced budget.

70. We have been told that the CPS is dividing its operations into magistrates' and

17 The Criminal Cases Review Commission informed us that between 1 April 1997 and 22 November 2013, the Commission has received a total of 16,938 applications. of which 1,432 were applications seeking a review of a Magistrates' Court conviction. This means that approximately 8.5% of the Commission's casework relates to Magistrates' Court convictions. .
Of the 1,432 Magistrates' Court conviction applications, 30 cases were referred back to Crown Courts for a fresh appeal hearing. Of the 30 Magistrates' Court convictions that the Commission has referred, 6 cases have featured a significant non-disclosure issue (approximately 20%). In addition, the Commission has identified a further 4 cases in which non-disclosure was a significant issue but did not result in a referral. In 7 of these 10 cases, the non-disclosure related to information pertaining to the credibility of a complainant or key prosecution witness(es). This is a theme that is also present in a significant proportion of the Commission's referrals to the Court of Appeal in respect of Crown Court convictions and may therefore be indicative of a wider problem within the CJS.

Crown Court case work teams and reducing the number of offices. Processes are being digitalised, with unused material and schedules now being stored and transmitted digitally.

71. We also understand that as part of the CPS streamlining work, they are likely to replace the unused schedule with a short disclosure report in anticipated not guilty plea summary cases. We have not seen an example of the proposed report, so are unable to comment further on this. The CPIA Code of Practice will need to be amended in this regard, but we mention it here to ensure that any reference or recommendation we make in relation to disclosure remains relevant.

72. We are also aware that standardised national operating procedures have been developed recently, including those dealing with CPS disclosure obligations. We would hope that these developments and changes to the system will improve timeliness and efficiency, in line with the relevant recommendations in this review.

73. We consider below specific stages of the process and how these may be improved. It will also be of benefit to note the table featured at Annex B which sets out the process of disclosure as undertaken by the prosecution in summary trials. This sets out both the stage (in chronological order) and the legislation and guidance document(s) which govern the process.

(i) Delays in the police investigation

74. There is widespread concern among those we consulted at the delay between the arrest or interview of a suspect, and the issuing of proceedings by way of summons, charge, or requisition. This has also been the subject of public debate in another context. In short, an unnecessarily lengthy investigation can mean that evidence is stale when it comes to court. This can lead to injustice. Similarly it is often unjust to victims, witnesses and eventual defendants, for whom an early resolution is normally desirable.

75. In the limited context of this review, we have considered the disclosure obligations under common law, as set out in ***ex parte Lee***, above. That obligation recognises that material should be disclosed at an earlier stage than required by statute when it, *"includes material which will enable the defendant and his legal advisers to make preparations for trial which may be significantly less effective if disclosure is delayed (e.g. names of witnesses who the prosecution do not intend to use)."*

76. The longer the delay, the greater the likelihood that evidence (such as CCTV) will be lost or destroyed, and the harder it will become to trace witnesses or for those potential witnesses to remember events fully and clearly.

77. In some cases a protracted investigation is unavoidable. There may be a number of lines of enquiry to follow. There may be a need for detailed and lengthy forensic science

investigation. However this is seldom the case with trials which take place in a magistrates' court. There are some exceptions. For example in an excess alcohol case a blood analysis may be needed. In some cases DNA evidence needs to be analysed, and that can take time. However those we consulted were concerned that delay had become routine and accepted. They pointed not only to the potential injustice for suspects and witnesses, but also to the inefficiency and extra cost for the prosecution.

78. Generally an investigation that cannot be done immediately is not done at all. The effect of bailing a defendant for a lengthy time is for the investigation to lose impetus; for evidence to become mislaid; and for witnesses to move on, or to be unwilling to attend court. Such problems are exacerbated by multiple listing of summary trials and the inevitability that some will be adjourned through lack of court time.

79. Complaint was also made that more cases than previously are now coming to court by way of requisition. These cases are also routinely characterised by unexplained delay.

80. We appreciate that the police are responsible for operational decisions in respect of each investigation. However, we recommend that the police review their timeliness between arrest and charge (including summons and requisition) carefully in light of both the need for speedy justice in summary cases and their common law disclosure obligations.

81. Where there is a lengthy delay in bringing a summary only or less complex either way case before the court, the prosecution should justify what has happened and provide an explanation at the first hearing. The courts should not tolerate a case to coming to court many months after the event.[18] Where any such delay occurs, in addition to the explanation, there should be a full set of papers (including disclosure) in anticipated not guilty cases.

(ii) Ascertaining the likely plea at the police station

82. There is a strong emphasis on avoiding overbuild of a file by the police. This relies upon the correct anticipation of pleas at the point of charge, requisition or summons (the feedback with regard to the accuracy of this process appears to vary between areas).

83. We agree with almost all those we consulted that it is vital for the police to be as accurate as possible in anticipating whether a defendant will plead guilty or not guilty. There was repeated criticism that in some areas a defendant who makes no comment in interview is assumed to be pleading guilty and the case is then handled accordingly. The reality, as many realise, is that a no comment interview will often be followed by a not guilty plea.

84. We have reservations about the appropriateness of paragraph 6.7 of the Code of

18 We recognise that the courts' powers are limited in this regard. However, a proper explanation should be sought from the prosecution and the culture of simply accepting lengthy, disproportionate delays should change. It may be worth considering what further can be done to escalate this concern with the police if this is perceived to be a significant problem in specific areas.

Practice (mentioned above), namely the suggestion that a schedule may not be needed if a police officer witnessed the offence and that person has not denied it. The reality, judged from everyday experience, is that 'not denying' an offence (usually by offering no comment) is often the precursor to a not guilty plea. It may be preferable for the Code to be amended such that a schedule may not be needed if the defendant has 'fully admitted' the offence.

85. An accurate prediction of plea will enable the necessary information to be available at the first hearing (either a streamlined file or a fuller file). It will also, if our recommendations are accepted, lead to the defendant being listed in the appropriate court (see below).

86. Consultees from all agencies thought that it would be worth considering a process whereby the police could ask **represented** defendants at the point of charge, to indicate whether they are likely to plead guilty or not guilty, on a without prejudice basis. Such a proposal requires safeguards to ensure that there is no unfairness to the defendant or appearance of coercion. A properly worded explanation of the process would alert the defendant to the benefits of an early plea in addition to focussing police resources on cases where there is a clear indication of a not guilty plea at the earliest possible stage.[19]

87. In the absence of any indication from the defence, the police recognise the importance of a correct prediction. They will be greatly assisted in this regard by improvements in training, either internally or as part of the joint training recommended later.

88. For the purpose of this review, it is essential that the appropriate officer,

(i) recognises the correct test for determining whether material falls to be disclosed;

(ii) draws this to the attention of the reviewing lawyer; and,

(iii) prepares a proper disclosure schedule for anticipated not guilty pleas.

89. At present, we understand that unused schedules are only submitted to the CPS upon submission of a file when it is upgraded for summary trial, which is normally 2-4 weeks after the not guilty plea has been entered. In anticipated not guilty pleas cases, the police are required under the CPIA Code of Practice to have identified material which may satisfy the disclosure test and to have prepared a schedule at the point of charge (paragraphs 7.2 and 6.6).

90. While we appreciate the resource based drive to avoid over-built files, we consider that service of the unused schedule 2-4 weeks following the not guilty plea is too late if the case is to be robustly case managed at the first hearing. While earlier consideration of the issues may have resource implications, this must be preferable to the alternative of a

19 This may have greater resonance given the work of the Sentencing Council and likely consultation in 2015 as to guilty plea sentence discount.

less productive hearing with significant longer term resource consequences.

91. With the digitalisation of case files, there are strict time frames within which the police must send electronic files to the CPS after charge; the CPS must then review them and prepare and serve the initial details of the prosecution case (IDPC) on the court and defence in advance of the first hearing.

92. We understand that all too often this material is served on the day of the hearing, which is unhelpful. If the first hearing is to be effective, with the aim of achieving proper case management, details of the case should be available to the defence in advance of this date, save in unavoidable circumstances, such as overnight custody cases.

93. It has been suggested that the optimal approach to case file review would be for a prosecutor review to take place on two occasions; first, to determine whether and what to prosecute (either at the pre-charge stage in cases where the CPS must make the charging decision, or between charge and first appearance in cases where the police have made the charging decision); second, when the upgraded police file is submitted, there should be a timely review of the content followed by service of any initial disclosure and consideration of relevant trial issues (including special measures, hearsay and bad character).

94. We believe that those matters currently considered by prosecutors at the second review stage, must instead be considered in advance of the first hearing of the case with appropriate instructions available to the representative/advocate such that they can assist the court and make progress. It appears to us that it would be preferable for there to be a prosecution lawyer present in all cases where there is an anticipated not guilty plea, to ensure that decisions can be taken and delay avoided.[20]

95. In an anticipated guilty plea case we would recommend that the CPS ensures there is a focus on the common law/***ex parte Lee*** exercise. This could be achieved by written confirmation to the defence that such early consideration of unused material which may undermine the prosecution or assist the defence has in fact taken place, indicating the assumptions on which their consideration has been based and attaching any such material if applicable.

20 Confirmation could be achieved by a standard form of notice, which could be emailed or handed to the defence at court. Any disclosable material could be also available by email, or in hard copy, depending on whether the solicitor is known in advance, or is on secure email. This may be relevant to basis of plea, an indication of lesser involvement in the offence, or evidence of mitigating factors relevant to sentence.

Defence

96. The defence representatives whom we consulted were keen to set out their basic requirements which they considered feasible and would improve the system. Their requests relate to both disclosure and other summary process issues.

97. The defence would like the IDPC to be served in advance of the first hearing whenever possible. Rule 10.2 CPR states that it must be served on the court and defence 'as soon as practicable' and in any event no later that the beginning of the day of the first hearing. We maintain it is preferable to serve the IDPC whenever possible in advance of the hearing, as a matter of best practice. In this regard it is important for defence representatives (when known) to be signed up to secure email, to ensure speed and efficiency in communication. This will be a requirement for defence firms when bidding for the new legal aid contracts in 2015, but until then we would urge all defence practitioners to use secure email as a matter of course.

98. In many cases the defence representative will be unknown in advance of the first hearing. In those circumstances the prosecution will need to consider whether to serve the IDPC on the defendant in person, or to wait until the hearing. Given our recommendation as to the timeframe between charge and first appearance, we would hope that this problem will diminish.

99. At the first hearing in an anticipated not guilty case, it was thought to be **essential** to have a legally qualified prosecutor present to engage in meaningful dialogue and take the case forward. We would entirely agree with this observation and understand that the CPS is currently making changes to its procedure to ensure that this will happen.

100. There was significant concern at the difficulty experienced in making contact with the CPS. We have already made reference to the need for all to be signed up to secure email, but acknowledge that this is not a panacea.

101. The defence were keen to have the unused material (and any schedule or report) served at, or before, the first hearing, but recognised that there was no statutory obligation to do this until the plea had been taken.

102. There was a focus on CCTV evidence which creates particular problems in the system, whether it is in evidence or classed as unused material. This was also identified as a significant concern by other parties, such that it merits consideration in a separate section below, at paragraphs 154 to 162.

103. The defence do not escape from criticism. Failure to engage with the prosecution and court sufficiently at the first hearing was a complaint raised by a number of those whom we consulted. It must, however, be conceded that this is frequently due to them having insufficient papers at this stage and thus being unable to take instructions.

104. This cannot automatically be acceptable as a basis for the first hearing achieving very little. At every summary case the requirement is to take the plea at the first hearing

even if there is limited information available.[21] However, the extent to which the case can be fully case managed depends on the CPS providing sufficient information. Thus the CPS should provide the papers and the court must ensure that the case is fully managed, subject to limitations in paperwork.

105. Provision of a defence statement in the magistrates' court is voluntary. We understand that it is rare to serve one in this jurisdiction. Where one is served, it is not unusual for it not to meet the requirements of section 6A CPIA or to be accompanied by a list of material sought by way of disclosure, some of which may be speculative. This is clearly unacceptable. If further disclosure is sought by the defence then they need to provide a full statement. For example, if CCTV is sought the defence statement should state exactly what the defence says it is expected to show, including whether their client was present and, if so, what he was doing at the relevant time. It is not sufficient to trigger section 8 simply to assert that CCTV will support the defendant's case. It must go further and spell out exactly what that case is.

106. Where a defence statement is served, it should be clear and detailed. If one is not served, the information provided on the effective trial preparation form should be sufficiently detailed. The defence need to be aware that the defence statement is admissible as evidence and that anything on the form may be *potentially* admissible in evidence if it can be regarded as amounting to a defence. This is dealt with in more detail below at paragraphs 119 to 128.

Courts

(i) First available court

107. The following section on 'first available court' drifts away somewhat from the specific question of disclosure. During our meetings with all parties the timing of this hearing was raised as crucial to the overall process and effectiveness of the hearing. We thought that it should be considered in brief, due to its relevance to timing and what is manageable in terms of the parties' compliance with the disclosure regime.

108. Following charge, a defendant must be produced at the first available court. We are aware that there has been discussion in the Criminal Procedure Rule Committee and elsewhere as to the meaning of the first available court.[22] We are however concerned that any system which exists must recognise the reality and allow for appropriate work to be done so that court time is used most effectively. This must of course in no way jeopardise the fundamental need to ensure fairness to the defendant.

21 CPR Rule 37.2 (2) Unless already done, the justices' legal adviser or the court must—
(a) read the allegation of the offence to the defendant; (b) explain, in terms the defendant can understand (with help, if necessary) (i) the allegation, and (ii) what the procedure at the hearing will be; (c) ask whether the defendant has been advised about the potential effect on sentence of a guilty plea; (d) ask whether the defendant pleads guilty or not guilty; and (e) take the defendant's plea.

22 Note Police and Criminal Evidence Act 1984, section 47(3A), although this does not use the precise term 'first available court.'

109. The reality is that in some parts of the country the delay between charge and first hearing is very significant indeed (average figures run from 10.71 to 53.13 days between charge and first appearance[23]). We recommend that this practice be reviewed as a matter of priority by each of the newly created Judicial Business Groups (JBGs). The JBG will want to consider the meaning of *first available court* as discussed below, our recommendation at paragraph 216 and the MOJ Strategy and Action Plan (see paragraphs 207 and 208 below). While we understand the case for local variation, especially to deal with temporary situations, it is strongly recommended that national timescales are adopted wherever possible. Periods of more than 28 days between charge and requisition and first appearance are not acceptable. This will mean that courts in some areas may need to consider 'blitz' courts to clear their blockages.

110. In our view the first available court is as follows:

(i) Where a defendant is in custody, the next sitting of the magistrates' court;

(ii) Where a defendant is not in custody, and is anticipated to plead **guilty**, then generally appearing in court 14 days later appears to be the most pragmatic solution. We consider that this will allow sufficient time to produce a streamlined file and for the defendant to consult a lawyer, if he has not already done so.

(iii) Where the defendant is not in custody and is anticipated to plead **not guilty**, then we recommend that the first available court should be considered to be 28 days from the time of charge. We recommend that there should be a duty solicitor available at the first available court.

111. Defence lawyers urged us to consider a period of 14 days as the minimum necessary to obtain prosecution papers, apply for legal aid, obtain instructions and prepare for a fully effective first hearing. The CPS said they need longer, particularly for anticipated not guilty pleas. Even with anticipated guilty pleas, they point to the right of victims to read their Victim Personal Statement in court, following implementation of the Victims' Code in December 2013. Thus there must be time to take such a statement and notify the victim of the date of the hearing. We have also been told about work that the CPS, police and others are engaged in as part of the MOJ Strategy and Action Plan, where impressive results have been recorded in courts with a 28 day timeframe (from charge to first appearance) in place.[24]

112. Our preliminary view was that the first court appearance time should be set at 2 working days for anticipated guilty and 14 days for anticipated not guilty plea cases. Following our consultation with all parties, we have been persuaded that any such recommendation would be unrealistic if our principal goal is to ensure that the first hearing is effective.

23 These figures are taken from a CPS / HMCTS combined performance summary which is presented to the Joint National Improvement Board.

24 The CPS carried out extensive research in five areas and identified 10 factors that led to improved performance. These factors are summarised in paragraph 207 of this review.

113. We recognise that some may consider a period of 28 days as stretching the meaning of "first available court". We also recognise the dangers of building-in delay, and previous experience suggests that allowing a lengthy time between charge and first hearing creates a fallow period where nothing is done.

114. Similarly, the requirement under the Victims' Code may be perceived as inconsistent with the legislation, which requires a hearing on '*a date which is not later than the first sitting of the court after the person is charged with the offence*.'[25] This is not something upon which we feel it is appropriate to comment further and is beyond the scope of our review.

115. Despite these well founded concerns we have concluded that the timescales set out in paragraph 110 above strike the right balance between timeliness and achievability.

116. Domestic violence cases might be an exception to this proposed timeframe. The prosecution recognises that there is a different dynamic in such cases which calls for an earlier first hearing. The police and CPS have restructured their internal response to these cases and aim for a 48 hour period with bail to a first hearing at a specialised DV court.

(ii) The first hearing

117. There is almost universal agreement that in summary proceedings it is essential for a contested case to be fully case managed at the first hearing.

118. Cases which are robustly managed at this stage result in a higher proportion of effective trials focussed upon the relevant issues between the prosecution and defence. There are significant savings and advantages to all parties if that occurs.[26] Another group set up under the remit of the MOJ Strategy and Action Plan (consisting of the CPS, HMCTS, MOJ and police representatives) is looking more broadly at this question.

Effective trial preparation form

119. Use of the form is prescribed by the Criminal Practice Directions.[27] It is in the process of being amended by the Criminal Procedure Rule Committee and an amended version will be available later in 2014.

120. It is important to reiterate the relevant points made in ***R v Newell***[28] where the Court distinguished the magistrates' court effective trial preparation form (the subject of R v Firth[29]), which '*provides for the making of admissions or the acknowledgement that*

25 Requirement under PACE 1984 Section 47(3A), subject to (3A) (b) 'where he is informed by the designated officer for the relevant local justice area that the appearance cannot be accommodated until a later date, that later date.'

26 *R (Drinkwater) v Solihull Magistrates' Court* [2012] EWHC 765(Admin). Divisional Court (Sir John Thomas, P.; Beatson, J.), 27th March, 2012. Note in particular the observations as to the essential nature of case management made by Lord Justice Thomas, President of the Queen's Bench Division, (as was), at paragraphs 47 to 56.

27 Criminal Practice Directions [2013] EWCA Crim 1631 issued on 3 October 2013. See paragraph 3A.3

28 ***R v Newell*** [2012] EWCA Crim 650; [2012] 2Cr.App.R 10. See paragraph 46 of the 2012 disclosure review.

29 *Firth v Epping Magistrates' court* [2011] EWHC 388 (Admin); [2011] 1 W.L.R. 1818; [2011] 4 All E.R. 326; [2011] 1 Cr. App. R. 32; [2011] Crim. L.R. 717

matters are not in issue' (para 35) from the Crown Court's PCMH form which, '*should be seen primarily as a means for the provision of information to enable a judge actively to manage the case up to and throughout the trial and the parties to know the issues that have to be addressed and the witnesses who are to come*' (para 33).

121. The different position regarding disclosure in the magistrates' and Crown Courts was noted in the judgment: unless a defence statement is given voluntarily in the magistrates' court there are '*no provisions equivalent to s.11 of the CPIA*' (para 35). The case also made clear that the form should be completed at the first hearing.

122. The different purpose of the PCMH form and the defence statement is clear: the former is primarily an administrative form, the latter a statement of the defence case. There is no reason, however, why a fully detailed effective trial preparation form should not contain sufficient detail so as to amount to a defence statement, thus enabling the prosecution to focus on what is disputed, assess the unused material and consider disclosure. In effect, one can regard the form in the following way:

(i) Information contained in the main body of the form, although admissible, should normally be excluded under section 78 of the Police and Criminal Evidence Act 1984;

(ii) Any admissions set out in the form may amount to section 10 Magistrates' Court Act 1980 admissions and therefore be admissible in evidence;

(iii) It is possible to turn the back page of the form into a defence statement, which will allow the defence to make any section 8 CPIA application as required. There may be scope for amending the form to ensure that this possibility is reflected on its face and perhaps prompt magistrates to ask what the defence propose to do (as part of their active case management function) in the event of it not being completed.

123. The form must be filled out correctly and in detail before or at the first hearing. It should confirm whether or not an application to adduce bad character or hearsay evidence is to be made, a matter which the defence raised during our consultation discussions, as a 'must have' whenever possible for the first hearing.

124. Part 2 of the form is for the prosecutor. The amended version is likely to include questions concerning unused material. This is a new addition to address an issue not previously considered at the first hearing, namely the unused material. The rationale for its inclusion is that earlier consideration could often lead to resolution of issues for the trial preparation that otherwise await a formal section 8 CPIA application by the defence. The whole tenor of the form is to promote full appreciation of the disclosure and trial management process and a need to make earlier directions and decisions that parties can rely upon.

125. The defence consultees have expressed concern at the perception that there

may be pressure put upon them to provide a defence statement at the first hearing. We repeat that there is no requirement to serve a defence statement at all, unless they want further disclosure. If they do want further disclosure, we would urge them to serve the full defence statement at the first hearing. In many cases this will trigger a section 8 application, which can be determined by the bench there and then.

126. We hope that our recommendations as to service of material before the first hearing and the timing of that hearing, may make this possible in most cases, so that separate and later disclosure applications can be avoided. This will assist in achieving maximum case management efficiency. However, we recognise that there will remain many occasions (for example when the defendant instructs a lawyer, perhaps a busy duty solicitor on the day of the first hearing) where there will be insufficient time to prepare an adequate defence statement.

127. In summary, normally we would expect the following to take place at the first hearing:

- The effective trial preparation form should be completed as far as the available information allows;
- The CPS should then provide a schedule of unused material and disclosure report confirming that they have complied with their statutory duties at this stage. This should take place at the first hearing (once the defence have provided their fully completed form which indicates that they will be pleading not guilty and identifies the issues)[30];
- If a defendant then wishes to apply for further disclosure under section 8 CPIA, s/he must serve a defence statement (either on the back of the form or separately).

128. If the defence seek section 8 disclosure they should set out a full defence statement at the first hearing where possible (unless the application is conceded). In many cases it will be possible for a section 8 application to be resolved by the Bench at this hearing. If that is not possible (and we appreciate that there may be practical difficulties in terms of timing) then provided a defence statement is served on time and an application is properly triggered, there may necessarily be a later 'hearing' before the date of trial. This may be dealt with electronically if the system permits and all parties agree, but see paragraphs 175 to 183 below.

129. Court arrangements for the first hearing are the responsibility of the justices' clerk. These will necessarily depend on courtroom and staff and CPS availability.

130. Where the facilities exist, and where the volume of work makes this realistic, then

30 It is understood that a defence statement is triggered by the prosecution serving initial disclosure under section 3 CPIA, but in many cases tried summarily we see no reason why it would be difficult to at least fully identify the issues at this first hearing, particularly in light of the observations made in paragraph 126.

there are great advantages in two first appearance courts sitting side by side. One court will deal with anticipated guilty pleas, and may be prosecuted by an associate prosecutor. The other court will deal with anticipated not guilty pleas, and should be prosecuted by a lawyer able to take all appropriate decisions. Having two courts sitting side by side enables unanticipated not guilty pleas to be transferred to the neighbouring court.[31]

131. This arrangement would not only permit the appropriate level of prosecutor, but would also enable the justices' clerk to list in the not guilty, or case management court a Bench that can confidently and properly case manage.

132. In less busy courts it may be possible to list all first appearances together, presided over by a Bench with strong case management experience (which we consider further below) and prosecuted by a lawyer with the necessary authority.

(iii) Case Management Bench

133. Several of those consulted strongly advocated that in general, district judges were in a better position to carry out robust case management than magistrates. The recent Judicial Protocol, (referred to above at paragraph 64) recommends that, "cases raising disclosure issues of particular complexity should be referred to a District Judge (Magistrates' Courts), if available." We would not disagree with this recommendation.

134. For many years it has been suggested that case management is often better placed in the hands of a professional judge. This is because their experience and professional training give them an advantage in quickly resolving disputes around the admissibility of evidence, (including hearsay and bad character) and, critically for this report, disclosure.

135. Repeated observations from our consultation groups support the contention that there is a widespread practice of ordering disclosure inappropriately (see also paragraph 24). It is also generally agreed that the more issues resolved at the first hearing, the better. This could include the question of defence section 8 CPIA disclosure applications or applications for third party witness summonses.

136. In our view it would be wrong to be prescriptive and to suggest that case management should be reserved to a district judge, where available. Many magistrates have a strong aptitude and interest in this work. Similarly, while some legal advisers are

31 Listing is a judicial responsibility, which is vested in the justices' clerk in the magistrates' court. The Senior Presiding Judge published a protocol on governance on 20 December 2013 entitled 'Responsibilities for the leadership and management of the judicial business of the Magistrates' Courts'. See paragraphs 19 and 20 of the protocol:
(19) Listing is a judicial function and it is the responsibility of the JBG to set the listing policy, and to determine the listing practice in the clerkship, under the supervision of the Presiding Judges. The JBG and the JLG must ensure that listing practice is consistent with the principles set out in the *Consolidated Criminal Practice Direction on Listing and Allocation* and any relevant guidance from the President of the Family Division.
(20) The JBG shall have responsibility for making strategic decisions relating to listing across the clerkship. Such strategic decisions may include centralising business where there is a need to do so, moving work across the clerkship to ensure effective distribution of workload, and ensuring that Magistrates across the clerkship maintain competences, and that fairness in sitting levels is achieved at a time of reduced workload. The day to day application of the JBG's listing policy is the responsibility of the Justices' Clerk.

said to be insufficiently assertive in case management, and to lack the necessary authority with advocates, there is no doubt that there are many legal advisers who have a strong ability to case manage. We are convinced that case management is an essential learned skill that needs to be acquired by magistrates. Efficient pre-trial case management will be wasted if the trial bench is not equipped to deal effectively with the issues that can arise on the day of trial.

137. The view was expressed by some that case management at the first hearing should always be conducted by a Bench, namely a judge or magistrates. That was the view advocated by *Stop Delaying Justice*! On the other hand, the legal adviser has case management powers such as the fixing or setting aside of a date, time and place for the trial of an information[32] as well as the giving, variation or revocation of directions for the conduct of a criminal trial,[33] so there are some who regard legal advisers as having a key role in case management.

138. Another argument advanced was that an experienced chairman might sit alone to deal with case management. The powers exist[34] enabling a single justice to make the directions described above in addition to certain other powers which are not available to legal advisers (such as: prohibiting the publication of matters disclosed or exempt from disclosure in court; extending bail on different conditions than previously imposed, or imposing or varying conditions of bail, without needing the consent of the parties; and ordering separate or joint trials in the case of two or more accused without needing the consent of the parties).

139. The disadvantage of this approach is that less experienced magistrates will lose an opportunity to gain experience of case management by sitting with a more experienced colleague. It may also be resource intensive for HMCTS who observe that any use of justices, rather than district judges, to undertake case management would require provision of a legal adviser to cover what takes place.[35]

140. In some areas magistrates have sat as observers with district judges in order to gain experience of case management. Similarly, where legal advisers (as opposed to court associates) sit with a district judge, this can lead to shared practice and undoubtedly also broadens the range of experience available to deal with this work.

141. As stated, we are of the view that robust case management, in particular in relation to disclosure, is essential. The decision as to where work is listed is the responsibility of the justices' clerk. We recommend that the justices' clerk ensures that the anticipated not guilty list is presided over by a strong case management bench. That bench might be a district judge, but might also be an experienced and well trained chairman, or a Bench with a legal adviser with particular aptitude and interest in case management.

32 Justices' Clerks' Rules 2005, Schedule, Para 15

33 Ibid, Schedule, Para 17. This includes directions as to the timetable for proceedings, the attendance of the parties, the service of documents (including summaries of any legal arguments relied on by the parties), and the manner in which evidence is to be given.

34 Crime and Disorder Act 1988, section 49

35 Consider Courts Act 2003, section 28(4) and (5) which provides for the advice giving function of the justices' clerk.

142. We have been struck by the extent to which the magistrates we have consulted have confirmed their view that case management should be undertaken only by those committed to the work and specifically trained in it. We recommend that thought be given to developing a programme of accreditation for case management magistrates. While such a programme is developed and the funding is securing, magistrates should be encouraged to sit with District Judges to observe case management in operation, much as aspiring Recorders shadow judges in the Crown Court.

143. We are of the view that it would be good practice for legal advisers to use their case management skills throughout the day. For example, legal advisers could preview forms before they reach the bench to ensure that the forms are properly completed and the parties have addressed their minds to questions the bench may ask. This could be done whenever there is time throughout the day, for example when the bench retire or there is a natural break in proceedings.

144. We recommend that there should be compulsory and detailed training for those involved in case management. This could include joint training of judges, experienced magistrates, and nominated legal advisers. Similarly we recommend a system of feedback. This would involve the justices' clerk, or someone of similar authority, reviewing both cases where a trial had been ineffective or cracked, as well as cases which had been managed successfully, to see what lessons can be learned and drawn to the attention of the case manager, whether judge, magistrates or legal adviser.

(iv) Disclosure not provided by the day of trial

145. It appears to be a fairly common experience that disclosure requirements have not been dealt with by the day of trial. Although accurate statistics are not available, this failure appears to account for many cases where the trial is ineffective or cracked.

146. The question has been raised as to what should happen on the day of trial if the prosecution has not complied with its disclosure obligations.

147. The first point for consideration is whether the Crown has indeed failed to comply. In some cases it is reported that there are late section 8 CPIA applications and that the fault, if any, therefore lies with the defence. However if the failure is clearly at the door of the prosecution, then it is the prosecution who must make the application for an adjournment to comply with its obligations.

148. If the application for an adjournment is refused, the consequence must be that the prosecution should offer no evidence, in line with the guidance set out in Chapter 1 of the CPS/ACPO Disclosure Manual. It would be against the professional code of conduct for prosecutors to proceed to trial having not complied with their statutory disclosure obligations. Generally an abuse of process argument is neither necessary nor appropriate.

149. A common and very unfortunate situation is that the prosecution serve, on the day of trial, disclosure or a notice stating that there is nothing to disclose. Here the

Bench should proceed in the interests of justice, applying common sense. Although the defence would be entitled to make a section 8 application within 14 days, it will often be appropriate for the court to expect the defence to set out its full defence case in order to trigger the section 8 application.

150. In some situations, the section 8 application can be dealt with there and then. If, having heard such an application, the court decides that there is no obligation for further disclosure, then, unsatisfactory as late service may be, the interests of justice may require the case to proceed. Similarly, where disclosure is made on the day of the hearing, it will often be possible, without injustice, for there to be a short adjournment on the day of trial for the defence to assimilate the new information, but for the trial itself nevertheless to proceed.

151. There will be occasions when it is unreasonable to expect the defence to assimilate new information on the day of trial, or where the court orders section 8 disclosure on the day of trial, and the prosecution cannot comply. In those circumstances an adjournment may be appropriate.

152. The key point is that this position should never have been reached. It is not simply a failing of the prosecution. The defence has an obligation to draw this to the attention of the court in advance, and it is the responsibility of the court to ensure that proper disclosure has been made sufficiently in advance of the trial.[36]

153. We recommend that in every case where there has been a disclosure failure which delays or derails a trial, the court should consider whether there were failings by the court itself.

(v) CCTV evidence generally and the obligation of the court not to order disclosure inappropriately

CCTV

154. It became clear during our consultations that many benches are ordering disclosure inappropriately. The most common situation reported to us involved CCTV, or drink drive cases.

155. If used in evidence, we consider that CCTV footage should, where possible, be available as part of the IDPC in an anticipated not guilty case, or at least be available to view at court, which may in turn lead to a guilty plea. We anticipate that this process may be facilitated in due course by the digitalisation process, when it is understood that defence will have access to a common IT platform.

156. In the event that CCTV evidence, on which the prosecution is to rely, is not

36 It is important to have in mind the overriding duty set out at Rule 1.2(1)(c) of the Criminal Procedure Rules, where each participant in the process must 'at once inform the court and all parties of any significant failure (whether or not that participant is responsible for that failure) to take any procedural step required by these Rules, any practice direction or any direction of the court. A failure is significant if it might hinder the court in furthering the overriding objective.'

available before or at the first hearing, it must be available in good time before the trial to prevent applications for adjournment and ineffective trials. This is a good example of where the court can exercise robust case management by directing arrangements to be made to ensure that the defence can view it timeously.

157. When CCTV footage is retained as unused material but is not considered to be disclosable, the defence should be provided with assistance to understand, in general, what it contains. The description on the unused schedule should be sufficiently clear to provide confidence that the footage has been viewed and considered appropriately. Ideally, the defence would like to be able to inspect the material in every case, although we are concerned that this would afford it a status which circumvents the disclosure statutory regime.

158. We are concerned about the difficulties and consequent inefficacy in the system that CCTV material creates. The delay in service or failure to consider it appropriately leads to frequent adjournments to trial.

159. Notwithstanding our concern in this regard, in respect of disclosure, we do not believe that CCTV should be afforded a special status or treated differently from other unused material. While we understand the defence concerns, we are mindful of the policy and resource implications which may arise from allowing this material to be disclosed or inspected without consideration of the statutory test.

160. However, the prosecution must ensure that the description of any such material, where it satisfies the tests for unused material, is sufficiently detailed and available to the defence at the first hearing to ensure any issues can be raised if appropriate. If the defence wish to provide a full defence statement, they may do so, setting out why they believe that disclosure of CCTV material is necessary in line with the identified issues in their case.

161. If CCTV is material to be used by the prosecution, then service is governed by the Attorney General guidelines. Paragraph 35 of the Judicial Protocol further assists in this regard and states:

> *35. Although CCTV footage frequently causes difficulties, it is to be treated as any other category of unused material and it should only be disclosed if the material meets the appropriate test for disclosure under the CPIA. The defence should either be provided with copies of the sections of the CCTV or afforded an opportunity to view them. If the prosecution refuses to disclose CCTV material that the defence considers to be disclosable, the courts should not make standard or general directions requiring the prosecutor to disclose material of this kind in the absence of an application under section 8. When potentially relevant CCTV footage is not in the possession of the police, the guidance in relation to third party material will apply, although the police remain under a duty to pursue all reasonable*

lines of inquiry, including those leading away from a suspect, whether or not defence requests are made.

162. It is worth repeating that if potentially relevant CCTV footage is not in the hands of the police or prosecution, then the guidance on third party material will apply. Any such application must be made by the defence as soon as practicable, and not on the day of trial. Similarly, service of CCTV on the day of trial is undesirable, but may not always lead to an adjournment (see paragraph 150 above).

(vi) Third party material

163. Another frequently occurring problem is where improper and unlawful orders for disclosure are made in driving and, in particular, in drink-driving cases. The law was reviewed in the case of *McGillicuddy*[37], an appeal by way of case stated against the decision in the magistrates' court to stay the proceedings as an abuse of process. The decision at first instance was that the failure of the Crown to disclose full printouts for an intoximeter machine (which had been ordered by the court previously under the provisions of section 8 CPIA) meant that the defendant could not receive a fair trial and that commercial confidentiality could not provide a basis for refusing disclosure. The printouts in issue were in the possession of the manufacturers of the device, not the Crown. On appeal it was held that the material in the hands of the manufacturer was not prosecution material section 8(3) and (4) of the CPIA. It had never been in the possession of the Crown, and the manufacturer was not part of the prosecution team.

164. In short the Crown cannot be ordered to serve material which is not in its hands, for example the F111 reports and engineer reports. Where an inappropriate order has been made, and not complied with, this does not amount to an abuse of process.

165. A useful definition of third party material can be found at paragraph 54 of the Attorney General's Guidelines 2011[38]:

"Third party material is material held by a person, organisation, or government department other than the investigator and prosecutor within the UK or outside the UK."

This material does not fall within the remit of the CPIA and there is no obligation on third parties to retain or provide material to the prosecution. The 2013 AG Guidelines and Judicial Protocol on Disclosure set out clearly what should be done with regard to material of this nature.

166. We do however make the following observations:

37 *DPP v Wood, DPP v McGillicuddy* [2006] EWHC 32 (Admin)
38 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/16239/Attorney_General_s_guidelines_on_disclosure_2011.pdf

(i) it is wrong for the Court to order the Crown to make disclosure of material that is not in their hands. The procedure used in a magistrates' court is set out in section 97 of the Magistrates' Courts Act 1980. Part 28 of the Criminal Procedure Rules and paragraphs 3.5 and 3.6 of the Code of Practice under the CPIA 1996 should be followed;

(ii) we are hopeful that the 2013 'Protocol and Good Practice Model for disclosure of information in cases of alleged child abuse and linked criminal and care directions hearings' in force from 1 January 2014 will assist in the timely provision of third party material in this specific category of case, although it is acknowledged that this protocol will apply in the main to proceedings in the Crown and Youth courts.

167. This is not an area which we have covered in any detail, because we considered that this would warrant a more focused piece of work should it be seen as necessary.

(vii) Case progression officers

168. It is a requirement of the Criminal Procedure Rules that the Court appoints a case progression officer for each case.[39] It was the experience of many of those that we consulted that the case progression officer played a vital role in ensuring that cases were ready for trial.

169. Case Progression Officers, appointed by HMCTS, check whether a case is trial ready, and if not attempt to resolve any difficulties outside court. However it is reported that in many areas this post has been abolished or at best undertaken by somebody who is not a dedicated case progression officer.

170. As we have already stated, the optimum approach is that all contested hearings in the magistrates' court are fully case managed at the first hearing. Best practice would dictate that all issues, including disclosure, are resolved before the parties leave court. At the moment it is rare, as many tasks including the service of disclosure are often delayed until after the first hearing. As we have mentioned, a separate group is looking at the wider aspects of this proposal.

171. Notwithstanding the ideal approach, the fact remains that there will be some cases where it is not possible to fully case manage at the first hearing. The question then arises as to what should happen if a case is not fully trial ready by the end of the first hearing.

172. The ideal solution is for the case progression officer to liaise with the parties before trial until the case is trial ready. However, as many areas no longer have dedicated case progression officers (which is a concern given the requirement set out in the Criminal Procedure Rules[40]) we need to consider the alternatives.

39 CPR Rule 3.4(2) In fulfilling its duty under rule 3.2, the court must where appropriate—(a) nominate a court officer responsible for progressing the case; and (b) make sure the parties know who he is and how to contact him.
40 CPR Rule 3.4

173. One possibility is that all such cases are automatically listed for a second case management hearing closer to the trial. We have evidence that this works very well in some areas, such as Sheffield and Hull, where it has reduced the incidence of ineffective trials.

174. This has the advantage of transparency and open justice. In many cases the defendant is required to attend and a guilty plea is frequently entered at these second case management hearings. This reduces the potential for trials to crack on the day of hearing, with all the consequent disadvantages for witnesses who attend unnecessarily, wasted preparation and wasted court time. However it has the disadvantage of an extra hearing with cost implications for the prosecution and defence, as well as the court.

175. A further concern as to the holding of a second case management hearing is that it is inconsistent with the philosophy of CJSSS[41] and *Stop Delaying Justice*!, both of which aim for two hearings only: the first (plea) hearing and the trial itself. In a very limited number of cases, the advantages of a second hearing may outweigh the disadvantages. For the majority, however, if issues need to be resolved we think it preferable for case management to be conducted outside court, as discussed below.

176. With resources firmly in mind, another possibility (also envisaged in Rule 3.5(d) of the Criminal Procedure Rules) is that individual cases should be routinely case managed outside court by judges and magistrates and legal advisers. There are various ways this could work, particularly using modern technology such as video or telephone conferencing, linking with electronic files, or telephoning the parties.

177. It has also been suggested that case progression meetings held out of court and not involving the judiciary, might be a useful means of identifying problems in advance of trial. We see force in this suggestion. These could be attended by the CPS, administrative police staff, the Witness Care Unit and HMCTS, at least two weeks before trial. If matters can not be resolved then, and only then, should they be listed for a further case management hearing.

178. A further suggestion made was for a single magistrate to use an office, perhaps on a weekly basis, to case manage files.[42] This would count as a sitting day.

179. There are at least three perceived difficulties with the concept of case management outside court:

(i) Do legal advisers have the capacity to undertake this case management work, in view of budget cuts at HMCTS?

(ii) Is it appropriate for members of the judiciary to take over a case progression role originally assigned to members of HMCTS who, for funding reasons, are no longer in post? This is, in effect, a political question;

41 CJSSS – Criminal Justice: Simple Speedy Summary, a cross-agency program of work which aimed to ensure that high volume magistrates' court cases were dealt with swiftly and efficiently.

42 Under CPR Rule 3.5(2) (a) the court may—(a) nominate a judge, magistrate or justices' legal adviser to manage the case;

(iii) It may be inappropriate for a member of the judiciary to be contacting one party, in effect, privately. In short the process lacks transparency unless all parties are copied into the communication.[43]

180. Our preliminary view is that we should explore ways of ensuring a case is properly managed out of court after the first hearing, to ensure that it is trial ready. There should be ways of satisfying the need for transparency, such as by way of an e-mail thread that both parties can read. The lack of transparency concern could arguably also be said to apply to case progression officers (although they are in a different position to members of the judiciary) who have historically been successful in carrying out this work, with rare complaints (indeed none that have been brought to our attention).

181. We appreciate that there are resource considerations with regard to the appointment of case progression officers in all courts: however all those we consulted felt that having someone in this dedicated role was essential. It is also required by the Criminal Procedure Rules. We would ask HMCTS to consider whether and how this could be achieved, with the potential balance of saving money by reducing the number of ineffective trials or second case management hearings.

182. The defence must notify the court as soon as they become aware that there is a problem which may affect the trial date and could require a pre-trial hearing, or more focused out of court case management (in line with the overriding objective set out in Part 1 of the Criminal Procedure Rules[44]). This will assist the court with its listing arrangements, avoid an ineffective trial and improve the process from the perspective of a victim or witness.

183. As far as disclosure is concerned, we see no problem with the defence being asked out of court whether they have received disclosure, and if not, for the prosecution to be reminded to serve it, and for these conversations to be followed up later, preferably by email.

(viii) Costs

184. Where a guilty plea is anticipated, a streamlined file should be prepared. Where the anticipated plea is not guilty, a more substantial file must be prepared.

185. An anticipated plea of not guilty will require a disclosure schedule containing a

43 We acknowledge that Rule 3.5(e) CPR allows this to happen, but the defence have raised concerns and would expect all parties to be copied into correspondence concerning the case (unless it related to a sensitive issue).

44 CPR Rule 1.2.—(1) Each participant, in the conduct of each case, must—
(a) prepare and conduct the case in accordance with the overriding objective;
(b) comply with these Rules, practice directions and directions made by the court; and
(c) at once inform the court and all parties of any significant failure (whether or not that participant is responsible for that failure) to take any procedural step required by these Rules, any practice direction or any direction of the court. A failure is significant if it might hinder the court in furthering the overriding objective.
(2) Anyone involved in any way with a criminal case is a participant in its conduct for the purposes of this rule.

clear identification by the officer to the CPS of any available material that undermines the prosecution case or assists the defence.

186. The cost difference, in terms of police resources, between a streamlined file and a full file is significant in the context of a summary trial. This is believed to be a major factor in undermining previous attempts to ensure full case management at an early stage.

187. In our view, it is appropriate to differentiate between the costs awarded to the prosecution on conviction depending on whether a streamlined file or a full file has been produced. Whether it is fair or appropriate in any particular case to award the higher amount will remain at the discretion of the court.

188. The longer the case lasts the more prosecution preparation is required and the costs will be greater. The bench may decide, for example, that a guilty plea was clearly indicated at an earlier stage and the preparation of a full file was unnecessary. On the other hand, where there is a last minute plea of guilty, preparation of a full file will usually be justified.

(ix) Sanctions

189. A number of consultees complained about the lack of teeth available to the court should it wish to sanction a party (in the event of non-compliance with orders and failure to provide material in time or at all). The options available to the court were generally regarded as ineffective.

190. The option of making an order for wasted costs was not greeted with enthusiasm by the consultees and, perhaps surprisingly, this included the defence who found that any attempt at enforcement cost a disproportionate amount of time and money. Such orders are not intended as sanctions in the sense of punishment, but as a means of getting recompense for costs incurred avoidably. The defence regard them as ineffective.

191. Making complaints about police failures/behaviour was also regarded by the defence as highly problematic and resource intensive. They considered it would be preferable to have a pre-ordained sanction available, which would not oblige the defence to pursue a complex and drawn out complaints process.

192. We have already addressed what should be done in the event of a prosecution failure to comply with their disclosure obligations by the date of trial. In most cases, we do not consider this to be an appropriate abuse of process matter.[45] If the prosecution has failed to serve disclosure by a given date, the defence should notify the court in good time in advance of the trial to give the court and prosecution an opportunity to address the failure. If the trial date arrives and disclosure obligations have not been met and can not be remedied that day, it is likely that such failure will force the prosecution to offer no evidence (see paragraphs 145 to 153).

45 See section 10(2) of the CPIA 1996. This is subject to s.10(3) which states that subsection (2) 'does not prevent the failure constituting such grounds if it involves such delay by the prosecutor that the accused is denied a fair trial.'

193. The statutory power most frequently used to make orders for costs in the event of prosecution failures is found in section 19 and 19A of the Prosecution of Offences Act 1985, supplemented by the Costs in Criminal Cases (General) Regulations 1986. The Criminal Procedure Rules have created a Rule for each situation in Part 76.

194. Section 52 of the Senior Courts Act 1981 refers to 'rules of court' which includes the Criminal Procedure Rules. This allows the Rules to create powers under that Act in relation to costs – but this is confined to the Crown Court and other senior courts. The Criminal Procedure Rules are unable to confer further powers in the magistrates' court and there is no other statutory provision which would allow magistrates' courts to create further types of cost sanctions. Any expansion in this area would therefore need to be achieved by primary legislation.

195. With this in mind, we make no immediate recommendations with regard to sanctions. We are also mindful of the 2012 review by Lord Justice Gross which expressly considered sanctions for disclosure failure, so conclude that further, detailed consideration of this area is unnecessary at the present time.

Training

196. It is apparent that there must be a change in culture in the prosecution, defence and judicial attitude to the first hearing. Many attempt to make it work, but there is frequently a reluctance to make the required progress for a variety of reasons. In the current economic climate, this culture needs to be addressed and one starting point will be by means of joint training for all those engaged in the system.

197. There was a general consensus among those with whom we consulted for joint events involving the police, CPS, defence practitioners and the judiciary. Some concern was expressed as to not being seen to do anything which could compromise the independence of the judiciary and for this reason we would advocate separate formal training, but joint local 'events' which could be organised by the court, in a similar manner to local events which were held to raise awareness of the Early Guilty Plea Scheme.

198. A major advantage of holding a joint event is that it could improve understanding between parties and incorporate all aspects of the process, thereby covering the expectations of all parties, firstly police, then CPS, then defence, then the court.

199. Separate training must start with the basics and incorporate the following:

- The terminology of disclosure, as well as the process must be set out, understood and used by all parties;
- A culture of early communication between the prosecution and defence must be encouraged;
- The IDPC and unused schedule (or report that purports to discharge the prosecution duty of initial disclosure) must be available to the defence before the first hearing;
- The importance of making the first hearing effective, either by way of a guilty plea or not guilty plea followed by robust case management;
- The necessity of completing the effective trial preparation form to a satisfactory standard, to enable identification of the precise issues in dispute and proper case management to take place;
- The importance and value for disclosure of providing a defence case statement where possible either at the first hearing, or shortly thereafter;

- The need for all to engage in the progression and monitoring of a case; the defence should be encouraged to contact the court before trial, in the event of disclosure failures/non compliance with orders, to avoid an ineffective trial.

200. The training that we envisage and recommend – including for the accreditation of magistrates to carry out pre-trial case management - would be run by the Judicial College, with the assistance of the Justices' Clerks' Society. Joint events could then be carried out by a core group who attend sessions in local areas. The training process is not without precedent and would be similar to that used in *Stop Delaying Justice*! (SDJ) but with a specific emphasis on disclosure. We contend that the cost is justified given the positive impact that SDJ had upon magistrates' court practices in respect of case management.

201. If resources permit, the training material could include a film which would be available on the judicial College website, in addition to the CPS and police websites and Crimeline.

202. In addition to training, we consider that a short guidance document for magistrates could be provided in a flow chart or manageable format for day to day reference purposes.

Legislative change

203. While the review does not call for legislative change, it was noted during our discussions that there may be a longer term case for considering whether a simpler regime in magistrates' courts may provide the foundation for a more efficient system. One proposition put forward was whether one could dispense with the undermining and assisting tests and provide the defence with all unused material in summary cases. This would then remove the need for the defence to serve a defence statement and for applications under section 8 of the CPIA.

204. We acknowledge that any such change would not necessarily require primary legislation, as it could be a matter of policy for the prosecution. This would not however, be a desirable solution. While nothing in the CPIA prevents the prosecution from adopting such a process, it would clearly not involve application of the CPIA test and is likely to be regarded as an abdication of responsibility.

205. The proposal would ultimately be cost neutral. By the time it came into force, the development of the digital file would have reached the stage where defence could access such material via the common IT platform, avoiding the need for the prosecution to copy papers to give to the defence. Furthermore, under the legal aid provisions, defence solicitors are not paid for looking at this unused material.

206. There is some concern that creating a different disclosure system in the courts could lead to confusion and send unhelpful messages to practitioners. This is clearly a matter for others to determine and we have deliberately restrained our recommendations such that they can have an immediate (or at least timely) impact upon the process.

Magistrates' Court Review: Linked work and the strategic picture for summary justice

207. The Ministry of Justice has recently published its 'Transforming the Criminal Justice System' paper,[46] in which Damian Green, Minister of State for Policing and Criminal Justice, makes reference to having established a Criminal Justice Board made up of senior representatives from across the CJS. The Board has collectively considered a number of areas in which improvement and greater efficiency is sought and devised a 64-point action plan. A number of these actions are aimed at transforming the summary justice system. These include:

- Better identification of anticipated guilty pleas by police and CPS.
- Prioritisation of anticipated guilty pleas for early preparation and where possible, for early hearing.
- Making first hearings as effective as possible in cases that are likely to go to trial.
- Supporting the Chief Magistrate and His Honour Judge Kinch QC in their review of the magistrates' courts disclosure rules to ensure they are proportionate and effective.
- Supporting the judicially-led reinvigoration of the '*Stop Delaying Justice*!'(SDJ) initiative.

208. The linked items within the Strategy and Action Plan fit together as outlined below:

Action 3-5, 16 and **29** refer to 'digitalisation' of the magistrates' courtroom which is being delivered by the CJS Efficiency Programme. This includes aim for all parties to operate without paper by 2015/16; increased use of video link by witnesses and prison video links and better use of agent prosecutors (the Bar).

Actions 1, 2 and 8 refer to the introduction of a streamlined digital case file, which will be based on standards decided by a working group, considering what the minimum requirement for a successful hearing will be. By April 2014 a simplified file for traffic and shoplifting cases should be available.

Action 9 refers to consolidating high-volume, low-level 'regulatory' cases and then

46 Transforming the CJS 'A Strategy and Action Plan to Reform the Criminal Justice System' published on 28 June. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/209659/transforming-cjs-2013.pdf

removing them from traditional courtrooms, enabling appropriate prioritisation of more serious and complex cases.

Actions 10 and 11 refer to increasing Police-led Prosecutions, (traffic and other specified offences) ensuring that in all areas, the CPS no longer have a role in straightforward, low-level, motoring cases (unless a not-guilty plea is entered), and that the approach is tested and adopted in other appropriate cases.

Actions 12, 13 and 23 refer to ensuring the right preparation is in place to make first hearing more effective, and proportionate. This includes ensuring that the police and CPS do more to identify and prepare accordingly anticipated guilty plea cases. As previously referred to at paragraphs 109-110, work on this so far has identified 10 factors which positively impact upon performance, mainly of which will be common sense:

(i) High quality police files;

(ii) Separate listing for anticipated guilty and not guilty cases;

(iii) Brigading cases to provide the right number for the tribunal in the separate list format;

(iv) Optimum bailing patterns for anticipated guilty and not guilty pleas at 14 and 28 days respectively to allow time to construct the file, carry out a review and engage with the defence;

(v) Early receipt of IDPC to allow the defence sufficient time to prepare the case;

(vi) The right advocate for the right case (a Senior Crown Prosecutor for not guilty courts and Associate Prosecutors for guilty plea courts);

(vii) Streamlined disclosure – with an unused material report available to the defence at the first hearing;

(viii) Improved communication between parties and clear expectations of the effectiveness of the first hearing, supported by joint CPS/Police/HMCTS performance measures;

(ix) Member of police staff present (in person or virtually) for each not guilty court;

(x) Dedicated facilities at court including WIFI and internet connectivity.

There are strong links between this work and the next cluster of actions which concern cases headed for trial.

Actions 6, 15 and 17 refer to matters which are going to trial, and seek to ensure that disclosure rules are appropriate and effective (the Magistrates' Disclosure Review is listed at **Action 15**), that training materials are appropriate to deliver the outcomes of that review, and that the court effectively manages each case from the outset to ensure the right issues are identified early and the appropriate preparation can be undertaken to ensure an effective trial at the second hearing is the rule, rather than the exception.

Summary of recommendations

209. Any recommendations made in this regard must take into account:

- new and increasingly digital processes;
- the need for a standardised national approach;
- the avoidance of the waste involved in both under built and over built files.

210. Furthermore, they must:

- ensure the fair but proportionate disclosure of unused material;
- allow for a review/preparation of files by investigators and prosecutors on a single occasion and reduce the need for files to be referred to prosecutors and to the police on multiple occasions;
- be simple for parties to understand and administer;
- require minimal training, supervision and performance management;
- reduce correspondence, mention hearings and ineffective trials;
- be proportionate and take into account cost and the impact upon the various agencies.

211. Disclosure, in terms of substance rather than process, rarely has any bearing on the outcome of cases tried summarily. Failure to adhere to the correct procedure creates delay and inefficiency and improvements can and should be made.

212. With this in mind, we make the following recommendations:

213. We recommend that the police review their timeliness in relation to the period between arrest and decision to prosecute, in the light of the need for speedy justice in summary cases. Where there is a lengthy delay in bringing the case to court this should be accompanied by an explanation to the Bench for the delay. The prosecution must ensure that they have in mind their common law/*ex parte Lee* duties, which must be considered from the point of arrest.

214. Consideration should be given to amending paragraph 6.7 of the Code of Practice to reflect the reality that 'not denying' an offence, (usually by offering no comment) may

often be the precursor to a not guilty plea so there should be no automatic assumption that it is unnecessary to provide an unused schedule to the prosecutor.

215. Early identification by the prosecution of likely guilty and not guilty plea cases, starting with police station identification by, (i) police asking represented defendants to confirm likely plea; and/or (ii) police determination of likely plea, with subsequent case channelling. The case file would then be prepared accordingly by the CPS.

216. Cases should be listed after an appropriate period into a likely guilty or not guilty list. Non-custody, likely guilty plea cases should be listed no later than 14 days after charge. Non-custody, likely not guilty plea cases should be listed no later than 28 days after charge. This period of time will facilitate preparation of papers and service of such on the defence before the hearing.

217. In non-custody, anticipated not guilty, cases we recommend the IDPC is provided to the defence (if representatives are known) prior to the first appearance. All efforts must be made to ensure that there is communication between the CPS and defence in advance of that hearing and we would encourage the use of secure email wherever possible.

218. A CPS lawyer should review the file in advance of the first hearing and identify the issues, including any that may arise with regard to disclosure.

219. There should be a prosecution lawyer at court dealing with not guilty list cases (at the first hearing) who is able to make substantive decisions and discuss the case with the defence.

220. There should be a streamlined, proportionate process for anticipated guilty plea cases. The prosecution do not need to serve an unused schedule where there is an anticipated guilty plea. It will be important to ensure that the prosecution's common law/ *ex parte Lee* disclosure duties are understood and have been followed and a standardised form of written confirmation to this end may be helpful.

221. We would recommend that the police and CPS amend the National File Standard to reflect the requirement of the Code with regard to provision by the police of the unused schedule/disclosure officer's report to the prosecutor. We consider that it should be expected for the prosecutor to be in possession of the unused schedule at an early stage and certainly in advance of the first hearing.

222. The unused material schedule, or a statement confirming that there is no disclosable material, should be available at court and served on the defence in the event of a not guilty plea. This would require a change to the CPIA Code of Practice.

223. Effective case management must take place at the first hearing. More time may be required for each hearing and a completed, detailed, effective trial preparation form should be provided to the court, to enable the Bench to determine the issues with sufficient clarity, set a trial timetable and make appropriate directions. Justices' Clerks will need to look at the ABC (Activity Based Costing) model and see if there is enough time allowed at the first hearing.

224. Where the defence require further disclosure they should complete a defence statement at the first hearing wherever practicable.

225. We ask HMCTS to consider the position with regard to the role of Case Progression Officers, which we consider to be vital to the outcome of court case management of trials.

226. We recommend that thought be given to developing a programme of accreditation for case management magistrates. In the meantime, magistrates interested in this work should sit with District Judges to observe case management in practice.

227. We recommend that there should be essential and detailed training for those involved in case management. This could include joint training with judges, experienced magistrates, and nominated legal advisers. Similarly we recommend a system of feedback.

228. The Adult Court Bench Book could be amended to contain specific guidance on disclosure. We believe that it would be helpful to reinforce correct nomenclature and ensure that key disclosure principles are fully explained. We recognise that the Judicial College gives careful thought to these matters and we would be keen for them to consider it again.

229. Specific training in this area should be undertaken by the prosecution agencies. Joint events should be considered for all parties to attend to address what is meant by disclosure, what needs to be disclosed and why. Defence lawyers should be involved with this process as they play a vital role in ensuring that guilty pleas or case issues can be identified as soon as possible.

230. Where evidence relied on by the prosecution includes CCTV footage, this should be available and provided to the defence ideally in advance of the first hearing in an anticipated not guilty case. Where the CCTV footage is unused, it should be treated in the same way as any other type of unused material, but the description on the disclosure schedule should be clear and sufficiently detailed.

231. The relevant guidance and process requirements as set out in the CPIA Code of Practice, DPP's guidance and National File Standard should be reviewed and amended as necessary to facilitate any adopted recommendations in this review.

232. Consideration should be given to a more radical change in the disclosure process, in terms of legislative change. This would apply to cases in the magistrates' court (both summary and either way matters). This will not increase costs and would dovetail with the IT work which is ongoing and to be implemented across all agencies, including the defence, over the next 2 years. There would be a clear distinction between cases heard at the magistrates' court and those that were sent to the Crown Court. All Crown Court cases would remain within the CPIA regime, while a pragmatic and proportionate new approach would apply in respect of those that fell under the jurisdiction of the magistrates' court.

Annex A: Principal disclosure responsibilities of parties in the CJS

The CPIA imposes a number of duties upon the parties to ensure that the process is conducted correctly. The duty to comply with relevant disclosure obligations arise as soon as a criminal investigation begins, as defined in section 22 CPIA.[47]

Given that this review is concerned with disclosure in the Magistrates' Court, the information set out below does not provide details about the specific handling and processes required for sensitive unused material. Such considerations may of course arise in summary only or either way cases which remain in the magistrates' courts, however this will be relatively rare.

1. Prosecution

(a) Police

The police must record, retain and reveal to the prosecutor, material relevant to the criminal investigation and related matters. This obligation is set out in the Code of Practice,[48] which also provides guidance as to what constitutes 'relevant' material.

There are three distinct roles in the investigation, which may or may not be carried out by the same officer (depending on the size of the investigation):

(i) The investigator – all investigators have a responsibility for adhering to their disclosure duties as imposed on them by the Code;

(ii) The officer in charge of the investigation – who directs and oversees procedures to ensure that the correct process is being followed;

(iii) The Disclosure Officer – has the responsibility of checking and providing material to the prosecutor, he must confirm that the correct test has been applied.

Further key duties:

- All **reasonable** lines of enquiry must be pursued.[49] This must include all lines of enquiry which may point away from the possible guilt of the suspect.

47 "...a criminal investigation is an investigation conducted by police officers with a view to it being ascertained – (a) whether a person should be charged with an offence, or (b) whether a person charged with an offence is guilty of it." And see also paragraphs 2.1, 4 and 5, CPIA Code of Practice.
48 Issued under Part II section 23 CPIA 1996
49 CPIA Code of Practice paragraph 3.5

- Any known material which may undermine the prosecution or assist the defence must be provided to the prosecutor prior to a charging decision being taken.

- Post-charge, the disclosure officer must examine all relevant unused material and detail it in a schedule which is provided to the prosecutor, ideally when they provide the file containing the material for the case.[50] Items that satisfy the test should be identified, together with copies where possible.

- There is an ongoing duty to keep schedules up to date and provide them to the prosecutor on a timely basis. This will also be important after receipt of any defence case statement, which may lead to further disclosure being made.

There are of course other practical steps that must be taken to ensure that the process operates correctly, in terms of keeping records and allowing the defence to inspect material where necessary. This is detailed in the Code of Practice, notably paragraphs 8, 9 and 10.

(b) The CPS/Prosecution Agency

The law and guidance setting out the prosecutor's responsibilities is found in the CPIA, Attorney General's Guidelines and the CPS/ACPO Disclosure Manual.

The prosecutor must work with investigators and disclosure officers to ensure that their obligations are met. They must be proactive in seeking answers if descriptions are unclear, or provision of material delayed.

Further key duties:

- Common law duties: prior to their obligation to consider disclosure arising under the CPIA, the prosecutor must ensure that they have complied with their common law duties and disclose any relevant material. This should be considered at the earliest stage and may include material which will assist the defendant in making an application for bail, or in identifying possible witnesses.

- Section 3 and 13 CPIA: to disclose to the defence material that satisfies the disclosure test, as soon as reasonably practicable. This is material which is reasonably capable of undermining the prosecution case or assisting the defence, or providing a statement to confirm that there is no such material.[51]

50 Using prescribed forms MG6C and MG6D (sensitive material – if any), and MG6E (disclosure officer's report), see paragraphs 6 and 7 CPIA Code of Practice.
51 Section 3 and 13 CPIA

- Section 7A CPIA: where a defence statement is provided[52] (provision of which is voluntary in the Magistrates' Court), the prosecutor must provide this to the disclosure officer and answer any defence requests for disclosure as appropriate, provided that the requested items satisfy the test. There is a continuing duty to keep disclosure under review and disclose items as necessary until the conclusion of the trial, but only if they satisfy the test.

2. Defence

There are limited disclosure obligations on the defence with regard to cases in the Magistrates' Court jurisdiction. The defence role may essentially be considered a reactive one, although there are specific obligations which they must adhere to within the CPIA and Criminal Procedure Rules. Section 6C CPIA requires the defence to supply details of witnesses whom they intend to call within 14 days of the prosecutor completing (or purporting to complete) initial disclosure. Rule 33.4 and 33.6 CPR requires the defence to disclose expert evidence. These duties apply regardless of whether a defence statement is served.

In line with the duty of the parties actively to assist the court in furthering the overriding objective of the Criminal Procedure Rules by active case management, it is best practice for them to identify the issues as soon as possible.

Defence statements should therefore be sufficiently detailed and respond to the prosecution case. Provision of a defence statement will enable the prosecutor to make informed decisions as to whether further material falls to be disclosed. If required, the defence should then make focused and proportionate applications to the court for material to be disclosed under section 8 CPIA.[53]

3. Court

The primary duty of the court is to actively manage a case following the entering of a not guilty plea. This requires close scrutiny of the information set out in the effective trial preparation form. The prosecution's compliance with its disclosure obligations must be considered and the defence must be encouraged to provide sufficient information to progress the case at the first hearing, including the provision of a defence statement.

Following service of a defence statement, an application by the defence under section 8 CPIA is permitted. The Court is expected to reject any application for material which is not relevant (or that does not to any issue as identified in the defence statement) and does not satisfy the test. As stated above, defence requests must be focused and proportionate and the court should be alive to this.

52 The obligation to provide a defence statement in the Crown Court arises in section 5 CPIA, which is triggered by the prosecutor's compliance (or purported compliance) with section 3, service of initial disclosure; the prosecutor's ongoing duty to disclose material that satisfies the test is set out in section 7A CPIA.

53 See also r.22.5 Criminal Procedure Rules and *R v M.O.* [2012] Crim.L.R 535 CA

Annex B: Prosecution disclosure process and legislative/guidance source

The table sets out in chronological order – as far as possible - the process of disclosure undertaken by the prosecution team in summary trials. It sets out the source documents which govern processes and procedures and some commonly arising issues.

Stage	Disclosure activity (from investigation to summary trial)	Source of requirement for this activity and comments on issues arising
Pre-charge **Police investigation**	The police to pursue all reasonable lines of enquiry, whether these point towards or away from the suspect.	Paragraph 3.5 CPIA Code of Practice.
Pre-charge **Police investigation**	The police should record and retain material which may be relevant to the investigation.	Paragraphs 4 & 5 CPIA Code of Practice.
Pre-charge **Police investigation**	Where the investigation reveals a reasonable suspicion of guilt and it may be in the public interest to prosecute, the police investigator should identify the likely charges, likely plea(s) and other relevant circumstances to determine whether the police or CPS should make the charging decision. They should also determine the content of a pre-charge report to the charging decision maker.	Paragraphs 4 and 5 of The Director's Guidance on Charging 2013 Fifth Edition.
Pre-charge **Police investigation**	In addition to the key evidence in the case, as part of the pre-charge report, the investigator should provide the charging decision maker with any material which may undermine the prosecution case or assist the defence.	Paragraphs 1A and 2A of The National File Standard at Annex C to The Director's Guidance on Charging 2013 Fifth Edition. The National File Standard provides that 'disclosure schedules are NOT required at this stage'.
Charge	A decision is made to prosecute the accused and the process is initiated by charge, summons or postal requisition.	

Stage	Disclosure activity (from investigation to summary trial)	Source of requirement for this activity and comments on issues arising
Charge	The charging decision maker (CPS or police) should identify the likely plea. Correct identification of the likely plea allows for a prosecution file to be built which is proportionate to the requirements of the first hearing.	Paragraph 32 of The Director's Guidance on Charging 2013 Fifth Edition and the National File Standard. The National File Standard provides for a staged and proportionate approach to the preparation of case files.
Charge	Upon charge, where the likely plea is not guilty, the disclosure officer should compile the disclosure schedule/s. The schedules are not provided to the CPS at this stage despite paragraph 7.1 of the Code which provides that the disclosure officer must give the schedules to the prosecutor, *'Wherever practicable... at the same time as he gives him the file containing the material for the prosecution case ... or as soon as is reasonably practicable after the plea (in what had been anticipated as likely guilty plea cases)...'*. The National File Standard states that schedules are NOT required at this stage as part of the prosecution file. The investigator therefore retains the completed schedule/s on the police file at this stage.	Paragraph 6.6 of the CPIA Code of Practice.
Post charge	The investigator should also identify any material which may be disclosable under the common law principles set out in *R v DPP ex parte Lee* [1999] 2 All ER 737.	Paragraph 14 of the Attorney General's Guidelines on Disclosure 2013 and paragraphs 2.5 to 2.9 of the CPS/ACPO Disclosure Manual. There is rarely any such material. The officer certifies the position on either the police case summary or file front sheet. If there is such material it should be provided to the prosecutor and to the defence.

Stage	Disclosure activity (from investigation to summary trial)	Source of requirement for this activity and comments on issues arising
Post charge police file build	The investigator must build a proportionate first-court-hearing file for submission to the CPS in accordance with the National File Standard and must submit it to the CPS, (digitally and 4 days in advance of the first court hearing in a bail case or usually in paper form together with IDPC bundles for the court and defence in a custody case). In relation to unused material, the file should at this stage contain any material which may undermine the prosecution case or assist the defence, plus any material which may be disclosable under the common law provisions.	Paragraphs 1B and 2B of the National File Standard set out the required contents. It also states that the file must not contain the disclosure schedules. We understand that in practice, the CPS rarely get unused material with the file prepared for first court hearing.
CPS receive the file	The CPS receive the file for first court hearing, review any police charged cases in accordance with the Code for Crown Prosecutors, prepare the Initial Details of the Prosecution Case (IDPC) and serve the IDPC on the defence and court (usually digitally and 2 days in advance in a bail case). The material supplied to the prosecutor at this stage should consist of: *(a) Anticipated guilty plea cases:* Must include **Pre-charge Report (which should include, among other items, any material that meets the disclosure test)** plus: **MG4** - Charge Sheet **MG5** - Police Report **MG9** - List of Witnesses **MG10** - Witness non-availability	Director's Guidance on Charging, Firth Edition 2013, Annex C

Stage	Disclosure activity (from investigation to summary trial)	Source of requirement for this activity and comments on issues arising
CPS receive the file	**If applicable, include:** **MG4A/B/C** - Bail Sheet Conditional/Vary/ Security/Surety **MG7** - Remand Application **MG8** - Breach of bail conditions **MG11(s)** - All key witness statement(s) or ROVI (if visually recorded) **MG15** - Interview Record (Only to be compiled in serious or complex cases) **MG18** - Offences TIC Previous convictions Compensation documentation e.g. estimates or invoices *(b) Anticipated not guilty plea cases* **Must include:** **Pre-charge Report (which should include, among other items, any material that meets the disclosure test)** plus: **MG4** - Charge Sheet **MG5** - Police Report **MG9** - List of Witnesses MG10 - Witness non-availability **MG11(s)** - Key witness statement(s) or ROVI (if visually recorded) If applicable, include: **MG2** - Special Measures Assessment **MG4A/B/C** – Bail Conditional/Vary/ Security/Surety **MG6** - Case File Evidence and Information (for information to CPS) **MG7** - Remand Application **MG8** - Breach of bail conditions **MG15** - Interview Record (only to be compiled in serious or complex cases) **MG16** - Bad Character/Dangerous Offender **MG18** - Offences TIC **MG21/21A** - Forensic Submissions **Any material that meets the disclosure test**	Director's Guidance on Charging, Firth Edition 2013, Annex C

Stage	Disclosure activity (from investigation to summary trial)	Source of requirement for this activity and comments on issues arising
First Hearing – NG plea cases	If the defendant enters a not guilty plea, the case is set down for summary trial. The parties and court complete the 'Preparation for effective trial in the Magistrates' court form' and the court directs a date by which initial duty of disclosure, (namely, disclosure of unused material, in accordance with the requirements of the CPIA) must be completed.	There is no statutory time limit for service of initial disclosure. Courts therefore set directions. NB: The National File Standard does not allow for unused schedules to have been submitted to the CPS prior to the first hearing because of the belief that a staged and proportionate approach to file building is optimally efficient.
CPS action following first hearing	The CPS updates its case management system with the hearing outcome and requests from the police an upgraded file for magistrates' court trial. The CPS request should be made digitally and will arrive with the police 24 to 48 hours after the hearing at which the plea was entered. It will normally request the file to be sent within 2 weeks.	Paragraph 3 of The National File Standard at Annex C to The Director's Guidance on Charging 2013 Fifth Edition directs that the upgraded file must include the unused material schedules & the disclosure officer's report required by the Code of Practice.
Police action	The police receive the request, compile schedules, where these have yet to be completed and submit the upgraded file to the CPS.	Paragraph 10.8 of the CPS Disclosure states that 'As an aid to prosecutors in their case review function copies of the crime report and log of messages should be routinely copied to the prosecutor in every case in which a full file is provided'. There is no corresponding requirement in Annex C Director's Guidance 5th edition for these documents so they often are not provided. Concern has been raised that the process of requesting and reviewing these documents can delay disclosure and contributes to a cautious and risk-averse prosecution culture in relation to disclosure.

Stage	Disclosure activity (from investigation to summary trial)	Source of requirement for this activity and comments on issues arising
CPS pre-trial preparation	Together with general trial preparation and ancillary matters such as special measures and bad character applications/notices, the CPS considers the unused material/ schedules submitted and completes its initial duty of disclosure by serving the material on the defence.	Sections 3 and 4 CPIA 1996 The role of the CPS in preparing a case for summary trial is set out in paragraph 5.13 of Standard 5 of the CPS Core Quality Standards. 13 pre-trial functions are set out of which 3 relate to discharging initial disclosure obligations.
Defence pre-trial preparation	The defence may serve a defence statement.	Section 6 CPIA 1996
CPS consideration of defence statement (if provided)	The CPS should consider the content of any defence statement; send it to the investigator with any observations if relevant and a timeframe for response; the police should revisit the material retained and respond to the CPS. The CPS should consider the response and write to the defence setting out their position. The defence may request a section 8 hearing if dissatisfied, and the court may make a ruling and directions on further disclosure.	Section 8 CPIA 1996
Trial	The trial should take place on the day it was scheduled	Section 10 CPIA provides the court with limited sanctions if the prosecution fails to comply with its obligations.

Annex C: Observations from commonwealth jurisdictions

1. The disclosure regimes operating in several other jurisdictions have been considered for the purpose of this review. The focus has been on other Commonwealth countries as there is a closer proximity with the legal system operating in England and Wales. We are grateful to those who assisted us in this regard and provided us with information in respect of the system operating in each of the countries below.

2. In particular, the following jurisdictions have been considered:

a. Canada

b. New Zealand

c. Australia: Northern Territory and New South Wales

d. New Zealand

3. In 2008, the Commonwealth Secretariat was mandated to conduct a comparative study of prosecution disclosure obligations in Commonwealth member states, in particular to identify good practice.[54] The Commonwealth Model Disclosure Guidelines to Prosecution Disclosure ('Model Guidelines') were published as a result. The Model Guidelines identify good practice and accompanies the Draft Model Disclosure Legislation (Annex A).[55]

Initial obligation

4. It appears that the two-stage process, as operated in England and Wales, of initial disclosure of evidence and secondary disclosure of other relevant material following a not guilty plea is widely adopted across Commonwealth jurisdictions.[56]

5. All the jurisdictions considered as part of the Commonwealth review had a system that provided for the advance disclosure of evidence to be relied upon by the prosecution.

6. The disclosure rules that operate in New Zealand are similar to those which operate in England and Wales. The prosecution is required to complete initial disclosure at the

54 http://www.secretariat.thecommonwealth.org/document/238332/clmm_2011.htm
55 It is not clear whether any Commonwealth member states have adopted, wholly or in part, the draft legislation and guidelines to date.
56 Model Guidelines, p.25

'commencement of proceedings'[57] or as soon as is reasonably practicable after that time but no later than 15 days after the commencement of criminal proceedings (or at a later upon application by the prosecutor). This disclosure must include inter alia the charge, a summary of the facts of the alleged offence and details on the penalty for the offence.[58]

7. In contrast to this, the practice adopted in Scotland involved automatic disclosure of all statements obtained by the prosecution at the earliest stages, perhaps even before the Crown has decided on charges.[59] While the approach of automatic disclosure has the benefit of reducing the likelihood that the prosecution incorrectly applies a disclosure test, on balance, it was considered that this system would create an unrealistic and intolerable burden on police and the prosecution.[60] The application of a disclosure test, such as the one in England and Wales, was a 'preferable approach'.[61]

8. Following a review by the Law Commission in New Zealand, a number of changes were made to the disclosure regime and led to the enactment of the Criminal Disclosure Act 2008. In particular, the Law Commission recommended more extensive initial disclosure, including material that was helpful to the defence as well as the prosecution.[62]

First hearing practice

9. It would appear that normally, directions on service of disclosure and other timetabling are made at the first hearing.

10. In New South Wales, a practice note provides that at the first mention where the not guilty plea is entered, the court is to order the service of the brief of evidence within four weeks of the hearing and list the case for mention in six weeks.[63] Where the defendant is legally represented, his or her representative is required to complete, sign and hand to the prosecutor and the court a 'Notice of Appearance'.[64]

11. The defendant may also exempt him or herself from attendance at the first appearance by responding to a court attendance notice by lodging a notice, stating his plea, not later than seven days before the hearing date under the Criminal Procedure Act 1986.[65]

Case management hearings

12. There are various forms of case management systems in operation across

57 s.12, Criminal Disclosure Act 2008. For these purposes, the criminal proceedings are commenced with the service of a summons, first appearance of the defendant in court following his or her arrest, the date on which the defendant was granted bail or the filing of a notice of hearing under the Summary Proceedings Act 1957: s.9, Criminal Disclosure Act 2008
58 s.12, Criminal Disclosure Act 2008
59 p.44, Model Guidelines
60 p.49, Model Guidelines
61 p.50, Model Guidelines
62 para.11, New Zealand Law Commission, Criminal Pre-Trial Processes: Justice Through Efficiency, June 2005
63 Part A, para.2 and para.5.2, Local Court Practice Note Crim 1 issued on 24 April 2012 (as amended in September 2013).
64 A copy of which is attached to the Practice Note.
65 Criminal Procedure Act 1986, s.182

the Commonwealth jurisdictions reviewed. In many cases, this involves use of case management hearings listed prior to the trial date.

13. In the Northern Territory of Australia, this is obligatory for all cases where there has been a not guilty plea. Under their system, the court makes an order for service of the brief of evidence within four weeks and lists a 'contest mention' to take place within six weeks. The defence will be expected at the hearing to indicate what the trial issues will be. If the contest mention cannot be effective, for example due to the late service of the brief of evidence, then the hearing will be listed for a further contest mention. The contest mention system is not considered to work well, with adjournments occurring frequently due to the late service of briefs of evidence.[66] The system is currently under review.[67]

14. In other jurisdictions, the requirement to hold pre-trial hearings (or in some instances termed 'conferences') appears to have been successful in achieving more efficient case management, such as in Canada.[68] There, the requirement to provide certain defence disclosure and hold pre-trial conferences has created a culture of improving the management of criminal cases in more general terms.[69]

15. Recent reforms to the system have been made in New Zealand, following the Criminal Procedure Act 2011 which came into effect in July 2013. Under the Act a "case management memorandum" is issued to the defendant's legal representative following a not guilty plea. This form must be completed by prosecution and defence and filed by the defence lawyer with the court no later than five days prior to the case review hearing.[70]

Pre-trial safeguards

16. It was acknowledged by the Commonwealth Secretariat in their review that an effective disclosure regime required judicial oversight.[71]

17. In some jurisdictions, there are clear repercussions for the prosecution case where there has been a failure to disclose information in advance. For example, in New South Wales, the court must refuse to admit evidence sought to be adduced by the prosecutor if the disclosure provisions have not been complied with in relation to that evidence, for example as a result of late service or failure to serve.[72] The court has a discretionary power to admit the evidence 'on such terms and conditions as appear just and reasonable'.[73] There is also a high test for vacating trial dates in New South Wales, where the party applying to vacate a trial date must show 'cogent and compelling reasons'.[74]

66 Email dated 30 September 2013 from John Lowndes, Chief Magistrate of the Northern Territory of Australia
67 Ibid.
68 Email from Lynne Leitch, Judge of the Superior Court of Justice, dated 1 November 2013
69 Ibid.
70 http://www.justice.govt.nz/publications/global-publications/l/legal-aid-criminal-procedure-act-2011-consultation-response/cpai-consultation-response-pdf?type=Finjan-Download&slot=00000016&id=00001815&location=0A640212
71 Model Guidelines, p.36
72 Criminal Procedure Act 1986, s.188
73 Criminal Procedure Act 1986, s.188(2)
74 Para. 6.1, Local Court Practice Note Crim 1 issued on 24 April 2012 (as amended in September 2013).

18. In Canada, the Supreme Court has ruled that there is a constitutional obligation on the Crown to disclose evidence and information to the defence.[75] One of the principles laid out by the Supreme Court was that disclosure should be timely, namely before election and or plea, so that the defence can make an informed decision with full knowledge of the Crown's case.[76] Although summary offences were not dealt with in the Supreme Court's decision, it has been applied in the lower courts to the extent that it is well-established that the same right applies to summary offences.[77] A breach of this right may result in an adjournment, awarding of costs, or, as a last resort, a stay of proceedings.[78]

19. The Commonwealth Secretariat also considered it important for an effective disclosure regime to include a mechanism for recording disclosure decisions and actions to keep the disclosure process under review, so that error can be minimised. This practice was found in Scotland where there is a Disclosure Representative for each prosecution agency with strategic responsibility for that agencies compliance with the domestic guidelines.[79]

75 (1991) 8 C.R. (4th) 277 (S.C.C.); T Quigley, *Procedure in Canadian Criminal Law* (2nd ed, 2005 Carswell) paragraphs 12.1 to 12.2
76 Ibid.
77 Ibid. para.12.4(b)
78 Ibid. Para. 12.4(g)
79 Model Guidelines, p.61

Annex D: List of Consultees

Judiciary

District Judge (Magistrates' Court) Stephen Earl

District Judge (Magistrates' Court) David Robinson

District Judge (Magistrates' Court) John Woollard

District Judge (Magistrates' Court) Naomi Redhouse

District Judge (Magistrates' Court) Robert Zara

Nicholas Moss JP

Richard Monkhouse JP (Chairman of the Magistrates' Association)

Eric Windsor JP (Chairman of the National Bench Chairmen's Forum)

Justices' Clerks

Graham Hooper

Sue Gadd

Sam Goozee

Judicial College

Magistrates' Courts Training Division, Judicial College

Crown Prosecution Service

Peter Lewis

Sue Hemming

Barry Hughes

Matthew McGonagle

Nicolette Movick

Police

ACC Sharon Rowe

Graham Marshall

David Evans

Solicitors and members of the Bar

Paul Harris

Richard Atkinson

Helen Cousins

Mike Jones

Aktar Ahmad

Hannah Kinch, 23 Essex Street (representing the Young Bar and Criminal Bar Associations)

Rebecca Lewis (Legal Advisor to the Chief Magistrate)

With particular thanks to Helen Duong of 23 Essex Street, who drafted Annex C of the review.

The Law Commission

Government

Enzo Riglia (HMCTS)

Ben Wood (MOJ)

Richard Chown (MOJ)

Ben Connah (MOJ)

International Consultees

Mark Guthrie (Legal Advisor, Commonwealth Secretariat)

Australia

Judge Richard Cogswell (New South Wales)

Judge Graeme Henson (New South Wales)

New Zealand

Mr Justice William Young

Canada

Madam Justice Lynne Leitch