INTRODUCTION

A wider, continuing, duty of disclosure – objective criteria

It will be seen that Parliament, in section 32 of the Criminal Justice Act 2003, amends section 3 of the Criminal Procedure and Investigations Act 1996 by substituting "might reasonably be considered capable of undermining" [the prosecution case], and "or of assisting the case of the accused", for the original wording. This is an improvement, but some commentators have been somewhat lukewarm about it: see "*Criminal Justice Act 2003, (1) Disclosure and its Discontents*", Mike Redmayne [2004] Crim.L.R. 441.[1]

NOTE: the existence of a revised code of practice in force as from the 4th April 2005 (*Criminal Procedure and Investigations Act 1996 (Code of Practice) Order 2005*, (SI 2005/985)).

NOTE: revised *Attorney-General Guidelines on Disclosure* issued in April 2005 (see *Archbold,* 2006).

NOTE: *Home Office Circular 20 / 2005*: issued 13th April 2005.

NOTE: *Disclosure Protocol*, Court of Appeal, (circulated 20th February 2006).

NOTE: *Revised CPS Disclosure Manual* (February 2006)

NOTE: *Criminal Procedure Rules 2005*:

- Prosecution duty to disclose, Part 22 – no rules as at the 21st February 2006;
- Defence duty of disclosure, Part 23 – no rules as at the 21st February 2006;
- Disclosure of expert evidence, Part 24 – some rules exist.
- PII, and matters relating to specific disclosure, Part 25

Section 37 of the 2003 Act inserts section 7A into the 1996 Act, requiring the prosecutor to keep disclosure under review applying the same test (as recommended by Lord Justice Auld) and "at any time" - but particularly following service of a Defence Statement (again, as recommended by Lord Justice Auld, see section 37, Criminal Justice Act 2003, inserting section 7A CPIA 1996: see para.171, Chapter 10, noting Lord Justice Auld's words "coupled with a defence statement identifying those issues to the extent that they are not otherwise apparent to the prosecutor at the outset").

7A. Continuing duty of prosecutor to disclose

(1) This section applies at all times -
  (a) after the prosecutor has complied with section 3 or purported to comply with it, and
  (b) before the accused is acquitted or convicted or the prosecutor decides not to proceed with the case concerned.

(2) The prosecutor must keep under review the question whether at any given time (and, in particular, following the giving of a defence statement) there is prosecution material which -
  (a) might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused, and
  (b) has not been disclosed to the accused.

(3) If at any time there is any such material as is mentioned in subsection (2) the prosecutor must disclose it to the accused as soon as is reasonably practicable (or within the period mentioned in subsection (5)(a), where that applies).

(4) In applying subsection (2) by reference to any given time the state of affairs at that time (including the case for the prosecution as it stands at that time) must be taken into account.

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[1] And see "*The Criminal Court Trial*", John Lea, 2004 (available on the internet). See also "*Abuse of process and Disclosure of evidence*", Julian Samiloff, Medina Chambers, Isle of Wight (available on the internet), and see Paul Keleher, "*Showing your hand*", CBA News, Issue 3, May 2003.

(5) Where the accused gives a defence statement under section 5,6, or6B -
  (a) if as a result of that statement the prosecutor is required by this section to make any disclosure, or further disclosure, he must do so during the period which, by virtue of section 12, is the relevant period for this section;
  (b) if the prosecutor considers that he is not so required, he must during that period give to the accused a written statement to that effect.

(6) For the purposes of this section prosecution material is material -
  (a) which is in the prosecutor's possession and came into his possession in connection with the case for the prosecution against the accused, or
  (b) which, in pursuance of a code operative under Part 2, he has inspected in connection with the case for the prosecution against the accused.

(7) Subsections (3) to (5) of section 3 (method by which prosecutor discloses) apply for the purposes of this section as they apply for the purposes of that.

(8) Material must not be disclosed under this section to the extent that the court, on an application by the prosecutor, concludes it is not in the public interest to disclose it and orders accordingly.

(9) Material must not be disclosed under this section to the extent that it is material the disclosure of which is prohibited by section 17 of the Regulation of Investigatory Powers Act 2000.[2]

INITIAL DUTY OF THE PROSECUTOR TO DISCLOSE

Section 3 is amended by section 32 of the Criminal Justice Act 2003 (deleting words marked below and inserting the words in square brackets). Schedule 36 paras.21-22 of the 2003 Act substitutes the new headings. The amendments came into force on the 4th April 2005, save in relation to offences in respect of which a 'criminal investigation began' before that date (within the meaning of s.1(4) of CIPA 1996): *Criminal Justice Act 2003 (Commencement No.8 and Transitional and Saving Provisions Order 2005* (SI 2005/950).

Section 3 CPIA 1996. ~~*Primary disclosure by prosecutor*~~ *[Initial duty of prosecutor to disclose]*

(1) The prosecutor must -
  (a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which ~~in the prosecutor's opinion might undermine~~ [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).

(2) For the purposes of this section prosecution material is material -
  (a) which is in the prosecutor's possession, and came into his possession in connection with the case for the prosecution against the accused, or
  (b) which, in pursuance of a code operative under Part II, he has inspected in connection with the case for the prosecution against the accused.

(3) Where material consists of information which has been recorded in any form the prosecutor discloses it for the purposes of this section -
  (a) by securing that a copy is made of it and that the copy is given to the accused, or
  (b) if in the prosecutor's opinion that is not practicable or not desirable, by allowing the accused to inspect it at a reasonable time and a reasonable place or by taking steps to secure that he is allowed to do so;

  and a copy may be in such form as the prosecutor thinks fit and need not be in the same form as that in which the information has already been recorded.

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[2] The section came into force on the 4th April 2005 (and old s.7 repealed), save in relation to offences in respect of which a 'criminal investigation began' before that date (within the meaning of s.1(4) of CIPA 1996): *Criminal Justice Act 2003 (Commencement No.8 and Transitional and Saving Provisions Order 2005* (SI 2005/950).

(4) Where material consists of information which has not been recorded the prosecutor discloses it for the purposes of this section by securing that it is recorded in such form as he thinks fit and -
   (a) by securing that a copy is made of it and that the copy is given to the accused, or
   (b) if in the prosecutor's opinion that is not practicable or not desirable, by allowing the accused to inspect it at a reasonable time and a reasonable place or by taking steps to secure that he is allowed to do so.

(5) Where material does not consist of information the prosecutor discloses it for the purposes of this section by allowing the accused to inspect it at a reasonable time and a reasonable place or by taking steps to secure that he is allowed to do so.

(6) Material must not be disclosed under this section to the extent that the court, on an application by the prosecutor, concludes it is not in the public interest to disclose it and orders accordingly.

(7) Material must not be disclosed under this section to the extent that it is material the disclosure of which is prohibited by section 17 of the Regulation of Investigatory Powers Act 2000.

(8) The prosecutor must act under this section during the period which, by virtue of section 12, is the relevant period for this section.

Section 4. ~~Primary disclosure~~ [Initial duty to disclose]: further provisions

(1) This section applies where -
   (a) the prosecutor acts under section 3, and
   (b) before so doing he was given a document in pursuance of provision included, by virtue of section 24(3), in a code operative under Part II.

(2) In such a case the prosecutor must give the document to the accused at the same time as the prosecutor acts under section 3.

There has been much criticism that the original test for primary disclosure in section 3(1)(a) CPIA was seriously flawed because (a) the words "in the prosecutor's opinion might undermine [the prosecution case]" invited disclosure only of material that might have a fundamental effect on the prosecution case [see the Review Chapter 10, para.161] and (b) the test was subjective. Parliament has modified the test in section 3 CPIA 1996 to an objective one, requiring the prosecutor to disclose material at a primary stage if it "might reasonably be considered capable of undermining the case for the prosecution against the accused, or of assisting the case for the accused". Disclosure under the latter limb will depend on the extent to which the prosecution is aware of the nature of the defendant's case. The defence is likely to be less obvious where for example, the defendant gives a "no comment" interview. Members of the Standing Committee broadly welcomed the changes introduced by section 32 [see *Standing Committee B,* 9.1.03, column 215-219)].

Prosecutor's duties of disclosure – Revised *A-G Guidelines*

These are onerous, and *include*:

> "17. Section 7A of the Act imposes a continuing duty upon the prosecutor to keep under review at all times the question of whether there is any unused material which might reasonably be considered capable of undermining the prosecution case against the accused or assisting the case for the accused and which has not previously been disclosed.
>
> 18. As part of their continuing duty of disclosure, prosecutors should be open, alert and promptly responsive to requests for disclosure of material supported by a comprehensive defence statement. Conversely, if no defence statement has been served or if the prosecutor considers that the defence statement is lacking specificity or otherwise does not meet the requirements of section 6A of the Act, a letter should be sent to the defence indicating this. If the position is not resolved satisfactorily, the prosecutor should consider raising the issue at a hearing for directions to enable the court to give a warning or appropriate directions.

32. Prosecutors must do all that they can to facilitate proper disclosure,….Prosecutors must also be alert to the need to provide advice to, and where necessary probe actions taken by, disclosure officers to ensure that disclosure obligations are met.

33. Prosecutors must review schedules prepared by disclosure officers thoroughly and must be alert to the possibility that relevant material may exist which has not been revealed to them or material included which should not have been.

35. When prosecutors or disclosure officers believe that material might reasonably be considered capable of undermining the prosecution case or assisting the case for the accused, prosecutors must always inspect, view or listen to the material and satisfy themselves that the prosecution can properly be continued having regard to the disclosability of the material reviewed….

36. Prosecutors should copy the defence statement to the disclosure officer and investigator as soon as reasonably practicable and prosecutors should advise the investigator if, in their view, reasonable and relevant lines of further enquiry should be pursued.

37. Prosecutors should examine the defence statement to see whether it points to other lines of enquiry. If the defence statement does point to other reasonable lines of inquiry further investigation is required and evidence obtained as a result of these enquiries may be used as part of the prosecution case or to rebut the defence.

40. Neutral material or material damaging to the defendant need not be disclosed and must not be brought to the attention of the court. Only in truly borderline cases should the prosecution seek a judicial ruling on the disclosability of material in its hands.

43. ….Prosecution advocates should consider, in every case, whether they can be satisfied that they are in possession of all relevant documentation and that they have been instructed fully regarding disclosure matters….

44. …..Prosecution advocates must not abrogate their responsibility under the Act by disclosing material which could not be considered capable of undermining the prosecution case or of assisting the case for the accused."

DEFENCE DUTY TO DISCLOSE

Note the amendments made to section 5 of the 1996 Act by section 33(1) of the 2003 Act:

Section 5**:** Compulsory disclosure by accused

(1) Subject to subsections {(3A)}[3] (2) to (4), this section applies where -
(a) this Part applies by virtue of section 1(2), and
(b) the prosecutor complies with section 3 or purports to comply with it.

(2) Where this Part applies by virtue of section 1(2)(b), this section does not apply unless -
(a) a copy of the notice of transfer, and
(b) copies of the documents containing the evidence,
have been given to the accused under regulations made under section 5(9) of the Criminal Justice Act 1987.

(3) Where this Part applies by virtue of section 1(2)(c), this section does not apply unless -
(a) a copy of the notice of transfer, and
(b) copies of the documents containing the evidence,
have been given to the accused under regulations made under paragraph 4 of schedule 6 to the Criminal Justice Act 1991.

(3A) Where this Part applies by virtue of section 1(2)(cc), this section does not apply unless -

[3] S.41 and schedule 3, para.66(1) and (3) amend section 5 by substituting the words in {..}; and repealing subsections (2) and (3). The amendment in relation to subsection 3A came into force on the 9th May 2005 (Criminal Justice Act 2003 (Commencement No.9) Order 2005, SI.2005/1267, **but only** in relation to cases sent for trial under s.51A(3)(d) of the Crime and Disorder Act 1998.

(a) copies of the documents containing the evidence have been served on the accused under regulations made under paragraph 1 of Schedule 3 to the Crime and Disorder Act 1998; and

(b) a copy of the notice under subsection (7) of section 51 of that Act has been served on him under that subsection.

(4) Where this Part applies by virtue of section 1(2)(e), this section does not apply unless the prosecutor has served on the accused a copy of the indictment and a copy of the set of documents containing the evidence which is the basis of the charge.

(5) Where this section applies, the accused must give a defence statement to the court and the prosecutor.

[*(5A) Where there are other accused in the proceedings and the court so orders, the accused must also give a defence statement to each other accused specified by the court.*

(5B) The court may make an order under subsection (5A) either of its own motion or on the application of any party.

(5C) A defence statement that has to be given to the court and the prosecutor (under subsection (5)) must be given during the period which, by virtue of section 12, is the relevant period for this section.

(5D) A defence statement that has to be given to a co-accused (under subsection (5A)) must be given within such period as the court may specify.] [4]

~~(6) For the purposes of this section a defence statement is a written statement –~~

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

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

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

~~(7) If the defence statement discloses an alibi the accused must give particulars of the alibi in the statement, including –~~

~~(a) the name and address of any witness the accused believes is able to give evidence in support of the alibi, if the name and address are known to the accused when the statement is given;~~

~~(b) any information in the accused's possession which might be of material assistance in finding any such witness, if his name or address is not known to the accused when the statement is given.~~

~~(8) For the purposes of this section evidence in support of an alibi is evidence tending to show that by reason of the presence of the accused at a particular place or in a particular area at a particular time he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission.~~

~~(9) The accused must give a defence statement under this section during the period which, by virtue of section 12, is the relevant period for this section~~. [5]

Note the object lesson in *R. v. Gleeson* [2004] Crim.L.R. 579.

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4 **Not** yet in force (as at January 2006).

5 In force from the 4th April 2004, with the saving mentioned above: *Criminal Justice Act 2003 (Commencement No.8 and Transitional and Saving Provisions Order 2005* (SI 2005/950).

CONTENT OF A "DEFENCE STATEMENT"

s.33(2) CJA 2003 inserts a new s.6A: -[6]

> ***"6A. Contents of defence statement***
> *(1) For the purposes of this Part a defence statement is a written statement -*
> *(a) setting out the nature of the accused's defence, including any particular defences on which he intends to rely,*
> *(b) indicating the* ***matters of fact*** *on which he takes issue with the prosecution,*
> *(c) setting out, in the case of each such matter, why he takes issue with the prosecution, and*
> *(d) indicating any point of law (including any point as to the admissibility of evidence or an abuse of process) which he wishes to take, and any authority on which he intends to rely for that purpose.*
>
> *(2) A defence statement that discloses an alibi must give particulars of it, including -*
> *(a) the name, address and date of birth of any witness the accused believes is able to give evidence in support of the alibi, or as many of those details as are known to the accused when the statement is given;*
> *(b) any information in the accused's possession which might be of material assistance in identifying or finding any such witness in whose case any of the details mentioned in paragraph (a) are not known to the accused when the statement is given.*
>
> *(3) For the purposes of this section evidence in support of an alibi is evidence tending to show that by reason of the presence of the accused at a particular place or in a particular area at a particular time he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission.*
>
> *(4) The Secretary of State may by regulations make provision as to the details of the matters that, by virtue of subsection (1), are to be included in defence statements."*

This subsection adds section 6A to the CPIA 1996. It replaces section 5(6)-(9) of the 1996 Act (which subsections are repealed).

Section 6A defines a "Defence Statement" for the purposes of the 1996 Act, and specifies matters that such statements must contain.

Section 5(6)(a) CPIA required an accused to set out "in general terms the nature of the accused's defence", but section 6A(1)(a) omits the words 'general terms' and now requires the accused to set out the nature of his defence including "any particular defences on which he intends to rely". This would appear to mean that the accused should set out recognised defences (for example, 'self-defence'), and also matters of fact or circumstances, which (if true) are likely to be fatal to the prosecution case or which significantly undermine it (for example, that a drug is not controlled, or that a complainant's injuries were self-inflicted).

During the examination of this provision in Standing Committee, concern was expressed as to whether new section 6A(1)(b) ["indicating matters of fact on which he takes issue with the prosecution"] would require the defence to provide a detailed pleading in respect of all disputed issues. As originally drafted, section 5(6)(b) of the 1996 Act required the defendant to disclose "matters on which he takes issue with the prosecution", whereas section 6A(1)(b) goes further

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[6] In force from the 4th April 2004, with the saving mentioned above: *Criminal Justice Act 2003 (Commencement No.8 and Transitional and Saving Provisions Order 2005* (SI 2005/950).

requiring "matters of fact on which he takes issue with the prosecution" to be pleaded. The Government suggests that this means "main facts" and not a requirement to rebut "point by point, everything in every witness statement" [*Standing Committee B*, column 234, 9.1.03]. Resolution of this issue might not be found in judicial opinions, but in Regulations that the Secretary of State is empowered to make under new section 6A(4) as to the "details of the matters" that are to be included in Defence Statements.

Note revised *AG Guidelines*

The AG Guidelines have something to say about defence disclosure:

> "15. …The more detail a defence statement contains the more likely it is that the prosecutor will make an informed decision about whether any remaining undisclosed material might reasonably be considered capable of undermining the prosecution case or of assisting the case for the accused, or whether to advise the investigator to undertake further enquiries….
>
> 18. As part of their continuing duty of disclosure, prosecutors should be open, alert and promptly responsive to requests for disclosure of material supported by a comprehensive defence statement. Conversely, *if no defence statement has been served or if the prosecutor considers that the defence statement is lacking specificity or otherwise does not meet the requirements of section 6A of the Act, a letter should be sent to the defence indicating this. If the position is not resolved satisfactorily, the prosecutor should consider raising the issue at a hearing for directions to enable the court to give a warning or appropriate directions*." [emphasis added]

Other matters relating to the content of a Defence Statement

Section 6A(3) reproduces the definition of "evidence in support of an alibi" as it appears in section 11(8) of the Criminal Justice Act 1967.

Subsection (4) gives the Secretary of State power to demand an increasing amount of detail of the defence case. Peter Carter QC has said, "*the advantage is that it will be done by statutory instrument, and can therefore be struck down by higher courts if the regulation is incompatible with Article 6*". It is submitted that it is doubtful that this would happen.

The section makes it harder for defendants to withhold a defence e.g. provocation, and this is what the section is intended to achieve.

Once a Defence Statement is served it will be taken to given with the authority of the accused [s.6E(1)] unless the contrary is proved. This is likely to mean that a Defence Statement will be admissible in evidence because it is, for all practical purposes, the statement of the accused himself: see *Rossborough* (1985) 81 Cr.App.R. 139. Thus, relying on the terms of section 11 of the CJA 1967, the Court in *Rossborough* said that an alibi notice was admissible, subject to relevance, as any other voluntary statement made by the defendant would be: and see "*Defence Statements - Weighting the Scales or Tipping the Balance on a Submission of No Case?*" Sally Thompson [1998] Crim.L.R. 802

The judge can order that the jury be provided with a copy of the defence statement or extracts from it [s.6E(4)].

No doubt issues will arise about whether the statement does reflect the accused's instructions. In such cases problems of privilege and wasted costs orders may arise.

UPDATED DISCLOSURE BY THE ACCUSED – S.6B [7]

> ***"6B. Updated disclosure by accused***
> *(1) Where the accused has, before the beginning of the relevant period for this section, given a defence statement under section 5 or 6, he must during that period give to the court and the prosecutor either -*
> *(a) a defence statement under this section (an "updated defence statement"), or*
> *(b) a statement of the kind mentioned in subsection (4).*
>
> *(2) The relevant period for this section is determined under section 12.*
>
> *(3) An updated defence statement must comply with the requirements imposed by or under section 6A by reference to the state of affairs at the time when the statement is given.*
>
> *(4) Instead of an updated defence statement, the accused may give a written statement stating that he has no changes to make to the defence statement which was given under section 5 or 6.*
>
> *(5) Where there are other accused in the proceedings and the court so orders, the accused must also give either an updated defence statement or a statement of the kind mentioned in subsection (4), within such period as may be specified by the court, to each other accused so specified.*
>
> *(6) The court may make an order under subsection (5) either of its own motion or on the application of any party."*

Section 33(3) of the CJA 2003 inserts section 6B into the 1996 Act. While this provision gives the defence further opportunity to clarify, rectify, or expand on matters not contained in the initial defence statement, it may also provide the prosecution with further material with which to attack the credibility of the defence case - particularly if the defendant gives evidence and is cross-examined. The section appears to envisage one update and no more. If an accused has nothing further to add to the Defence Statement then he 'may' give a written statement confirming that fact [s.6B(4), CPIA].

What is the position if the defence has failed to serve a Defence Statement at all, or before the relevant period? The opening words of s.6B imply that the section is not engaged at all!

It seems that if there really is nothing to add to the original Defence Statement, the defence must nonetheless serve a "no change" statement.

NOTIFICATION OF INTENTION TO CALL DEFENCE WITNESSES [8]

A new s.6C reads: -

> ***"6C. Notification of intention to call defence witnesses***
> *(1) The accused must give to the court and the prosecutor a notice indicating whether he intends to call any persons (other than himself) as witnesses at his trial and, if so -*
> *(a) giving the name, address and date of birth of each such proposed witness, or as many of those details as are known to the accused when the notice is given;*
> *(b) providing any information in the accused's possession which might be of material assistance in identifying or finding any such proposed witness in whose case any of*

[7] NOT yet in force (14th January 2006).
[8] NOT yet in force (14th January 2006).

the details mentioned in paragraph (a) are not known to the accused when the notice is given.

(2) Details do not have to be given under this section to the extent that they have already been given under section 6A(2).

(3) The accused must give a notice under this section during the period which, by virtue of section 12, is the relevant period for this section.

(4) If, following the giving of a notice under this section, the accused -

(a) decides to call a person (other than himself) who is not included in the notice as a proposed witness, or decides not to call a person who is so included, or

(b) discovers any information which, under subsection (1), he would have had to include in the notice if he had been aware of it when giving the notice,

he must give an appropriately amended notice to the court and the prosecutor."

This section is added by section 34 of the 2003 Act.

Where the accused proposes calling witnesses other than himself, he must serve on the prosecution a notice – styled a "witness notice" for the purposes of section 39 of the 2003 Act [see section 39(12)]. The notice must set out the matters referred to in new section 6C(1)(a), and (b), CPIA 1996.

Section 6C represents something of a departure from the conclusions of Lord Justice Auld in his Review of the Criminal Court of England and Wales who, whilst recognising that requirements of the sort set out in s.6C of CPIA 1996 might have much to commend them "as a matter of efficiency", they would nevertheless be difficult to enforce, and be objectionable to many as going beyond the definition of issues as well as imposing on the defendant an obligation to set out pre-trial, an affirmative case [see Chapter 10: para.180].

It is important to note that the section does not require the defence to identify the issue to which the witness relates, still less does it require the defence to disclose the evidence the witnesses will give.

It follows that such a notice does NOT form part of a Defence Statement and it *need not* be served as part of such a statement.

Concern was expressed in Parliament that this provision might deter witnesses from coming forward, or attending court. The Government's position was expressed by the Parliamentary Under-Secretary for the Home Department [Standing Committee B, 9.1.03, column 247]:

> *"The advantages to the measure are that it deters surprise witness and ambush defences in so far as that remains a problem, helps to weed out incomplete, inadequate or false defences—indeed, it enables the police to make criminal records checks on defence witnesses, thus helping the jury to assess their credibility—and allows the police to interview defence witnesses before the trial, if necessary, and to make further inquiries."*

It is not yet clear what time limit will be imposed for this disclosure. If it is to be 14 days from the date when the prosecution comply with their duty of primary disclosure, then it will cause obvious problems. There is provision under the existing regulations to apply for an extension of time – but only if that application is itself made within the 14 days.

There are other concerns: suppose that there are good reasons for *not* notifying the prosecution of defence witnesses, e.g. a vulnerable witnesses, or witnesses in fear of reprisals, or witnesses who mistrust the police and are not prepared to be interviewed by them pre trial (and who might then fail to attend court). However, although the police will be able to carry out 'intelligence' checks on defence witnesses, the prosecution must comply with the requirements of s.100 of the Criminal Justice Act 2003 (non-defendant's bad character) before putting or adducing evidence of a defence witnesses' bad character. The prosecution will need to serve proper notice, and make proper disclosure to the defence, before applying for leave under s.100. Note that the expression "the

defendant" is defined by s.112 (for the purpose of chap.1 to Part 11) to mean the person *charged* with an offence in the proceedings.

NOTIFICATION OF NAMES OF EXPERTS INSTRUCTED BY DEFENCE [9]

Section 35 of the CJA 2003 inserts a new s.6D into the CPIA 1996.

The new s.6D provides: -

> *"**6D. Notification of names of experts instructed by accused***
> *(1) If the accused instructs a person with a view to his providing any expert opinion for possible use as evidence at the trial of the accused, he must give to the court and the prosecutor a notice specifying the person's name and address.*
>
> *(2) A notice does not have to be given under this section specifying the name and address of a person whose name and address have already been given under section 6C.*
>
> *(3) A notice under this section must be given during the period which, by virtue of section 12, is the relevant period for this section."*

This section is designed to put the prosecution, and the court, on notice of the fact that the defence intend to instruct an expert to provide an opinion for possible use in evidence during criminal proceedings. It frequently happens that the defence seek an independent opinion to verify the conclusions of a prosecution expert. Occasionally, the defence will seek the assistance of an expert even if the prosecution has not done so. The defence often disclose, at a pre-trial hearing, the fact that an expert has been instructed, but rarely divulge the identity of the expert to the court, or to the prosecutor. Accordingly, if the defence choose not to call their expert, the prosecution would not know whom to contact with a view to interviewing, and perhaps calling, that witness itself. In any event, although there is no property in a witness, objection is sometimes taken to an expert divulging to another party material that is said to be the subject of legal professional privilege.

Sections 6D CPIA 1996 does not alter the rules of legal professional privilege in any way, but gives the prosecution an opportunity to interview the expert pre-trial (whether to be called by the defence or not), and to obtain information from him/her: see *Standing Committee B*, column 255, 9.1.03.

This provision is like to be of practical importance. It will enable fact-finders to receive relevant admissible expert evidence that the defence chose not to call. However, it is also likely to attract criticism that the prosecution is able to capitalise on information gained somewhat parasitically in circumstances where the defence took the initiative to seek expert assistance whereas the prosecution agencies did not. Although section 39 of the 2003 Act amends section 11 of the 1996 Act (faults in disclosure by the accused) it would seem that no statutory power exists to permit either the court, or any party to the proceedings, to comment adversely on the failure of the defendant to call an expert. The Government contemplated making it a requirement that the defence disclose unused experts reports, but having sought views on that proposal, considered that this was not a good idea [*Standing Committee B*, column 254].

What do the words "for possible use as evidence" mean? Were the defence to instruct an expert to sift information, or to explain the significance of complex or technical material, or to provide a preliminary opinion, would the section engaged at all? Would it be a permissible tactic for the defence to require of an expert that he shall be contractually bound not to act for another party to the proceedings and not to disclose to a third party his/her conclusions/opinions?

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[9] NOT yet in force (14th January 2006).

Note the existing duty to disclose expert evidence in certain circumstances: note new *Rules 24.1, 24.2, 24.3* of the *Criminal Procedure Rules*:

> 24.1 Requirement to disclose expert evidence
> (1) Following—
> (a) A plea of not guilty by any person to an alleged offence in respect of which a magistrates' court proceeds to summary trial;
> (b) the committal for trial of any person;
> (c) the transfer to the Crown Court of any proceedings for the trial of a person by virtue of a notice of transfer given under section 4 of the Criminal Justice Act 1987;
> (d) the transfer to the Crown Court of any proceedings for the trial of a person by virtue of a notice of transfer served on a magistrates' court under section 53 of the Criminal Justice Act 1991;
> (e) the sending of any person for trial under section 51 of the Crime and Disorder Act 1998;
> (f) the preferring of a bill of indictment charging a person with an offence under the authority of section 2(2)(b) of the Administration of Justice (Miscellaneous Provisions) Act 1933; or
> (g) the making of an order for the retrial of any person, if any party to the proceedings proposes to adduce expert evidence (whether of fact or opinion) in the proceedings (otherwise than in relation to sentence) he shall as soon as practicable, unless in relation to the evidence in question he has already done so or the evidence is the subject of an application for leave to adduce such evidence in accordance with section 41 of the Youth Justice and Criminal Evidence Act 1999 —
> (i) furnish the other party or parties with a statement in writing of any finding or opinion which he proposes to adduce by way of such evidence, and
> (ii) where a request in writing is made to him in that behalf by any other party, provide that party also with a copy of (or if it appears to the party proposing to adduce the evidence to be more practicable, a reasonable opportunity to examine) the record of any observation, test, calculation or other procedure on which such finding or opinion is based and any document or other thing or substance in respect of which any such procedure has been carried out.
> (2) A party may by notice in writing waive his right to be furnished with any of the matters mentioned in paragraph (1) and, in particular, may agree that the statement mentioned in paragraph (1)(a) may be furnished to him orally and not in writing.
> (3) In paragraph (1), "document" means anything in which information of any description is recorded.
>
> *Formerly rule 3 of the Magistrates' Courts (Advance Notice of Expert Evidence) Rules 1997 and rule 3 of the Crown Court (Advance Notice of Expert Evidence) Rules 1987. For the equivalent requirement in Crown Court proceedings under Part 2 of the Proceeds of Crime Act 2002 see rule 57.9.*

> 24.2 Withholding evidence
> (1) If a party has reasonable grounds for believing that the disclosure of any evidence in compliance with the requirements imposed by rule 24.1 might lead to the intimidation, or attempted intimidation, of any person on whose evidence he intends to rely in the proceedings, or otherwise to the course of justice being interfered with, he shall not be obliged to comply with those requirements in relation to that evidence.
>
> (2) Where, in accordance with paragraph (1), a party considers that he is not obliged to comply with the requirements imposed by rule 24.1 with regard to any evidence in relation to any other party, he shall give notice in writing to that party to the effect that the evidence is being withheld and the grounds for doing so.
>
> *Formerly rule 4 of the Magistrates' Courts (Advance Notice of Expert Evidence) Rules 1997 and rule 4 of the Crown Court (Advance Notice of Expert Evidence) Rules 1987.*
> *For the equivalent exception in Crown Court proceedings under Part 2 of the Proceeds of Crime Act 2002 see rule 57.10.*

> 24.3 Effect of failure to disclose
> A party who seeks to adduce expert evidence in any proceedings and who fails to comply with rule 24.1 shall not adduce that evidence in those proceedings without the leave of the court.
>
> *Formerly rule 5 of the Magistrates' Courts (Advance Notice of Expert Evidence) Rules 1997 and rule 5 of the Crown Court (Advance Notice of Expert Evidence) Rules 1987.*

FURTHER DEFENCE DISCLOSURE PROVISIONS

Section 6E is inserted into the CPIA 1996 by section 36 of the CJA 2003.

Section 6E: Disclosure by accused: further provisions [10]

(1) Where an accused's solicitor purports to give on behalf of the accused -
  (a) a defence statement under section 5,6, or6B, or
  (b) a statement of the kind mentioned in section 6B(4),
  the statement shall, unless the contrary is proved, be deemed to be given with the authority of the accused.

(2) If it appears to the judge at a pre-trial hearing that an accused has failed to comply fully with section 5,6B, or6C, so that there is a possibility of comment being made or inferences drawn under section 11(5), he shall warn the accused accordingly.

(3) In subsection (2) "pre-trial hearing" has the same meaning as in Part 4 (see section 39).

(4) The judge in a trial before a judge and jury-
  (a) may direct that the jury be given a copy of any defence statement, and
  (b) if he does so, may direct that it be edited so as not to include references to matters evidence of which would be inadmissible.

(5) A direction under subsection (4) -
  (a) may be made either of the judge's own motion or on the application of any party;
  (b) may be made only if the judge is of the opinion that seeing a copy of the defence statement would help the jury to understand the case or to resolve any issue in the case.

(6) The reference in subsection (4) to a defence statement is a reference -
  (a) where the accused has given only an initial defence statement (that is, a defence statement given under section 5 or 6), to that statement;
  (b) where he has given both an initial defence statement and an updated defence statement (that is, a defence statement given under section 6B), to the updated defence statement;
  (c) where he has given both an initial defence statement and a statement of the kind mentioned in section 6B(4), to the initial defence statement.

APPLICATION BY DEFENCE FOR DISCLOSURE

Section 8 of CIPA 1996, as amended by section 38 of the CJA 2003, reads as follows:[11]

~~(1) This section applies where the accused gives a defence statement under section 5,or6 and the prosecutor complies with section 7 or purports to comply with it or fails to comply with it.~~

~~(2) If the accused has at any time reasonable cause to believe that -~~
  ~~(a) there is prosecution material which might be reasonably expected to assist the accused's defence as disclosed by the defence statement given under section 5,or6, and~~
  ~~(b) the material has not been disclosed to the accused,~~
  ~~the accused may apply to the court for an order requiring the prosecutor to disclose such material to the accused.~~

[*(1) This section applies where the accused has given a defence statement under section 5, 6, or 6B and the prosecutor has complied with section 7A(5) or has purported to comply with it or has failed to comply with it.*

[10] In force from the 4th April 2004, with the saving mentioned above: *Criminal Justice Act 2003 (Commencement No.8 and Transitional and Saving Provisions Order 2005* (SI 2005/950).

[11] In force from the 4th April 2004, with the saving mentioned above: *Criminal Justice Act 2003 (Commencement No.8 and Transitional and Saving Provisions Order 2005* (SI 2005/950).

(2) If the accused has at any time reasonable cause to believe that there is prosecution material which is required by section 7A to be disclosed to him and has not been, he may apply to the court for an order requiring the prosecutor to disclose it to him.]

(3) For the purposes of this section prosecution material is material -

(a) which is in the prosecutor's possession and came into his possession in connection with the case for the prosecution against the accused,

(b) which, in pursuance of a code operative under Part II, he has inspected in connection with the case for the prosecution against the accused, or

(c) which falls within subsection (4).

(4) Material falls within this subsection if in pursuance of a code operative under Part II the prosecutor must, if he asks for the material, be given a copy of it or be allowed to inspect it in connection with the case for the prosecution against the accused.

(5) [Identical to s.3(6)]

(6) [Identical to s.3(7) (including the amendment).]

FAULTS IN DEFENCE DISCLOSURE [12]

Section 39 of the CJA 2003 makes provision for sanctions where there are faults in defence disclosure:

Fault	Section	Consequence
Failure to serve an initial defence statement	s.11(2)(a)	Adverse comment; adverse inferences [s.11(5)]
Giving a defence statement out of time	s.11(2)(b)	Adverse comment; adverse inferences [s.11(5)]
Failure to give an updated defence statement	s.11(2)(c)	Adverse comment; adverse inferences [s.11(5)]
Failure to give a "no change" statement	s.11(2)(c)	Adverse comment; adverse inferences [s.11(5)]
Giving an updated defence statement out of time	s.11(2)(d)	Adverse comment; adverse inferences [s.11(5)]
Giving a "no change" statement out of time	s.11(2)(d)	Adverse comment; adverse inferences [s.11(5)]
Pleading inconsistent defences [13]	s.11(2)(e)	Adverse comment; adverse inferences [s.11(5)]
At trial, a defence is put forward that is not pleaded in a Defence Statement	s.11(2)(f)(i)	Adverse comment; adverse inferences [s.11(5)], BUT the court must have regard to the extent of any differences and whether there is justification for it: s.11(8)
At trial, the defendant relies on a matter not pleaded in the Defence Statement	s.11(2)(f)(ii)	*Comment* may only be made with the leave of the court IF the omission relates to a point of law/admissibility of evidence: s.11(6)
At trial, the defence	s.11(2)(f)(iii)	Adverse comment; adverse inferences [s.11(5)]

[12] New s.11(4), (7), (11) NOT in force (14.1.06) but the other subsections are in force from the 4th April 2004, with the saving mentioned above: *Criminal Justice Act 2003 (Commencement No.8 and Transitional and Saving Provisions Order 2005* (SI 2005/950): note schedule 1, Article 2, para.2. Note that paragraph 2 to Schedule 2 (SI 2005/950) provides that "The coming into force of the provisions referred to in paragraphs 2…of Schedule 1 to this Order is of no effect in relation to alleged offences into which a criminal investigation within the meaning of section 1(4) of the Criminal Procedure and Investigation Act 1996[27] has begun before 4th April 2005".

[13] Presumably this means merely pleading inconsistent defences (i.e. the fact the defendant does not testify at all is immaterial).

Fault	Section	Consequence
adduce evidence in support of an alibi without giving particulars in a Defence Statement		
At trial, the defence call an alibi witness without giving full particulars in the Defence Statement	s.11(2)(f)(iv)	Adverse comment; adverse inferences [s.11(5)]
Witness Notice		
Gives a witness notice out of time	s.11(4)(a)	*Comment* only with leave of the court: s.11(7);
Defendant calls a witness (other than himself) not named or not adequately identified in a Witness Notice.	s.11(4)(b)	*Comment* only with leave of the court: s.11(7), UNLESS there is justification for the failure [s.11(9)]
Generally	s.11(11)	Serving a 'no change' statement when an updated statement should have been served, will be treated as if the defect relates to the original defence statement [e.g. NFE served after giving the original Defence Statement; new facts in issue not pleaded in an Updated Statement]