

Changes to the Statutory Disclosure Regime Effected By Part 5 of the CJA 2003

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Introduction

Part 5 of the Criminal Justice Act 2003 (CJA 2003) effected significant change to the statutory scheme of disclosure implemented in April 1997 by Part I of the Criminal Procedure & Investigations Act 1996 (CPIA). The catalyst for this reform was a comprehensive review of the criminal justice system undertaken by Lord Justice Auld which reported in 2001. A section of this was devoted to a specific review of the disclosure regime and considered the chief complaints regarding alleged defects of the CPIA scheme.

In Chapter 10 of his Review, Lord Justice Auld called for the introduction of a single disclosure test, which he defined as “material which in the prosecutor’s opinion might reasonably weaken the prosecution case or assist that of the defence” (see Chapter 10, para 171). Secondly, Lord Justice Auld called for a revision of the CPIA defence disclosure requirements in order to make them more effective (para 183). Finally, he called for greater resources to be provided to both investigators and prosecuting lawyers to ensure that they had sufficient time to schedule and examine unused material in order to make informed disclosure decisions (see para 130).

The CJA 2003 reforms were foreshadowed in a Home Office White Paper “*Justice for All*”, which advocated “a trial system that works”, which in its view should be a system which focuses on the search for truth (para 4(4)). In this document the Home Office announced that it accepted most of Lord Justice Auld’s recommendations concerning necessary reforms to the CPIA disclosure regime and confirmed that they would be implemented in the next criminal justice bill

The reforms introduced by the CJA 2003 were implemented in England and Wales in April 2005. They are not retroactive. Accordingly, for those prosecutions based upon

a criminal investigation which commenced before 4th April 2005, the “old” CPIA regime will apply together with the first version of the “CPIA Code of Practice” and the set of Attorney General’s Guidelines on Disclosure, promulgated in 2000. For prosecutions where the investigation began after 4th April 2005, the CPIA disclosure regime as modified by the CJA 2003 applies, together with a new code of practice¹ and a new set of Attorney General’s Guidelines, promulgated in April 2005 (the AG’s Guidelines).²

This paper only considers the CPIA disclosure regime as modified by the CJA 2003. It will also refer to the related changes or commentary contained in the AG’s Guidelines, the amended CPIA Code of Practice and the rewritten CPS Disclosure Manual.

“Initial Duty” of the Prosecutor to Disclose

Section 3 of the CPIA is amended by Section 32 of the CJA 2003 as follows (deleting the original CPIA wording as shown below and substituting the new wording as shown in bold):

Section 3 CPIA

~~Primary disclosure by Prosecutor~~

Initial Duty of Prosecutor to Disclose

- (1) The Prosecutor must:
 - (b) 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**

¹ *Criminal Procedure and Investigations Act 1996 (Code of Practice) Order 2005, SI 2005/98*

² *These can be found at www.lslo.gov.uk*

the remainder of Section 3, (1)(b) to (8) of the CPIA is un-changed.

The heading to Section 4, CPIA which was entitled “Primary disclosure” is deleted in favour of the words **Initial duty to disclose**. So the test and wording of primary disclosure created by the CPIA is abandoned in favour of an initial duty.

The CPS Disclosure Manual creates a “Disclosure Test” in relation to all unused material which it defines “any material which might reasonably be considered capable of undermining the case for the prosecution against the accused, or of assisting the case for the accused, which has not previously been disclosed (Para 8). The CPS therefore sees the initial duty as a single not bifurcated test of disclosure – again as abandonment of the dual primary and secondary disclosure tests created by the CPIA.

The fundamental difference between primary disclosure and this new initial test is the shift from subjective to objective prosecutorial decision – making. This is achieved by the import of a reasonableness test instead of the previous prosecutor’s opinion test. A more consistent approach by prosecutors concerning disclosure is therefore intended. This is reinforced by paragraphs 8 to 14 of the AG’s Guidelines, which set out principles (para 10) and particular examples (para 12) of how this initial test should be and applied. These paragraphs in summary make the following points:

1. In assessing whether material might weaken the prosecution case or strengthen an accused’s case, the prosecutor should take cognisance of all information available at the time when disclosure decisions are made. In particular, regard should be had to any representations made by the accused as to their likely defence case, for example what they said during their caution interview. Accordingly, if the accused did answer questions, then the prosecutor is obliged to peruse the record of interview (or a summary of it) in order to assess what it reveals about the likely defence case (see para 9).
2. The concept of weakening the prosecution case or strengthening the defence case is not defined is not confined to a consideration of what possible use the defence could make of the material during a trial, for example, cross-examination a of prosecution witness. It should be interpreted more widely

whether the material could reasonably be used to support a defence submission relating to exclusion of evidence, abuse of process or breach of the accused's Convention rights (see para 10). Thus a prosecutor has to take a broad view of disclosability and to some extent speculate as to what arguments the defence may mount.

3. There are certain types of material which prosecutors should presume fall within the initial duty test. Paragraph 12 lists six of these and paragraph 14 a seventh.
4. Consideration of whether a particular item falls within or outside the initial duty test should take account of the possibility that whilst the material on its own may fall outside, when it is combined with other material it may fall inside (see para 13).
5. In relation to the extent to which a prosecutor has to forecast future defence tactics paragraph 14 states "it is not necessary prior to the receipt of the defence statement to speculate about every possible defence or submission that may be raised. Nevertheless, where a distinct explanation has been put forward by the accused or is apparent from the circumstances of the case, it must be considered in the context of assessing whether there is any material requiring disclosure. This consideration should take place at the earliest opportunity and does not need to await receipt of the defence statement".

Non-Justiciability and the Initial Duty

The condition precedent or trigger for the defence duty of disclosure under Section 5 of the CPIA is when the prosecutor fulfils their obligation under Section 3 (initial disclosure) or "purports to comply with it". This wording is unchanged by the 2003 Act. It's significance is to prevent the courts being able to enquire into how a prosecutor has fulfilled (or otherwise) their initial duty until after the defence have purported to comply with their duties.

This wording “purports to comply” is obviously intended to preclude any defence argument to the effect that the defence duty to disclose has not arisen because the prosecutor has failed to discharge their initial duty adequately or fully. If the prosecutor purports to comply then this is sufficient.

In *R –v- Lewis & Others [2006] EWCA 3764* a case under the CPIA regime prior to the 2003 Act reforms, the defence argued that prosecution had failed to comply with its duty of primary disclosure. Secondly, that in the light of this failure the trial judge was empowered to order the prosecutor to comply with this duty before requiring any defence disclosure. Auld L.J. held that the courts have no power to direct or interfere with a prosecutor’s decisions concerning primary disclosure, “there is no power in the Court to direct primary disclosure..... the scheme of the Act [CPIA] is to rely upon the prosecutor at that stage to disclose to the defence any unused material.....the machinery for testing the objectivity and adequacy of that disclosure, given the prosecutor’s incomplete knowledge at that stage of what issues lie ahead is the scheme of secondary disclosure” (paras 49 - 50). Whilst *Lewis* is a pre 2003 Act authority it is submitted that its reasoning applies equally post the 2003 Act regime. The ‘purport to comply’ wording remains unchanged.

The Disclosure Manual also provides guidance as to types of material which *prima facie* fall within the scope of the initial duty. Paragraph 14 of Chapter 12 “*Applying the disclosure test*” sets out eleven types of such material, although in contrast to the types set out in the AG’s Guidelines above, the manual states that such of these types may or may not be disclosable.

Prosecutor’s Responsibility for the Initial Duty

This is also addressed at paragraphs 15 to 21 of Chapter 12 of the Disclosure Manual. Paragraph 16 states that the prosecutor has primary responsibility for ensuring that the material satisfying the initial duty is identified and disclosed, subject only to special circumstances listed in paragraph 17, which imposes such responsibility upon the disclosure officer. Paragraph 18, however, encourages dialogue and co-operation between the prosecutor and disclosure officer concerning practicalities.

Timing of Initial Duty

Most Crown Court centres now have standard directions concerning a timetable for steps to be taken by both prosecution and defence following the sending of an accused by magistrates and these include when the initial duty should be completed and any consequent disclosure made. However there are no statutory time limits concerning when a prosecutor must comply (or purportedly comply) with their duty of initial disclosure.

Disclosure of the Non-Sensitive Schedule (from MG6C)

Section 4 of the CPIA concerns disclosure of this schedule. It envisages that this will be disclosed at the same time as any primary disclosure and this has been the convention. However the wording of this section does not demand this. It provides that a prosecutor must disclose it to the accused only when they are in possession of it.

In *DPP -v- Wood and McGillicuddy [2006 EWHC 322]*, the Administrative Court considered a defence submission that the duty of primary disclosure was not fulfilled until the prosecutor had done two things:

- (i) disclosed material falling under the test of primary disclosure or made a written statement to the effect that there was none; and
- (ii) served the MG6C

The Court on a construction of Section 3 of the CPIA however disagreed that (ii) was a condition and held that disclosure of MG6C under Section 4 “is not itself a necessary component nor the mark of primary disclosure” (para 23).

Whilst this authority is decided under the CPIA prior to its amendment by the 2003 Act, the Court did consider the effect of it on this issue and held that its implementation should make no difference.

Whilst in *Wood* the Court held that the prosecutor's obligation to serve the unused schedule was separate and distinct to their obligation concerning primary disclosure or the initial duty of disclosure under Section 3 and accordingly, the schedule could be served later, this is not what the Disclosure Manual envisages. The manual envisages that the prosecutor is provided with the schedule at the same time as material, which the disclosure officer believes satisfies the disclosure test and that they carry out their review of both at the same time.³ This is good practice bearing in mind that the schedule will inevitably have to be served and separating the tasks in time is apt to cause inefficiencies. Moreover, if one is not served with any initial disclosure then the defence may respond by seeking an extension of time in which to serve the defence statement, submitting that the absence of the schedule is inimical to good preparation of the defence case. The court may or may not be minded to grant the extension.

Continuing Duty to Disclose

Under the un-amended CPIA regime the ambit of this continuing duty was determined by whether the test or primary or secondary disclosure applied. If for example the defence had failed to serve the defence statement, the only the primary duty applied. Under the modified regime the disclosure test remains the same throughout the course of proceedings irrespective of whether or not, for example, a defence statement is served. In this sense therefore it is correct to observe that one of the effects of the modified regime is to conflate the primary and secondary disclosure under the CPIA into a single disclosure test.

Section 7A is a new section inserted into the CPIA by section 37 of the 2003 Act. It is entitled "Continuing Duty of Prosecutor to Disclose". Sub Section (2) imposes a continuing duty upon the prosecutor to keep under review at any time the question of whether there is any unused material, which satisfies the disclosure test and which has not previously been disclosed. This duty to "keep under review" arises once the initial duty of disclosure of the prosecutor has been carried out under Section 3.

³ See paragraph 7 & 8 of Chapter 11

Paragraph 3 of Chapter 14 of the Disclosure Manual prescribes as follows “The prosecutor should be alert to the possibility that further unused material may come to light or be generated after the point at which initial disclosure has been made, after further investigation as a result of the prosecutor’s advice, or when materials such as negative finger print or forensic results become available”.

One consequence of this continuing duty is that not only should newly discovered or newly available material be assessed as to whether it satisfies the disclosure test, but also whether this new material other material previously considered and deemed not to be disclosable should now be disclosable. Moreover, there may also be a need to consider whether there is material in the hands of third parties, which the investigators should seek to obtain.

The service of a defence statement is fundamental to the continuing duty to review disclosure. Bearing in mind that the disclosure test applies to unused material, which in the words of Section 3 “might reasonably be considered capable.... of assisting the case for the accused”, this obviously means that unused material which was previously considered not to satisfy this test may now satisfy it. The CPIA imposes no time limit upon the carrying out of this continuing duty, for example, there is no deadline concerning how long it should take a prosecutor to review the defence statement and make decisions about additional disclosure. However, paragraph 6 of Chapter 14 of the Disclosure Manual envisages that this would be accomplished “as soon as reasonably practicable, and in any event before the commencement of the trial”.

Defence Disclosure

Rebalancing the System

Section 5 & 6 of the CPIA are radically changed in consequence of new wording inserted by the 2003 Act. The effect of this wording is principally to make the obligation of defence disclosure much more onerous under the previous CPIA regime. These reforms are the manifestation of the principles embraced by both Lord Justice Auld and “*Justice for All*” that the trial should be the search for the truth and that the

defendant should be obliged to assist the trial by identifying in advance the issues in dispute. In his review Lord Justice Auld said that defence disclosure should be guided by the principle that “*a defendant’s right of silence is not a right to conceal in advance of trial the issues he is going to take at it. Its purposes is to protect the innocent from wrongly incriminating themselves, not to enable the guilty, by fouling up the criminal process, to make it as difficult as possible for the prosecution to prove their guilt, regardless of cost and disruption to others involved*” (para 183). See also *R v Gleeson [2004] CLR579*.

Defence Statement and Authority of the Accused

Sub-Section 6E (1) of creates a statutory presumption that where an accused’s lawyers serve a defence statement under the CPIA (either original or updated)

“The statement shall, unless the contrary is proved, be deemed to be given with the authority of the accused.”

This provision is intended to have the following practical effects: Firstly, to impress upon an accused and their defence lawyers that a defence statement is a formal pleading which the law will presume whether it is signed by the accused or not that it represents their defence case.

Secondly, if at the subsequent trial the accused defence as presented to the court is inconsistent or materially different from that set out in the statement then to make it easier for the court to draw an adverse inference under Section 11. In the absence of a good explanation from the accused as to why their case at trial differs from their statement the inference may be drawn. Furthermore, what will count as such good explanation is unlikely to be a bare assertion by the accused that their lawyers served the statement without their informed consent. A waiver of privilege looks like a pre-requisite.

Admissibility of a Defence Statement

A defence statement served by an accused or authoritatively presumed to be made by him, see Section 6 (E) (i) supra, is admissible subject only to the court’s overriding discretion under Section 78 PACE.

By Section 6 (E) (iv) of the CPIA a trial judge is empowered to direct that the jury be given a copy of a defence statement and to facilitate this may edit the statement in order to exclude any inadmissible passages. In the absence of agreement between the parties the court may do this of its own motion, see Section 6 (E) (v) (a). The judge may do this pursuant to sub-section (5) “only if the judge is of the opinion that seeing a copy of the defence statement will help the jury to understand the case or to resolve any issue in the case.” An application to the judge to exercise this statutory power can be made by any party including a co-accused.

Disclosure of Defence Statement Amongst Co-Accused and Others

Under the CPIA there was uncertainty, if not controversy, concerning whether the prosecution could treat a defence statement like any other unused material and accordingly, if it satisfied the primary or secondary test of disclosure as appropriate, then disclose it upon other co-accused. In *Cairns* [2003] the Court of Appeal held that where one of the accused was running a “cut-throat” defence against another, the prosecution were entitled to disclose the former’s defence statement to the latter.

Section 5A seeks to put disclosure of a defence statement as between accused on a statutory basis. The court is entitled to order such disclosure. Presumably it follows that a defendant is not entitled to a copy of the co-defendant’s defence statement, its disclosability depends purely upon whether or not it satisfies the disclosure test. If it does and it does not contain any sensitive material in respect of which PI issues pertain then the order should be made. However this should perhaps already have occurred as a result of the prosecutor having disclosed it to the co-accused. Here there is no need to seek leave from either the court or the accused who made the statement.

The continuing duty of disclosure also applies to a co-accused’s defence statement; a duty to disclose may arise in respect as later when a accused gives evidence, where there is a “cut-throat” defence or where and that accused departs from their defence statement.

The Defence Statement

The defence statement is due within 14 days of the date upon which the prosecution has complied with, or purported to comply with, the duty of initial disclosure. The same system applies in relation to applications for extensions of time in which to serve a defence statement.

A new Section 6A CPIA replaces and repeals Sections 5(6) – (9) of the CPIA. The purpose of Section 6A is to define a defence statement and specify the matters that such statement must contain.

Under Section 5(6) of the CPIA the accused was required in their statement to set out “in general terms the nature of the accused defence” and under Section 5(6) to disclose “matters on which he takes issue with the prosecution”. The aim of the 2003 Act is to make more specific orders as to what is required to be disclosed in a defence statement and to increase the extent of defence disclosure generally.

Section 6A(1) entitled “Contents of defence statement” contain four specific requirements as follows:

- (a) setting out the nature of the accused’s defence, including any particular defence he intends to rely;*
- (b) indicating the matters of fact that 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 upon which he intends to rely for that purpose.*

Guidance as to the extent of Defence disclosure required:

The requirements of Section 6A(1) have not yet received discrete judicial attention. However, there is no lack of exhortation from both the Attorney General and various Court Protocols in favour of greater rather than lesser Defence disclosure.

Paragraph 15 of the AG's guidelines states as follows:

“A comprehensive defence statement assists the participants in the trial to ensure that it is fair..... 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 “should be disclosed.” The Disclosure Protocol states that “the defence statement must spell out, in detail, the nature of the defence, and particular defences relied upon; it must identify the matters of fact upon which the Accused takes issue with the Prosecution, and the reason why, in relation to each disputed matter of fact. It must further identify any point of law (including points as to misability of Evidence, or abuse of process (which the accused proposes to take, and identify authorities relied on in relation to each point of law.”

In *R v Bryant [2005] EWCA 2079* Judge L J stated that a reiteration of the defendant's plea is not the purpose of a defence statement. Defence statements must comply with the requisite formalities set out Section 6A.

Paragraph 35 of the Disclosure Protocol prescribes as follows:

“The defence statement must spell out, in detail, the nature of the defence, and particular defences relied upon; it must identify the matters of fact upon which the accused takes issue with the prosecution, and the reason why, in relation to each disputed matter of fact.”

Section 6A(1) is intended to be as clear as possible to all sides and the court as to what this pleading should comprise. The accused must set out their defence(s) and any matters of fact (including circumstances) upon which the accused intends to rely in substantiating their defence(s). Whilst disclosing the nature of the accused's defence seems relatively straightforward eg. self-defence or lack of intent, addressing

the requirement “matters of fact in which [the accused] takes issue with the prosecution” is less clear. For example, does this mean all facts or the principle or main facts. Secondly, does fact include circumstance or state of mind? None of these questions have received a judicial answer, as the requirements of Section 6A have not yet been judicially considered. It is, however, submitted that a defence statement as a pleading should be distinguished from a proof or witness statement and accordingly, the statement need only address the principle or main facts in dispute. Otherwise the defence statement would need to descend into a detailed point by point analysis of every section of the prosecution statement as to what was in dispute or not accepted.

The views of Lord Justice Auld in his Review are pertinent to this issue where he accepted that the imposition of a statutory requirements concerning defence disclosure, which were unduly onerous and detailed would probably fail and “would be difficult to enforce” (see para 180). Lord Justice Auld drew attention to the practicalities and difficulties that defence lawyers routinely face in preparation of their clients’ defences (difficulties of accessing clients on remand in custody, unwilling or incapable etc⁴). No mention has however been made concerning legal aid reflecting any increase in the defence role.

Ultimately if it proves necessary to clarify what Section 6A requires, there are two methods of resolution. Firstly, either the prosecutor can seek a direction from the court if necessary at a pre-trial hearing and invite the court to give a statutory warning under 6E(2) of the CPIA (see further below) or the Home Secretary pursuant to Section 6A(4) is unable to make further regulations “as to the details of the matters that, by virtue of sub section (1) are to be included in defence statements”.

Defence Statement & Alibi

Section 6A(3) defines what an alibi defence is⁵ where such a defence will be raised at trial. It obviously comes within Section 6(A)(1)(a) referred to above. Where it does apply, Section 6A(2) demands the disclosure of additional and specific

⁴ See para 183 of his Review

⁵ *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 likely to have been, at the place where the offence was alleged to have been committed at the time of its alleged commission. This definition is taken from Section 11(8) of the Criminal Justice Act 1967.*

information relating to this defence in relation to potential witnesses who are or may be able to substantiate this defence (see Section 6A(2)(a) and (b)).

Prosecution Response to Service of Defence Statement

(1) Additional Disclosure

Paragraphs 10 to 30 of Chapter 15 of the Disclosure Manual provide detailed guidance to a prosecutor and disclosure officer as to how they should respond to a defence statement in relation to considering whether further disclosure should be made pursuant to their duty to review disclosure.

Paragraph 10 provides a statement of principle in this respect: “Prosecutors should open, alert and responsive to requests for disclosure of material, when the request is supported by a comprehensive defence statement.”

In relation to advice to a disclosure office. Paragraph 14 states “the prosecutor should draw the attention of the disclosure office to any key issues raised by the defence statement.....the prosecutor should give advice to the disclosure officer in writing as to the sort of material to look for.....”. In relation to the non-sensitive schedules in his/her profession, the prosecutor should reconsider these and “must be proactive in identifying discloseable material (para 25)”.

In relation to the duties of the disclosure officer, paragraph 20 requires them to “promptly look again at the retained material and draw the attention of the prosecutor any material by the disclosure test, both sensitive and non-sensitive material must be considered”.

Where the prosecutor is satisfied that there is no disclosure to make, having received the defence statement, para 28 of the manual requires the defence to be specifically informed as to this.

(2) Resisting unjustified Defence requests for disclosure

As well as complying with the requirements of Section 6A it has become common practice for the defence lawyers to include within the defence statement a series of particular disclosure requests (“shopping lists”) for either particular documents or classes of documents believed to be in the prosecution’s possession. These requests can be wide ranging and if granted could result in the disclosure by the prosecution of thousands of documents. A pejorative euphemism for acceding to such requests for disclosure is frequently used in governmental and prosecutorial circles, “giving the keys to the warehouse”. The Disclosure Protocol, for example, states that

“Handing the Defence the keys to the warehouse” has been the cause of many gross abuses in the past, resulting in huge sums being run up by the Defence without any proportionate benefit to the course of justice. These abuses must end.” (paragraph 31).

These prescriptions echo what was said by the House of Lords in *R v H & C [2004] 2AC 134*:

“... the parties respective cases should not be restrictively analysed. But they must be carefully analysed to ascertain the specific facts that the prosecution seek to establish and the specific grounds on which the charges are resisted. The trial process is not well served if the defence are permitted to make general unspecified allegations and then seek far-reaching disclosure in the hope that material may turn up and make good.”

In the Fraud Protocol the subject of “the keys to the warehouse” was revisited. Paragraph 4 (iii) states that such a warehouse key disclosure was undesirable because “(a) this amounts to an abrogation of the responsibility of the Prosecution “and “ (b) the defence solicitors may spend a disproportionate amount of time and incur disproportionate costs falling through a morass of documents.

- (3) Can the Defence then be used by the Prosecution for the adversarial purpose of strengthen his case?

There is no discrete statutory guidance as to what use other than for the purposes of making any additional disclosure can be made by the prosecution of a defence statement. There is thus no statutory prohibition on using it for the purpose of strengthening the prosecution's case by means of serving additional evidence to rebut or reverse any defence pleaded in the statement. Neither, is it submitted, any as yet judicial guidance as to this subject, either endorsing a practice of a prosecutor making use of a defence statement for this purpose or deprecating it as an abuse of process.

The defence statement originally introduced by the CPIA was foreshadowed by Section 9(5) of the Criminal Justice Act in 1987, which empowered a court in a case of serious or complex fraud to order the accused to provide a "defence case statement". In the prosecution of Asil Nadir in the early 1990's, the SFO made use of Mr Nadir's defence case statement for the purpose of strengthening its case. Mr Nadir submitted that this was abuse of process by the SFO. The Divisional Court disagreed holding that such conduct was not abusive and in any event the court did not have the power to direct the prosecution as to how it conducted the investigation of crime.⁶ Taylor CJ held at 13.25; "The powers of the trial judge relate to the admission of evidence and conduct of the trial, not to the investigation process". It is submitted that the authority remains good, not simply for the serious fraud regime under the 1967 Act, but also regards to the CPIA.

The Disclosure Manual envisages no objection to the use of a defence statement for adversarial purposes. Paragraph 17 of Chapter 15 states "The defence statement gives a valuable opportunity for the prosecution to confirm or rebut defence allegations and it is likely to point the prosecution to other lines of enquiry, for example, the investigation of an alibi, or where forensic evidence is involved.

Paragraph 18 states "Further investigation in these circumstances should be considered. Evidence obtained as a result of inquiring into a defence statement may be used as part of the prosecution case or to rebut the defence". The only prescription contained in the manual in para 19, "An investigator should not show a defence statement to a non-expert witness without prior permission from the prosecutor".

⁶ See *R -V- Nadar* [1993] 1WLR 1322.

Prosecution challenges to inadequate defence statements.

Paragraph 23 of the AG's Guidelines provides the following guidance to prosecutors:

“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”.

The warning referred to is that under Section 6(E)(2) of the CPIA (as inserted by the 2003 Act), which prescribes that if a judge at a pre-trial hearing is satisfied, presumably upon a complaint of such by the prosecution, that the accused has failed to provide an adequate defence statement then the accused shall be warned of that at the trial itself both the court and the prosecution may comment upon this and invite the jury to draw an adverse inference.

The Disclosure Protocol adds to the guidance as follows:

40. Judges must, of course, be alert to ensure that defendants do not suffer because of the faults and failings of their lawyers, but there must be a clear indication to the professions... that a full and careful defence case statement is essential.⁷

41 Where there are failings by the defence or the prosecution, judges should, in exercising appropriate oversight of disclosure, pose searching questions to the parties and, having done this in accordance and explored the reasons for the fault, give clear directions...”

The ultimate sanction for a failure and disclosure by the accused is a drawing of an inference under Section 11 of the CPIA. This allows the prosecution to comment

⁷ Defence lawyers are thus to be recruited as part of the rebalancing exercise.

upon any failure of defence disclosure with a view to seeking such an inference (excluding where failure relates to a point of law) without leave of the court.

(4) Use of the Defence Statement in Court

The CPS manual encourages forensic use of the statement.

Paragraph 31 states that the prosecution that the prosecutor should put the contents of the defence statement to the accused in cross-examination in order to elicit any differences between it and the actual defence relied upon. In *R v Tibbs (2000)* 2CAR309 it was held that leave of the court is not required for the prosecutor to do this.

The subject on adverse inferences under Section 11 of the CPIA is considered in detail below.

Updated Defence Statements

A new sub-section 6B is inserted into the CPIA by the 2003 Act. What is envisaged is one update in order to give the defence a further opportunity to clarify, rectify or expand on matters not contained in the initial defence statement. However this may also provide the prosecution with further material with which to attack the credibility of the defence case. If the accused has nothing further to add then under Section 6B(4) may simply give a written statement to the effect.

Notification of Intention to call Defence Witnesses

The 2003 Act creates a brand new obligation of defence disclosure entirely absent from the CPIA. A new section 6C is entitled “Notification of intention to call Defence Witnesses.”

Where the Accused proposes to call witnesses other than him/herself they must serve on the Prosecution a Witness Notice which contains the matters set out in 6 (C) (i) (a) and (b).

The justification for this new requirement was explained in Parliament as follows:

“The advantages to the measure are that it deters surprise witnesses and ambushed defences insofar 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 enquiries.” 5

Pursuant to Section 6 (C) (a) and (b) the accused must on the prescribed notice disclose the name, address and date of birth of each proposed witness or provide information about them if possible to assist in the identification of such a witness. It is thus plain that this section does not require the defence to identify the issue or issues to which the witness relates or disclose in any way the evidence that they will give.

Notification of Experts Instructed by the Defence

A new Section 6D is inserted into the CPIA by the 2003 Act.

This section is intended to put the prosecution and the court on notice of the fact that the defence intends to instruct an expert to provide an opinion for possible use in evidence during the trial. “If the accused instructs a person with a view to his providing any expert opinion for possible use as evidence at the trial...”

This new disclosure requirement takes effect before the expert evidence disclosure rules under the CPR which only apply to when the defence have decided to serve expert evidence. This section requires the defence to disclose whom they have consulted even if subsequently it chooses not to call their expert. Moreover, it obliges the defence to disclose the identity of the expert consulted.

Presumably the purpose of Section 6D is to permit the prosecution to interview a defence expert pre-trial. What happens if the defence refused to disclose their identity? First of all it seems to doubtful that the prosecution would ever discover that

an expert had been consulted. Or if they had, there is no provision for an adverse inference to be drawn from this refusal under Section 11. Certainly there is no provision in Section 11 to permit the court or any party to the proceedings to comment adversely on the failure of the defendant to call an expert.

Section 6D does not purport to alter the rules of LPP in any way and accordingly the decision in *R v R [1994] 4AllER 260* is unaffected. An expert's advice/opinion is subject to litigation privilege. Accordingly it would be inadmissible for the prosecution to quiz an expert about their instructions from the defence.

Application by Defence for Disclosure

Section 8(1-2) of the CPIA is deleted by the 2003 Act and new sub-sections (1) and (2) are added. If the accused has provided a defence statement and the prosecutor has purported to comply with their obligations relating to further disclosure and the accused has reasonable cause to believe that there is prosecution material which satisfies the disclosure test then they may make an application under Section 8 to the court and will receive an order requiring the prosecutor to disclose it.

This defence remedy only arises once a defence statement has been served and the defence has reasonable basis to believe that disclosure pursuant to the initial duty test has not been made.

A question arises as to whether a defence application for further disclosure must be connected to an assertion made in the defence statement. The wording of the initial duty is of course free-standing and not linked or subsequently limited to the contents of a defence statement. The disclosure protocol argues that a defence request for specific disclosure under Section 8 should only be considered if it is referable to any issue identified in the defence statement. Otherwise the application should be rejected.

FAULTS IN DEFENCE DISCLOSURE ^[1]

This table was created by Rudi Forston of Counsel

| 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 ^[2] | 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) | <i>Comment</i> 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 adduce evidence in support of an alibi without giving particulars in a Defence Statement | s.11(2)(f)(iii) | Adverse comment; adverse inferences [s.11(5)] |
| 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) | <i>Comment</i> 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) | <i>Comment</i> only with leave of the court: s.11(7), UNLESS there is justification for the failure [s.11(9)] |
| | | |

| Fault | Section | Consequence |
|------------------|----------------|---|
| 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] |

Other Developments

(i) New Code of Practice under CPIA taking account of changes affected by CJA. Significant changes are as follows:-

- a) Paragraph 2.1 definition of “the prosecutor”; to ensure that this definition is narrowed down to a particular prosecuting authority conducting the prosecution. Accordingly to make all other prosecuting authorities on behalf of the Crown, third parties.
- b) The concept of sensitive material is removed and replaced by new wording reflecting the decision in R v H&C [2004] 2WLR 335; “material, the disclosure of which, in the opinion of the disclosure officer would give rise to the real risk of serious prejudice to an important public interest”.
- c) Paragraph 3.1 provides for the appointment of deputy disclosure officers.
- d) Paragraph 3.2 provides for a disclosure officer not being appointed where there is a conflict of interest.
- e) The obligation in paragraph 3.4 is slightly diluted in relation to material held on computer. An investigator is not under any obligation to examine more files on the computer than is reasonable in the circumstances.
- f) Paragraph 5.1 provides for original material to be returned if it is reasonable only to retain a copy.

(ii) LCJ Protocol 22/3/05 – “Control and Management of Heavy Fraud and Other Complex Criminal Cases”.

A “protocol” to set out best practice for such cases. Highlights as follows:-

- (a) Case Management Hearings (Section 3)
 - Defence advocates should outline the defence case and accordingly be fully instructed.
 - Judge should insist that a full defence statement is served
- (b) Disclosure (Section 4)
 - Prosecution should only disclose what is relevant and not give the ‘warehouse key’ to the defence

- Judge require defence to provide schedule of any disclosure requests and set deadline for making of any specific disclosure requests
- Unreasoned requests for disclosure should be automatically rejected
- If bona fides of investigation in issue, judge to ensure prosecution disclosure process overseen by independent counsel.

(iii) Admission of hearsay evidence

Part 11 of CJA creates a statutory discretion to allow out of court statements to be admitted as evidence. Accordingly defence lawyers to be mindful of alerting the prosecution to unused witness statements which may contain assertions damaging to the defence case.

(iv) Terminating rulings

Under Part 9 of the CJA prosecution may appeal a ruling which has the effect of terminating a trial, in other words a ruling which is fatal to the prosecution's case. Accordingly an order for disclosure against the prosecution may permit this order to be appealed.

Public Interest Immunity

The leading authority in this area is now R v H&C which in effect provides a trial judge with a checklist when considering PII disclosure issues in place of a balancing act as outlined by Glidewell LJ in Ward.

In H&C the issue for appeal was when a trial judge should order the appointment of special independent counsel to introduce a further adversarial element into an ex parte PII hearing and whether such an appointment is necessary to comply with the jurors' prudence of the ECHR in order to avoid a possible violation of Article 6. The Court of Appeal ruled that the trial judge had been premature to invite the Attorney General to appoint special counsel. The House of Lords held as follows:-

- a. A trial judge in an ex parte PII application was required to ensure that any deviation from the full disclosure rule was the minimum necessary to secure the required protection.
- b. An application made ex parte without letter to the defence would only be permissible in the most exceptional circumstances.
- c. The appointment of special counsel for such an application might be necessary in the interests of justice but such appointment should not be ordered until the trial judge was satisfied that no other course would adequately meet the overriding requirement of fairness to the defendant.

The House however overruled R v Joe Smith [2001] where the judge had dismissed a defence application for unlawful arrest on the basis of information he had received during an ex parte PII application.

In H&C the House emphasised that the rights of an accused must not be viewed in isolation from those of the victim and the public interest. It echoed the statement made by Lord Steyn in AG's Reference No. 3 of 1999 [2001] that,

“the purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property and it is in the interests of everyone to go about their daily lives without fear of harm to personal property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides ...whilst the house re-echoed the golden rule that fairness ordinarily requires disclosure if the material weakens the prosecution's case or strengthens that of the accused it also acknowledged that “circumstances may arise in which such material... cannot be disclosed to the defence fully or even at all without the risk of serious prejudice to an important public interest”.

Accordingly a deviation from the “golden rule” may be legitimate although it should be the minimum required to protect the public interest in question and should never jeopardise the overall fairness of the trial.

This view is consonant with that of the ECHR in Rowe & Davis v UK. The ECHR acknowledged the right to relevant material was not absolute. At paragraph 61 of its judgement the Court said; “.....the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests ...which must be weighed against the rights of the accused”.

Accordingly the trial judge has a pivotal role to play since he/she is in a position to monitor the need for disclosure at the trial. This faith in the role of the trial judge led the ECHR by a majority to uphold the ex parte PII system in Jasper v UK[2000] and Fitt v UK[2000]. In Dowsett v UK[2004] the court emphasised at paragraph 50, “the Court reiterates the importance that material relevant to the defence be placed before the trial judge for his or her ruling on questions of disclosure, namely, at the time when it can serve most effectively to protect the rights of the defence.”

Criminal Justice Act 2003

PART 5

DISCLOSURE

32 Initial duty of disclosure by prosecutor

In the Criminal Procedure and Investigations Act 1996 (c. 25) (in this Part referred to as "the 1996 Act"), in subsection (1)(a) of section 3 (primary disclosure by prosecutor)-

(a) for "in the prosecutor's opinion might undermine" there is substituted "might reasonably be considered capable of undermining";

(b) after "against the accused" there is inserted "or of assisting the case for the accused".

33 Defence disclosure

(1) In section 5 of the 1996 Act (compulsory disclosure by accused), after subsection (5) there is inserted-

"(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."

(2) After section 6 of that Act there is inserted-

"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."

(3) After section 6A of that Act (inserted by subsection (2) above) there is inserted-

"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."

34 Notification of intention to call defence witnesses

After section 6B of the 1996 Act (inserted by section 33 above) there is inserted-

"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 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."

35 Notification of names of experts instructed by defendant

After section 6C of the 1996 Act (inserted by section 34 above) there is inserted-

"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."

36 Further provisions about defence disclosure

After section 6D of the 1996 Act (inserted by section 35 above) there is inserted-

"6E Disclosure by accused: further provisions

(1) Where an accused's solicitor purports to give on behalf of the accused-

(a) a defence statement under section 5, 6 or 6B, 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 or 6C, 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."

37 Continuing duty of disclosure by prosecutor

Before section 8 of the 1996 Act there is inserted-

"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.

6B-

(5) Where the accused gives a defence statement under section 5, 6 or

(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 (c. 23)."

38 Application by defence for disclosure

In section 8 of the 1996 Act (application by accused for disclosure), for subsections (1) and (2) there is substituted-

"(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.

(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."

39 Faults in defence disclosure

For section 11 of the 1996 Act there is substituted-

"11 Faults in disclosure by accused

(1) This section applies in the three cases set out in subsections (2), (3) and (4).

(2) The first case is where section 5 applies and the accused-

(a) fails to give an initial defence statement,

(b) gives an initial defence statement but does so after the end of the period which, by virtue of section 12, is the relevant period for section 5,

(c) is required by section 6B to give either an updated defence statement or a statement of the kind mentioned in subsection (4) of that section but fails to do so,

(d) gives an updated defence statement or a statement of the kind mentioned in section 6B(4) but does so after the end of the period which, by virtue of section 12, is the relevant period for section 6B,

(e) sets out inconsistent defences in his defence statement, or

(f) at his trial-

(i) puts forward a defence which was not mentioned in his defence statement or is different from any defence set out in that statement,

(ii) relies on a matter which, in breach of the requirements imposed by or under section 6A, was not mentioned in his defence statement,

(iii) adduces evidence in support of an alibi without having given particulars of the alibi in his defence statement, or

(iv) calls a witness to give evidence in support of an alibi without having complied with section 6A(2)(a) or (b) as regards the witness in his defence statement.

(3) The second case is where section 6 applies, the accused gives an initial defence statement, and the accused-

(a) gives the initial defence statement after the end of the period which, by virtue of section 12, is the relevant period for section 6, or

(b) does any of the things mentioned in paragraphs (c) to (f) of subsection (2).

(4) The third case is where the accused-

(a) gives a witness notice but does so after the end of the period which, by virtue of section 12, is the relevant period for section 6C, or

(b) at his trial calls a witness (other than himself) not included, or not adequately identified, in a witness notice.

(5) Where this section applies-

(a) the court or any other party may make such comment as appears appropriate;

(b) the court or jury may draw such inferences as appear proper in deciding whether the accused is guilty of the offence concerned.

(6) Where-

(a) this section applies by virtue of subsection (2)(f)(ii) (including that provision as it applies by virtue of subsection (3)(b)), and

(b) the matter which was not mentioned is a point of law (including any point as to the admissibility of evidence or an abuse of process) or an authority,

comment by another party under subsection (5)(a) may be made only with the leave of the court.

(7) Where this section applies by virtue of subsection (4), comment by another party under subsection (5)(a) may be made only with the leave of the court.

(8) Where the accused puts forward a defence which is different from any defence set out in his defence statement, in doing anything under subsection (5) or in deciding whether to do anything under it the court shall have regard-

(a) to the extent of the differences in the defences, and

(b) to whether there is any justification for it.

(9) Where the accused calls a witness whom he has failed to include, or to identify adequately, in a witness notice, in doing anything under subsection (5) or in deciding whether to do anything under it the court shall have regard to whether there is any justification for the failure.

(10) A person shall not be convicted of an offence solely on an inference drawn under subsection (5).

(11) Where the accused has given a statement of the kind mentioned in section 6B(4), then, for the purposes of subsections (2)(f)(ii) and (iv), the question as to whether there has been a breach of the requirements imposed by or under section 6A or a failure to comply with section 6A(2)(a) or (b) shall be determined-

(a) by reference to the state of affairs at the time when that statement was given, and

(b) as if the defence statement was given at the same time as that statement.

(12) In this section-

(a) "initial defence statement" means a defence statement given under section 5 or 6;

(b) "updated defence statement" means a defence statement given under section 6B;

(c) a reference simply to an accused's "defence statement" is a reference-

(i) where he has given only an initial defence statement, to that statement;

(ii) where he has given both an initial and an updated defence statement, to the updated defence statement;

(iii) 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;

(d) a reference to evidence in support of an alibi shall be construed in accordance with section 6A(3);

(e) "witness notice" means a notice given under section 6C."

40 Code of practice for police interviews of witnesses notified by accused

In Part 1 of the 1996 Act after section 21 there is inserted-

"21A Code of practice for police interviews of witnesses notified by accused

(1) The Secretary of State shall prepare a code of practice which gives guidance to police officers, and other persons charged with the duty of investigating offences, in relation to the arranging and conducting of interviews of persons-

(a) particulars of whom are given in a defence statement in accordance with section 6A(2), or

(b) who are included as proposed witnesses in a notice given under section 6C.

(2) The code must include (in particular) guidance in relation to-

- interview;
 - (a) information that should be provided to the interviewee and the accused in relation to such an interview;
 - (b) the notification of the accused's solicitor of such an interview;
 - (c) the attendance of the interviewee's solicitor at such an interview;
 - (d) the attendance of the accused's solicitor at such an interview;
 - (e) the attendance of any other appropriate person at such an interview taking into account the interviewee's age or any disability of the interviewee.

(3) Any police officer or other person charged with the duty of investigating offences who arranges or conducts such an interview shall have regard to the code.

(4) In preparing the code, the Secretary of State shall consult-

- (a) to the extent the code applies to England and Wales-
 - (i) any person who he considers to represent the interests of chief officers of police;
 - (ii) the General Council of the Bar;
 - (iii) the Law Society of England and Wales;
 - (iv) the Institute of Legal Executives;
- (b) to the extent the code applies to Northern Ireland-
 - (i) the Chief Constable of the Police Service of Northern Ireland;
 - (ii) the General Council of the Bar of Northern Ireland;
 - (iii) the Law Society of Northern Ireland;
- (c) such other persons as he thinks fit.

(5) The code shall not come into operation until the Secretary of State by order so provides.

(6) The Secretary of State may from time to time revise the code and subsections (4) and (5) shall apply to a revised code as they apply to the code as first prepared.

(7) An order bringing the code into operation may not be made unless a draft of the order has been laid before each House of Parliament and approved by a resolution of each House.

(8) An order bringing a revised code into operation shall be laid before each House of Parliament if the order has been made without a draft having been so laid and approved by a resolution of each House.

(9) When an order or a draft of an order is laid in accordance with subsection (7) or (8), the code to which it relates shall also be laid.

(10) No order or draft of an order may be laid until the consultation required by subsection (4) has taken place.

(11) A failure by a person mentioned in subsection (3) to have regard to any provision of a code for the time being in operation by virtue of an order under this section shall not in itself render him liable to any criminal or civil proceedings.

(12) In all criminal and civil proceedings a code in operation at any time by virtue of an order under this section shall be admissible in evidence.

(13) If it appears to a court or tribunal conducting criminal or civil proceedings that-

(a) any provision of a code in operation at any time by virtue of an order under this section, or

(b) any failure mentioned in subsection (11),

is relevant to any question arising in the proceedings, the provision or failure shall be taken into account in deciding the question."

