JUDICIARY OF
ENGLAND AND WALES

Review of Disclosure in Criminal Proceedings

The Rt Hon. Lord Justice Gross

September 2011

1. This is a review ("the review") conducted at the request of and for the Lord Chief Justice, prompted by concerns as to the operation of the disclosure regime contained in the Criminal Procedure and Investigations Act 1996, as amended ("the CPIA").

2. The review was established to consider the practical operation of the CPIA disclosure regime and, if appropriate, the legislative framework, with a particular focus on the proportionality of the time and costs involved in that disclosure process.

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

    i) For the improved operation of the CPIA disclosure regime;

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

Scope

4. As is apparent:

    i) The review is confined to disclosure in criminal cases, albeit lessons may be learnt from developments in disclosure in civil (especially commercial) cases.

    ii) The legislative framework falls within the remit of Government and Parliament, rather than the Judiciary. If appropriate, however, the review may highlight areas of the existing legislative framework that would benefit from consideration by Government.

5. The review is essentially concerned with disclosure in criminal cases generating a substantial amount of documentation, whether in paper or electronic format. Though the review is not confined to cases of serious fraud, such cases lie at the heart of the concerns expressed as to the operation of the disclosure process.

6. The review is not concerned with the very complex issues which can arise in respect of security and intelligence material under the Regulation of Investigatory Powers Act 2000 ("RIPA 2000") and related legislation.

7. The review has been conducted by Gross LJ, assisted throughout by Stephen H. Smith, Barrister, at the material times, Legal Secretary to the Lord Chief Justice.[1]

[1] The considerable assistance given by Ms Camilla Barker, clerk to Gross LJ, should likewise be acknowledged here.

Executive Summary

8. Under this heading, we summarise the principal themes of the review.

General

i) There is no "quick fix" or instant solution to concerns as to the operation of the *CPIA* disclosure regime in "heavy" criminal cases, which prompted the review. This conclusion is reinforced by our brief opportunity to consider the workings of other respected legal systems.[2] It does not follow that this jurisdiction is doomed to an unpalatable choice between risking miscarriages of justice or accepting unaffordable documentary excesses. There is room for significant, if incremental, improvement on the part of all concerned with the criminal justice system. It is necessary to address the explosion in electronic communications, which was not and could not have been anticipated when the CPIA regime was enacted. It is essential that the burden of disclosure should not render the prosecution of economic crime impractical.

ii) We do not call for (or for consideration of) legislative intervention[3].

iii) Improvements in disclosure must be prosecution led or driven, in such a manner as to require the defence to engage – and to permit the defence to do so with confidence. The entire process must be robustly case managed by the judiciary. The tools are available[4]; they need to be used.

The present regime

[2] The US, The Netherlands and Germany.
[3] Though it is only the likely timescale which deters us from advancing such a proposal in respect of consolidation of the "Guidance" – see below.
[4] Under the *Criminal Procedure Rules* 2010 (SI 2010 No. 60) ("the Rules"), the *Code of Practice* issued under Part II of the CPIA ("the Code"), the *Guidelines* issued by the Attorney General in 2005 ("the Guidelines"), the *Supplementary Attorney General's Guidelines on Disclosure, Digitally Stored Material* issued in July 2011 ("the 2011 Guidelines") and *Disclosure: A Protocol for the Control and Management of Unused Material in the Crown Court*, issued by Lord Justice Thomas, then Senior Presiding Judge, in February 2006 ("the Protocol").

iv) We do not recommend making any change to the CPIA test for prosecution disclosure; we encountered no criticism of the test itself.

v) Real concern and cogent criticism have been expressed as to the striking width of the relevance test at the investigatory stage contained in the Code, especially in the context of the volume of electronic materials now generated. That test triggers a duty to record and retain material which may have "*some bearing*" on the investigation "*unless it is incapable of having any impact on the case*". We were tempted but ultimately not persuaded to narrow the test by the insertion of a proportionality qualification. We do not think that the time is yet ripe to introduce such a qualification and would wish to see a settled period of improved confidence in the prosecution's performance of its disclosure obligations before contemplating a change of this nature. There are still too many examples of prosecution disclosure failures.

vi) There is considerable scope for greater common sense in "*scheduling*" of unused material, which appears to have become an unnecessarily burdensome exercise. Over and above the importance of investigators not seizing more material than is necessary, *excessive* detail in scheduling is to be avoided; a schedule must be a clear record but there is no need for it to become an art form. We see no reason why full use should not be made of the "block listing" provisions contained in para. 6.10 of the Code and para. 51 of the 2011 Guidelines, where appropriate and, in particular, when dealing with enormous volumes of electronic materials.

The prosecution

vii) Improvements in disclosure must – and can only – be prosecution[5] led or driven. To achieve such improvements, it is essential that the prosecution takes a grip on the case and its disclosure requirements from the very outset of the investigation.

[5] Using the term here to encompass investigators, prosecutors and trial counsel.

viii) In this regard we commend the CPS proposals canvassed with us, including by the DPP personally, in particular (for present purposes) those as to the production of a *disclosure management document* and a *prosecution case statement*. These proposals, supported by the SFO, are intended both to clarify the prosecution's approach to disclosure (for example, which search terms have been used and why) and to identify and narrow the issues in dispute. By explaining what the prosecution is – and is not – doing, early engagement from the defence will be prompted. To achieve the desired objectives, these prosecution documents will require careful preparation and presentation, tailored to the individual case; *pro forma* documents would be of no use. Necessarily the test of these proposals will be whether the prosecution consistently performs in accordance with them; i.e., it will be a question of "delivery" rather than good intentions. But we have no doubt that all these proposals are on entirely the right lines and look forward to their practical implementation. We would further welcome the production of a separate "*Disclosure Bundle*", to be produced by the prosecution and updated as necessary, comprised of unused material which the prosecution has identified as satisfying the CPIA test for disclosure.

ix) We understand the merits of an integrated prosecution model (as found in the US and atypically here at the SFO). That said, we would not have been minded to recommend structural changes to the typical English prosecution model involving institutional separation (between investigators, prosecutors and trial counsel), even had our remit extended to doing so. Instead, we promote early, sensible and sustained cooperation between prosecutors and investigators in connection with disclosure, together with the early involvement of trial counsel. There are strengths in the typical English prosecution flowing from the separate roles of police, CPS and the independent Bar and we see no good reason why such institutional separation should impede proper cooperation, utilising the strengths of each of those involved. In this way, legally trained prosecutors can and should assist early on with

issues of disclosure, in accordance with and building on para. 32 of the Guidelines. With such cooperation, performance should not lag behind that of the integrated US model. While conscious of the arrangements already in place for cooperation of this nature, we would be surprised if here, as elsewhere, there was not room for improvement.

x) Disclosure is only as good as the person doing it. In the typical English prosecution, the "person doing it" will most likely be a police officer. We recommend that proper training in issues of disclosure, extending to an appropriate "mindset", should be part and parcel of the professional development of a police investigator.

xi) For a variety of reasons and with respect to the contrary views urged on us, we do not favour the adoption of the "keys to the warehouse" approach.

The defence

xii) Responsible legal practitioners representing the defence have a key role to play in improving the operation of the disclosure system – but that role is essentially reactive and needs to be properly understood. Moreover, no proper criticism can be made where the defendant's legal representatives attack non-compliant prosecution disclosure; they are entitled and possibly (depending on all the circumstances) duty bound to do so. Perspective must be maintained.

xiii) Provided, however, the prosecution does have its tackle in order – the indispensable trigger – it is or ought to be unacceptable for the defence to refuse to engage and assist in the early identification of the real issues in the case. Defence criticism of the prosecution approach to disclosure should be reasoned, as indeed defence applications under s.8, CPIA already must be. There should be scant tolerance of continual, speculative sniping and of late or uninformative defence statements.

xiv) While we do not go so far as to advocate formal pleadings, where the prosecution has properly sought to narrow the issues through a prosecution case statement, the defence can and should be pressed for an appropriate response[6] – and all concerned should be alert to the benefits which can be obtained by way of admissions.

xv) A constructive defence approach to disclosure issues should be seen and encouraged as professional "best practice". It involves no sacrifice of the defendant's legitimate interests; in large and complex cases it is difficult to see how the system can otherwise remain affordable. The Rules in any event impose an obligation on each participant in a criminal case to conduct the case in accordance with the "overriding objective": rule 1.2(1), together with rules 3.3 and 3.10(a) of the Rules.

The judiciary

xvi) Robust case management of disclosure issues by Judges constitutes, likewise, an essential part of the improved operation of the disclosure regime. Here too, our impression is that there is room for improvement - despite the excellent and vigorous case management which many Judges already provide and the recognition that proper case management is time consuming, not least with regard to preparation time. Nonetheless, this is an important judicial task and not one to be overlooked.

xvii) Judges have ample case management powers in this area, derived from the Rules (see, rr. 3.2 and 3.10(a)), augmented by a growing body of authority and reinforced by the unequivocal wording of the Protocol. There should be no hesitation in using such powers; judicial leadership will be indispensable if support is to be rallied from prosecution and defence to improve the operation of the system.

[6] Building more generally on the provisions already contained in s.9 of the Criminal Justice Act 1987.

xviii) We see considerable attraction, where possible, in early judicial guidance or indications as to the prosecution approach to disclosure (always assuming that approach has been adequately formulated). A critical consideration of this nature will naturally involve the Judge inquiring as to the position of the defence, so prompting early defence engagement.

xix) We envisage the Judge insisting on clarity in the prosecution's approach to disclosure and timeliness in the disclosure of material in its possession. We can anticipate that late disclosure of material (by any party) may be capable of resulting in the exclusion of such material from the trial – subject, as ever, to the interests of justice.

xx) As to the defence, we contemplate the Judge insisting on responsible engagement in the disclosure exercise, together with the early identification of the principal disputed issues in the proceedings. Further, in our view, there will be cases where there can be no proper objection to the Judge seeking (perhaps with the assistance of the LSC[7], see below) to limit the time available for the perusal of disclosed unused material, always subject to a reasoned application for an extension.

xxi) Judicial case management of disclosure issues may well benefit from specific treatment by the Judicial College; we invite the Judicial College to consider doing so.

Legal aid

xxii) When considering how the operation of the disclosure regime is to be improved, the criminal justice system needs to be looked at as a whole; as in this jurisdiction defence costs in large white collar cases are most likely to be publicly funded[8], the operation of the legal aid system

[7] Legal Services Commission
[8] The position in the US appears to be different, in part at least attributable to a different approach to asset freezing.

needs to be taken into account. Given that under the GFS[9] there are no separate payments for consideration of unused material, the principal area of concern is the proper control of defence costs under the VHCC[10] scheme (relating both to served evidence and disclosed unused material).

xxiii) The LSC has proposed more widespread and formalised cooperation, providing for a line of communication between it and the Judge and extending to attendance by the LSC at PCMHs[11] where appropriate. Without confusing the separate responsibilities of the Judge and the LSC, we see force in the LSC proposal and support it in principle. Cooperation could take the form of the LSC assisting in how best to address the practicalities in time, approach and costs flowing from an order for disclosure.[12] In turn, the Judge could guide the LSC's consideration of the case by highlighting the real issues. Care would need to be exercised, given the access enjoyed by the LSC to defence LPP[13] material.

xxiv) While we do not think that any rule change is required, the detail of the LSC proposal requires further consideration - best pursued by way of consultation, in the first instance, between the Bar, Law Society and the LSC, followed thereafter by appropriate consultation with the judiciary. It may be that an extremely brief protocol would be helpful as to the mechanics.

Technology

xxv) Technological advance and the explosion of electronic materials are facts of life in criminal as well as civil proceedings. The problem posed by vast quantities of materials is likely to get worse rather than better; it cannot be wished away.

[9] Graduated Fee Scheme
[10] Very High Cost Cases
[11] Plea and Case Management Hearings
[12] For example, if a Judge was minded to limit the time available to the defence for perusal of particular unused material, the LSC could give practical advice as to the work entailed.
[13] Legal Professional Privilege

xxvi) The problem needs to be addressed by recognising that with enormous quantities of material it is likely to be physically impossible or wholly impractical to read every document on every computer seized. Full use should therefore be made of sampling, key words or other appropriate search tools – as provided for in rule 3.2(h) of the Rules, the Guidelines at para. 27 and, more particularly, the 2011 Guidelines, at paras. 41 and following. There is no other way. However, when employing such techniques, the prosecution should explain exactly what it has done and what it has not done.

xxvii) When faced with enormous quantities of electronic material, responsible cooperation between the parties - extending to an identification of the issues, the choice of search terms and the like - is all the more important. As part of its case management function, the Court should give a firm and clear steer as to what is required and should give short shrift to any party not engaging appropriately. In all this, useful guidance can be obtained from the sphere of civil proceedings, as set out in *PD31B*[14] and the *ACC Guide*[15].

xxviii) Out-sourcing may (in the light of US experience) assist in reducing cost but control must be maintained of the exercise. Again with the US experience in mind, the management of electronic material requires careful attention, in particular as to the format of the material supplied.

Guidance

xxix) There is too much "guidance" amplifying the operation of the CPIA.[16] We encountered a near unanimous call for consolidation and abbreviation. We agree entirely in principle, though the reality of what can be achieved is more complex.

[14] Practice Direction 31B, Civil Procedure, Vol. 1, 2011, 31BPD.1 and following.
[15] The Admiralty and Commercial Courts Guide, Civil Procedure, Vol. 2, 2011, 2A-39, esp. at 2A-80 and following
[16] The Rules, the Code, the Guidelines, the 2011 Guidelines, the Protocol and the ACPO/CPS manual, "*The Disclosure Manual"* ("The Manual").

xxx) Given the statutory foundation of the Rules and the Code, it must be doubtful whether anything can be done to consolidate this material without legislative intervention. However, given the time such intervention would realistically require, for the time being at least, it must be assumed that this statutory material will remain separate and in place.

xxxi) To an extent at least the Manual is an "in-house" matter for ACPO and the CPS. While understanding why the Manual takes the form it does, so far as it is a matter for us, we cannot help thinking that it would greatly benefit from substantial shortening.

xxxii) We do see practical scope for consolidation in the area of authoritative source material for use in (and out of) Court by all parties – namely, the Guidelines, the 2011 Guidelines and the Protocol. Despite their individual merits, ideally, we would like to see these three documents reduced to one, with the healthy effect of better concentrating minds on the essentials and the desired "culture" of the disclosure regime. In our view, this is a matter best pursued in the first instance by way of discussions between the Senior Presiding Judge and the Attorney General.

Order of Proceeding

9. It will be convenient to proceed under the following broad headings:

10. The Annexes to the review are as follows:

Annex A – Domestic Consultees

Annex B – International Consultees

Annex C – Sentencing Comparison Grid

Annex D – Summary of Recommendations

I. History[17]

11. Before considering the present regime and how it may be improved, it is necessary to outline how it evolved into its present form, and why.

12. The emergence of formal duties of disclosure resting upon the Crown appears to be of relatively recent vintage. Hitherto formal safeguards had been seen as unnecessary; reliance was instead placed on a belief in fair play and the integrity of those acting on behalf of the Crown in criminal cases. As *Corker & Parkinson* observe[18], the common law was thus "slow" to develop obligations on the part of the prosecution "to disclose material in its possession which might undermine its case or assist that of the accused".

13. Consideration of the prosecution's duty to make disclosure begins[19] with the judgment of Lord Goddard CJ in *R v Bryant and Dickson* (1946) 31 Cr App R 146. While the prosecution was not under a duty to supply a copy of a statement obtained from an individual whom it did not intend to call to give evidence, the prosecution did have a duty to make available to the defence a witness whom it knew could give material evidence.

14. *Dallison v Caffery* [1965] 1 QB 348 concerned[20] a claim for (*inter alia*) malicious prosecution and the propriety of the prosecution's omission to disclose statements supporting the plaintiff's alibi defence at the criminal trial. Lord Denning MR, at p.369, expressed the duty of the prosecution in these terms:

> "The duty of a prosecuting counsel or solicitor, as I have always understood it, is this: if he knows of a credible witness who can speak to material facts which tend to show the prisoner to be innocent, he must either call that witness himself or make his statement available to the defence. It would be highly reprehensible to conceal from the court the evidence which such a witness can give. If the prosecuting counsel or solicitor knows, not of a credible witness, but a witness whom

[17] See, generally, the excellent summary in *Corker & Parkinson, "Disclosure in Criminal Proceedings"* (2009) ("*Corker & Parkinson"*), chapter 1.
[18] At para. 1.06.
[19] See, *per* Lord Hutton, in *R v Mills* [1997] 3 WLR 458, at p.470.
[20] As did *Bryant and Dixon.*

> he does not accept as credible, he should tell the defence about him so that they can call him if they wish. ”

Diplock LJ (as he then was) spoke (at pp. 375 – 376) of:

> “...the erroneous proposition that it is the duty of the prosecutor to place before the court all the evidence known to him, whether or not it is probative of the guilt of the accused person. A prosecutor is under no such duty. His duty is to prosecute, not to defend. If he happens to have information from a credible witness which is inconsistent with the guilt of the accused, or, although not inconsistent with his guilt, is helpful to the accused, the prosecutor should make such witness available to the defence…”

15. In *R v Hennessey* (1979) 68 Cr App R 419, Lawton LJ put the matter in very similar terms (at p.426):

> “...those who prepare and conduct prosecutions owe a duty to the Courts to ensure that all relevant evidence of help to an accused is either led by them or made available to the defence…The judges for their part will ensure that the Crown gets no advantage from neglect of duty on the part of the prosecution…”

16. Against the background, in very broad terms, of other developments in criminal procedure[21], the law on disclosure saw the production of the Attorney General’s Guidelines of 1981. While the lasting legacy of those Guidelines may be seen as the introduction of the concept of “unused material”[22], for the time being they provided a wide test for disclosure subject to a prosecutorial discretion not to disclose. Unhappiness with this regime was evident by the end of the 1980s, even before its inadequacies were highlighted by a number of high profile cases such as *R v Ward (Judith*) [1993] 1 WLR 619.

17. *Ward* was one of a number of terrorism related cases dating back to the 1970s, in which miscarriages of justice were shown to have resulted. In *Ward*, at pp. 641-2, the Court of Appeal Criminal Division (“the CACD”) held it to be settled law that the failure of the prosecution to disclose to the defence evidence which ought to have been disclosed was an “irregularity in the course

[21] By way of examples, *R v Turnbull* [1977] QB 224 and the enactment of the *Police and Criminal Evidence Act 1984 (“PACE”).*

[22] “...everything in the possession of the Crown not adduced as evidence”: *Corker & Parkinson*, at para. 1.23 *et seq*.

of the trial" within the meaning of s.2(1)(c) of the Criminal Appeal Act 1968 (as s. 2(1) then stood). The obligation to disclose arose in relation to evidence which was or may be material in relation to issues expected to arise, or which unexpectedly did arise, in the course of the trial; if there was non-disclosure of such evidence, it was likely to constitute a material irregularity. The Court in *Ward* (at p.674) went on to observe that "timely disclosure" by the prosecution was an "incident of a defendant's right to a fair trial".

18. The difficulty with *Ward* was its apparent requirement that, subject only to considerations of Public Interest Immunity ("PII"), "virtually everything else gathered and created by the investigators during their investigation had to be disclosed" – so giving the defence something akin to a blank cheque and causing real difficulty in the fight against crime.[23] Against this background, the *Runciman Commission* took the view that the law on disclosure imposed unnecessary burdens, requiring too much from the prosecution and too little from the defence.[24]

19. Legislation followed in the shape of the CPIA, which, as amended, contains the disclosure regime presently in force. The intention was a more balanced approach to disclosure – a reaction to a pendulum which may have been thought to have swung too far in favour of the defence. Even so, as will readily be apparent from even this compressed historical sketch, the context in which the CPIA came into force was the anxiety to prevent a recurrence of the miscarriages of justice which were a legacy of an earlier and troubled period in the criminal justice system; indeed the CPIA *was* the legislative response to such miscarriages and other concerns[25]. Thus, in *R v H* [2004] UKHL 3; [2004] 2 AC 134, Lord Bingham, at [14], underlined the central importance of proper disclosure:

> "Fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed to the defence. Bitter experience

[23] *Corker & Parkinson*, at paras. 1-42 and 1-48.
[24] *Report Of The Royal Commission On Criminal Justice, Cmnd 2263* (1993, HMSO) Chapter 6, esp. paras 3 – 33, discussed in *Corker & Parkinson* at paras. 1-50 *et seq*.
[25] For instance, those relating to the West Midlands Crime Squad.

> has shown that miscarriages of justice may occur where such material is withheld from disclosure. The golden rule is that full disclosure of such material should be made."

It should, moreover, be underlined that the CPIA regime pre-dated the enormous expansion in e-mail traffic and other electronic communications, so much a hallmark of the present landscape.

II. The Present Regime

20. *(1) The Criminal Procedure and Investigations Act:* The CPIA gives statutory force to the prosecution's duty of disclosure. The scheme of the statute proceeds in stages but involves a single test for prosecution disclosure.

21. *First*, s.3(1)(a) deals with the "initial duty" of the prosecutor to disclose to the accused:

> "…any prosecution material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused…"

22. *Secondly*, the intention of the CPIA is that initial disclosure on the part of the prosecutor will be followed by the accused giving a "defence statement" to the prosecutor and the court: see, ss. 5, 6 and 6B of the Act. It is noteworthy that the contents of the defence statement required by the CPIA have been expanded, by amendment, to grapple with the problem of uninformative defence statements.[26]

23. As the law now stands, s.6A(1) provides as follows:

> "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,
>
> (ca) setting out particulars of the matters of fact on which he intends to rely for the purposes of his defence, and

[26] The changing context in which criminal trials are conducted of which such requirements form part, so reducing the possibility for surprise, is helpfully outlined in a lecture by Sir Brian Leveson, *Disclosure in Criminal Cases and Trial Efficiency*, New South Wales, August 2010. See, for example, the provisions made for alibi notices and advance notice of any expert evidence on which a party proposes to rely.

> (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. ”

24. S.6A(2) of the CPIA deals with the further requirements of a defence statement where an alibi is disclosed, including the identification of witnesses on whom the defence hopes to rely. S.6C makes provision for the notification of the intention to call defence witnesses – a provision of general application, not confined to alibi witnesses. S.6D makes similar provision for the notification of experts instructed by the accused.

25. S.11 of the CPIA addresses the question of sanctions where the accused has failed to give disclosure pursuant to the provisions outlined above. Where this section applies, s.11(5) provides that:

> “(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.”

By way of safeguard, s.11(10) provides that a person shall not be convicted solely on an inference drawn under s.11(5).

26. *Thirdly*, after compliance or purported compliance with its duty under s.3, the prosecutor comes under a “continuing duty” in relation to disclosure, pursuant to s.7A, CPIA. This continuing duty is applicable whether or not the accused has produced a defence statement in accordance with the provisions just discussed. S.7A(2) is in these terms:

> “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.”

27. As noted by Lord Bingham, in *R v H (supra)*, at [17], s.3 does not require disclosure of material which is either neutral or adverse to the defendant; a defendant could not complain of non-disclosure of material which lessened his chance of acquittal. S.7A is to the same effect. Later in his speech, Lord Bingham added this (at [35]):

> "If material does not weaken the prosecution case or strengthen that of the defendant, there is no requirement to disclose it. For this purpose the parties' respective cases should not be restrictively analysed. But they must be carefully analysed, to ascertain the specific facts 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 and unspecified allegations and then seek far-reaching disclosure in the hope that material may turn up to make them good. Neutral material or material damaging to the defendant need not be disclosed and should not be brought to the attention of the court."

28. Fourthly, if (and only if) a defence statement has been furnished, an application may be made by the accused for disclosure pursuant to s.8:

> "(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."

29. The procedure for an application under s.8 is to be found in the *Criminal Procedure Rules* 2010 (S.I. 2010 No.60) ("the Rules")[27], to which we turn next.

30. *(2) The Rules:* That procedure is to be found in rule 22 of the Rules. Insofar as here material, rule. 22.5 provides as follows:

> "(1) This rule applies where the defendant –
>
> (a) has served a defence statement given under the *Criminal Procedure and Investigations Act* 1996; and
> (b) wants the court to require the prosecutor to disclose material.
>
> (2) The defendant must serve an application on –
>
> (a) the court officer; and
> (b) the prosecutor
>
> (3) The application must –
>
> (a) describe the material that the defendant wants the prosecutor to disclose;
> (b) explain why the defendant thinks there is reasonable cause to believe that –
>
> (i) the prosecutor has that material, and
> (ii) it is material that the *Criminal Procedure and Investigations Act* 1996 requires the prosecutor to disclose…"

Rule 22.5 (3)(c) goes on to state that the application must ask for a hearing if the defendant wants one and explain why it is needed. Rule 22.5 (4) provides that the court may determine such an application either at a hearing or without a hearing.

[27] The successor to *Criminal Procedure Rules 2005* (SI 2005 No. 384)

31. For present purposes, however, the Rules have a far greater significance than simply determining the procedure for s.8 applications. In essence, the Rules now consolidate the Court's case management powers and furnish a guide to the underlying culture intended to govern the conduct of criminal trials. Accordingly, the Rules are or should be of the first importance in the proper application of the disclosure regime.

32. Rule 1.1 introduces the "overriding objective":

> "(1) The overriding objective of this new code is that criminal cases be dealt with justly."

Rule 1.1(2) explains that dealing with a criminal case justly includes:

> "(a) acquitting the innocent and convicting the guilty;
>
> (b) dealing with the prosecution and the defence fairly;
>
> (c) Recognising the rights of a defendant particularly those under Article 6 of the European Convention on Human Rights;
>
> (e) dealing with the case efficiently and expeditiously;"

33. Rule 1.2 addresses the duty of the "participants in a criminal case". So:

> "(1) Each participant, in the conduct of each case, must –
>
> (a) prepare and conduct the case in accordance with the overriding objective;
>
> (b) comply with these Rules, practice directions and directions made by the court;
>
> …
>
> (2) Anyone involved in any way with a criminal case is a participant in its conduct for the purposes of this rule."

34. Rule 1.3 requires the Court to further the overriding objective, in particular and *inter alia*, when exercising any power given to it by legislation.

35. Rule 3 deals with case management. Rule 3.2 imposes a duty on the Court to further the overriding objective "by actively managing the case". Rule 3.2(2) provides as follows:

> "Active case management includes –
>
> (a) the early identification of the real issues;
>
> (c) achieving certainty as to what must be done, by whom, and when, in particular by the early setting of a timetable for the progress of the case;
>
> (d) monitoring the progress of the case and compliance with directions;
>
> (f) discouraging delay, dealing with as many aspects of the case as possible on the same occasion, and avoiding unnecessary hearings;
>
> (g) encouraging the participants to co-operate in the progression of the case; and
>
> (h) making use of technology."

Rule 3.3 deals with the duties of the parties and provides (in Rule 3.3(a)) that each party must "actively assist the court in fulfilling its duty under rule 3.2". It is unnecessary to set out here the other (extensive) provisions of Rule 3, save that, given the importance of the issues to disclosure requirements, Rule 3.10(a) should be noted:

> "In order to manage a trial or (in the Crown Court) an appeal –
>
> (a) the court must establish, with the active assistance of the parties, what disputed issues they intend to explore…"

36. The philosophy underlying case management was, with respect, crisply set out by Judge LJ (as he then was) in *R v Jisl* [2004] EWCA Crim 696, as follows:

> "114. The starting point is simple. Justice must be done. The defendant is entitled to a fair trial: and, which is sometimes overlooked, the prosecution is equally entitled to a reasonable opportunity to present the evidence against the defendant. It is not however a concomitant of the entitlement to a fair trial that either or both sides are further entitled to take as much time as they like, or for that matter, as long as counsel and solicitors or the defendants themselves think appropriate. Resources are limited…Time itself is a resource…It follows that the sensible use of time requires judicial management and control.

> 116. The principle therefore, is not in doubt…its practical application depends on the determination of trial judges and the co-operation of the legal profession. Active, hands on, case management, both pre-trial and throughout the trial itself, is now regarded as an essential part of the judge's duty…"

This is a matter to which we shall return, later.

37. It is further convenient to underline here the growing body of authority, involving the judicial application of the Rules, so as to maintain control of the proceedings and further the overriding objective; see, by way of examples: *R v Musone* [2007] EWCA Crim 1237; [2007] 2 Cr App R 29; *R v Jarvis* [2008] EWCA Crim 488; [2008] Crim LR 632; *R v Ensor* [2009] EWCA Crim 2519; [2010] 1 Cr App R 18; *R (Firth) v Epping Justices* [2011] EWHC 388 (Admin); [2011] 1WLR 1818.

38. *(3) The Code:* There has been no shortage of material amplifying the operation of the statutory regime. The first source, of which mention must be made, is the *Code of Practice* ("the Code"), issued under Part II of the CPIA. As recorded in its Preamble, the Code sets out "the manner in which police officers are to record, retain and reveal to the prosecutor material obtained in a criminal investigation and which may be relevant to the investigation, and related matters".

39. Certain features of the Code loom large in this review. First, the Code draws a clear distinction between the roles and responsibilities of *investigators* (and *disclosure officers*) and *prosecutors*. The background is the important distinction to be drawn generally in an English prosecution between the roles and responsibilities of *investigators, prosecutors* and *counsel.*[28] A typical prosecution in this jurisdiction involves investigation by the police, the Crown Prosecution Service ("CPS") acting as prosecutor, with the Crown represented at trial by a barrister. Atypically (in this jurisdiction), the Serious Fraud Office ("SFO") operates an integrated model – integrating the working of investigators and prosecutors. At all events, para. 2.1 of the Code includes the following definitions, relevant in this regard:

[28] We use the term "counsel" to refer to both practising barristers and solicitor-advocates with higher rights of audience.

> "…an *investigator* is any police officer involved in the conduct of a criminal investigation. All investigators have a responsibility for carrying out the duties imposed on them under this code, including in particular recording information, and retaining records of information and other material;
>
> the *officer in charge of an investigation* is the police officer responsible for directing a criminal investigation. He is also responsible for ensuring that proper procedures are in place for recording information, and retaining records of information and other material, in the investigation;
>
> the *disclosure officer* is the person responsible for examining material retained by the police during the investigation; revealing material to the prosecutor during the investigation and any criminal proceedings resulting from it, and certifying that he has done this; and disclosing material to the accused at the request of the prosecutor;
>
> the *prosecutor* is the authority responsible for the conduct, on behalf of the Crown, of criminal proceedings resulting from a specific investigation; "

It may be noted that the functions of the investigator, officer in charge of an investigation and the disclosure officer are separate: para. 3.1 of the Code. By para. 3.3 of the Code, an obligation is placed on chief police officers to ensure:

> "…that disclosure officers and deputy disclosure officers have sufficient skills and authority, commensurate with the complexity of the investigation, to discharge their functions effectively."

40. Secondly, there is the definition of "*material…relevant to an investigation*" contained in para. 2.1. *"Material"* is defined to include "not only material coming into the possession of the investigator (such as documents seized in the course of searching premises) but also material generated by him (such as interview records)". Next "material may be *relevant to an investigation"* if:

> "…it appears to an investigator, or to the officer in charge of an investigation, or to the disclosure officer, that it has some bearing on any offence under investigation or any person being investigated, or on the surrounding circumstances of the case, unless it is incapable of having any impact on the case."

While it is of course to be anticipated that the relevance test at the *investigation* stage will be wider than the test for *disclosure* (see above), the width of this test is striking and has occasioned much comment from those contributing to the review. To reiterate, relevance at the investigation stage may extend to material which has "*some bearing*" on the investigation "*unless it is incapable of having any impact on the case*". The width of this definition impacts on the duties to record and retain; if material may be relevant to the investigation, then duties to record and retain it are triggered: see, paras. 4.1 and 5.1 of the Code. It may be noted that the officer in charge of the investigation, the disclosure officer or an investigator "may seek advice from the prosecutor" about whether any particular item of material may be relevant to the investigation: para. 6.1.

41. Thirdly, the Code requires an open-minded investigation. In the conduct of an investigation, para. 3.5 of the Code directs the investigator to:

> "...pursue all reasonable lines of inquiry, whether these point towards or away from the suspect. What is reasonable in each case will depend on the particular circumstances. For example, where material is held on computer, it is a matter for the investigator to decide which material on the computer it is reasonable to inquire into, and in what manner."

42. Fourthly, the Code provides for the "preparation" of material for and "revelation" of material to, the prosecutor: paras. 6.1 and 7.1 of the Code. The need for such provisions flows from the separate roles of investigator and prosecutor, already highlighted - together with the need to alert the prosecutor to material relevant to the investigation, not believed to form part of the prosecution case and, in particular, to such material of this nature which may satisfy the test for prosecution disclosure under the CPIA. These provisions introduce the requirement of "scheduling" of "unused material" (i.e., relevant material, retained and recorded, not forming part of the prosecution case) which, again, occasioned much comment in the course of the Review. Accordingly:

i) Para. 6.2 provides as follows:

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

ii) Paras. 6.9 – 6.11 deal directly with scheduling:

> "6.9 The disclosure officer should ensure that each item of material is listed separately on the schedule, and is numbered consecutively. The description of each item should make clear the nature of the item and should contain sufficient detail to enable the prosecutor to decide whether he needs to inspect the material before deciding whether or not it should be disclosed.
>
> 6.10 In some enquiries it may not be practicable to list each item of material separately. For example, there may be many items of a similar or repetitive nature. These may be listed in a block and described by quantity and generic title.
>
> 6.11 Even if some material is listed in a block, the disclosure officer must ensure that any items among that material which might satisfy the test for prosecution disclosure are listed and described individually."

iii) Para. 7.1 provides for the disclosure officer to give the schedules to the prosecutor, where practicable, at the same time as giving him the file containing the material for the prosecution case. Para. 7.2 provides for the disclosure officer to draw the prosecutor's attention to any retained material which may satisfy the test for prosecution disclosure under the CPIA. Para. 7.3 specifically requires the disclosure officer, at the same time as complying with his duties under paras. 7.1 and 7.2, to give the prosecutor copies of the following material (if not already given to him as part of the file containing material for the prosecution case):

> "- information provided by an accused person which indicates an explanation for the offence with which he has been charged;
>
> - any material casting doubt on the reliability of a confession;

- any material casting doubt on the reliability of a prosecution witness;

- any other material which the investigator believes may satisfy the test for prosecution disclosure in the Act;

- any other material which the investigator believes may fall within the test for primary disclosure in the Act "

Various ancillary provisions mirror the prosecutor's continuing duty in respect of disclosure under the CPIA and also provide for the disclosure officer to satisfy the prosecutor that all relevant retained material has been revealed to the prosecutor in accordance with the Code.

43. *(4) The Guidelines:* In April 2005, the Attorney General issued new *Guidelines* ("the Guidelines")[29] on the disclosure of unused material in criminal proceedings. Various general considerations are highlighted in the Foreword and Introduction. The Guidelines underline that disclosure is "one of the most important issues in the criminal justice system and the application of proper and fair disclosure is a vital component of a fair criminal justice system"; fair disclosure to an accused "is an inseparable part of a fair trial". That said, the tenor of the Guidelines points to strong emphasis "on the need for all concerned…to apply the provisions of the 1996 Act in a rigorous fashion".[30] In this vein, the Guidelines urge that a just and fair disclosure process must not be abused; prosecutors must not abrogate their duties under the CPIA 1996 by making wholesale disclosure "in order to avoid carrying out the disclosure exercise themselves". Likewise, defence representatives should avoid "fishing expeditions" and using instances where disclosure is not provided "as an excuse for an abuse of process application". The Guidelines contain a reminder that, as held in *R v H & C (supra)*, if the current disclosure system is scrupulously operated, in accordance with the law and with proper regard to the interests of the defendant, then it is entirely compatible with Article 6 of the European Convention on Human Rights ("ECHR"). All these themes appear clearly from the following passages in the Introduction:

[29] In succession to the 2000 Guidelines ("the 2000 Guidelines").
[30] *Archbold* (Third Supplement, 2011 ed.), at A-242.

> "3. The scheme set out in the… [CPIA]… is designed to ensure that there is fair disclosure of material which may be relevant to an investigation and which does not form part of the prosecution case. Disclosure under the Act should assist the accused in the timely presentation of their case and assist the court to focus on all the relevant issues in the trial. Disclosure which does not meet these objectives risks preventing a fair trial taking place.
>
> …
>
> 5. Disclosure must not be an open ended trawl of unused material. A critical element to fair and proper disclosure is that the defence play their role to ensure that the prosecution are directed to material which might reasonably be considered capable of undermining the prosecution case or assisting the case of the accused. This process is key to ensuring prosecutors make informed determinations about disclosure of unused material.
>
> 6. Fairness…should also ensure that material is not disclosed which overburdens the participants in the trial process, diverts attention from the relevant issues, leads to unjustifiable delay, and is wasteful of resources. "

44. Generally (as befits "guidelines"), the Guidelines outline and expand upon the principles involved in the CPIA disclosure regime, together with the responsibilities of those concerned – in particular those of investigators and prosecutors. In the light of the discussion to come, particular attention should be paid to two matters.

45. The *first matter* relates to the inspection and scheduling of large volumes of unused material, whether paper or, more especially, electronic – one of the principal concerns giving rise to this Review. Para. 27 of the Guidelines is in these terms:

> "Generally… such material [i.e., retained material] must be examined in detail by the disclosure officer or the deputy, but exceptionally the extent and manner of inspecting, viewing or listening will depend on the nature of material and its form. For example, it might be reasonable to examine digital material by using software search tools, or to establish the contents of large volumes of material by dip sampling. If such material is not examined in detail, it must nonetheless be described on the disclosure schedules accurately and as clearly as possible. The

> extent and manner of its examination must also be described together with the justification for such action."

It should at once be noted that the Guidelines did not adopt the approach contained in para. 9 of the 2000 Guidelines, often termed "the keys to the warehouse"; in those earlier Guidelines, as summarised by *Corker & Parkinson*[31]*:*

> "The solution to this problem… was that if the unused material was too large to inspect and schedule as required by paragraph 6 of the Code, but the possibility that it contained disclosable material could not be eliminated, then not to inspect and schedule but instead to permit the defence controlled access to it. Thus responsibility for ascertaining whether it contained anything of relevance was transferred to the defence…"

46. Returning to the Guidelines, Para. 28 permits the disposal of hitherto retained material, on the basis of the conclusion that it is incapable of impact (thus outwith the definition of "material which may be relevant" in the Code); however, the paragraph adopts a cautious approach to any disposal. Para. 29 addresses the detail required when scheduling:

> "In meeting the obligations in paragraph 6.9 and 8.1 of the Code, it is crucial that descriptions by disclosure officers in non-sensitive schedules are detailed, clear and accurate. The descriptions may require a summary of the contents of the retained material to assist the prosecutor to make an informed decision on disclosure…"

47. Before leaving this topic, the *Supplementary Attorney General's Guidelines on Disclosure, Digitally Stored Material* ("the 2011 Guidelines")[32] must be noted. These are intended to supplement the Guidelines and were prompted by the recognition of a need for more detailed guidance, given the number of cases involving digitally stored material and the scale of such material that may be involved. The objective of the 2011 Guidelines, as set out in para. 2 thereof, is as follows:

> "…to set out how material satisfying the tests for disclosure can best be identified and disclosed to the defence without

[31] At para. 4.41.
[32] Issued on the 14th July, 2011

> imposing unrealistic or disproportionate demands on the investigator and prosecutor."

The 2011 Guidelines proceed on the assumption (see para. 3) of prosecution transparency, adopting case management and disclosure strategies, coupled with the expectation that defence will play its part in defining the real issues in the case. On this footing the Court should be in a position to use its case management powers effectively.

48. The 2011 Guidelines reiterate the open-minded nature of the investigation – but observe[33] that it is not the duty of the prosecution "…to comb through all the material in its possession… on the look out for anything which might conceivably or speculatively assist the defence." Further, the 2011 Guidelines build on para. 27 of the Guidelines (set out above). Accordingly:

> "…Where there is an enormous volume of material it is perfectly proper for the investigator/disclosure officer to search it by sample, key words, or other appropriate search tools or analytical techniques to locate relevant passages, phrases and identifiers." [34]

Cooperation and dialogue with the defence as to the appropriate use of search terms is likewise encouraged, with the aim of ensuring that reasonable and proportionate searches can be carried out.[35] The "keys to the warehouse" approach – a feature of the 2000 Guidelines – has not re-appeared. The scheduling requirement is retained[36], essentially in the same form as that contemplated by paras. 6.9 – 6.11 of the Code (set out above).

49. The *second matter*, again of very considerable significance to this Review, goes to prosecutor – investigator cooperation. When dealing with the responsibilities of prosecutors, the Guidelines say this (at para. 32):

> "Prosecutors must do all they can to facilitate proper disclosure, as part of their general and personal professional responsibility to act fairly and impartially, in the interests of justice and in accordance with the law. Prosecutors must also be alert to the

[33] At para. 41
[34] At para. 43
[35] Para. 44
[36] Paras 48 – 49.

> need to provide advice to, and where necessary probe actions taken by, disclosure officers to ensure that disclosure obligations are met."

Later, we shall look rather more broadly at the desirability of and need for cooperation between prosecutors and investigators.

50. *(5) The Protocol:* The importance of the judicial and case management role in the disclosure process is underlined in *Disclosure: A Protocol for the Control and Management of Unused Material in the Crown Court* ("the Protocol"), issued in February 2006 by Lord Justice Thomas, then Senior Presiding Judge for England and Wales. While here too the importance of proper disclosure is re-emphasised, the Protocol treats as "essential" the need for the trial process not to be "overburdened or diverted by erroneous and inappropriate disclosure of unused prosecution material, or by misconceived applications in relation to such material"[37]. The Protocol goes on to say this[38]:

> "The overarching principle is… that unused prosecution material will fall to be disclosed if, and only if, it satisfies the test for disclosure applicable to the proceedings in question, subject to any overriding public interest considerations."

51. The Protocol treats as "crucial" the need for the police (and all investigative bodies) to implement appropriate training regimes and to appoint competent disclosure officers.[39] Judges are encouraged not to allow the prosecution to "abdicate their statutory responsibility for reviewing the unused material"[40] by allowing the defence to inspect or providing the defence with copies of everything on the schedules of non-sensitive unused prosecution material – irrespective of whether the test for disclosure is satisfied. The Protocol expresses unequivocal opposition to the "keys to the warehouse" approach, described as being[41]:

> "...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."

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[37] Para. 3.
[38] Para. 4.
[39] Para. 14.
[40] Para. 30.
[41] Para. 31.

52. Blanket disclosure orders "should cease"[42], as inconsistent with the statutory framework endorsed by the House of Lords in *R v H and C (supra)*. The Protocol further deals with the significance of the defence statement (calling for a "complete change in the culture"[43]), listing considerations and general case management. The Protocol concludes as follows[44]:

> "The new regime...gives judges the power to change the culture in which such cases are tried. It is now the duty of every judge actively to manage disclosure issues in every case. The judge must seize the initiative and drive the case along towards an efficient, effective and timely resolution, having regard to the overriding objective of the Criminal Procedure Rules (Part 1). In this way the interests of justice will be better served and public confidence in the criminal justice system will be increased."

53. *(6) Manuals:* This outline of the present regime would not be complete without a mention of the detailed operational instructions for investigators and prosecutors, contained in the joint *ACPO[45]/CPS* manual, "*The Disclosure Manual"*[46]("the Manual"). It is unnecessary to say more of this manual at this stage; it may, however, already be apparent that one topic for consideration (below) is whether there would be merit in consolidating and shortening the plethora of guidance and commentary currently available. As has been seen, the CPIA is currently supplemented by the Rules, the Code, the Guidelines and the Protocol, even before reaching the Manual.

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[42] Para. 46.
[43] Para. 37; see, in this regard and set out above, the legislative developments post-dating the Protocol.
[44] Para. 63.
[45] Association of Chief Police Officers.
[46] This is a substantial document, running to over 200 pages, followed by over 70 pages of annexes. The Foreword includes a notable quotation from John Stuart Mill, "He who knows only his side of the case knows little of that".

III. The Mischief: Current Concerns

54. *(1) Methodology:* Our methodology in conducting the Review has involved wide consultation with those engaged in one capacity or another in the criminal justice system. We are grateful to those who have given their time to see us and, in some cases, to produce most helpful written contributions. A full list of those with whom we have consulted is set out at ***Annex A*** herewith. This consultation was indispensable in seeking to form a view as to the nature and degree of concern as to the operation of the present regime. In turn, forming such a view is a necessary first step in developing recommendations for its improved operation. Accordingly, this chapter summarises the concerns reported to us.[47]

55. *(2) The CPIA test for prosecution disclosure:*[48] While there is criticism of the *application* of this test, we have not encountered criticism of the test itself. Without exception, all consultees had well in mind the importance of the test in guarding against the risk of miscarriages of justice. As to the application of the test, criticism has focussed on a tendency – on the part both of some prosecutors and some Judges – to take the "easy" course of giving more rather than less disclosure, notwithstanding the clear provisions of the CPIA and the supplementary material outlined above.

56. *(3) The relevance test at the investigatory stage*[49]*:* The striking width of this test has already been underlined; it has been a frequently expressed and major source of concern.

    i) While there is understanding for the historical context in which this test was introduced – concern as to past miscarriages of justice and the need to guard against lazy, complacent or unscrupulous investigators – there is widely held unease as to this test, in particular given the deluge of electronic material now generated and capable of retrieval. The

[47] For completeness, we acknowledge that neither the time nor the resources available permitted us to undertake cost calculations or a study of the economics of different approaches; that said, whether any such calculations or studies would, realistically, have provided material assistance, must remain an open question.
[48] CPIA, ss. 3 and 7A, set out above.
[49] The Code, para. 2.1, set out above.

digital age means that material which once would have taken weeks to duplicate by those holding it – thus ensuring its circulation was kept to a necessary minimum – may now be duplicated by electronic means almost instantaneously. The result is an exponential increase in the quantity of material with which a serious or complex criminal investigation must engage. In the absence of knowing how a case will be presented – or defended – at trial, determining what is genuinely "relevant" is very difficult at the early stages of an investigation, especially where there may be an array of potential charges and an even wider array of corresponding potential defences[50].

ii) As will be recollected, the test contains no "proportionality" qualification. Nor is there a requirement that the material in question should have a "material" bearing on the investigation; "some" bearing suffices. When this test is coupled with the duty placed on investigators to pursue all reasonable lines of inquiry, whether pointing towards or away from the suspect, the burden on the prosecution[51] in large investigations is likely to be heavy indeed; consider, for example, the typical large fraud investigation conducted by the Serious Fraud Office ("SFO"). In such cases, it may be said, the prosecution is obliged to search for a needle in a very large haystack. Some of our consultees argued that this test now imposes unrealistic standards of review.

iii) It may be noted that the problem here relates principally to material seized – rather than generated – in the course of an investigation; it has particular relevance to electronic materials: the contents of computers (or hard drives) which come into the prosecution's possession. Necessarily too and as seen from the earlier consideration of the Code, the relevance definition impacts on duties to record, retain and schedule. The complaint, as expressed by the SFO, is that such material is likely to be "of the most peripheral relevance and…

[50] Such difficulties extend to the compilation of schedules, as disclosure officers must include sufficient information for prosecutors to decide whether material passes the disclosure test without knowing what the eventual charges or defences will look like. See below.
[51] Used here to cover both investigators and prosecutors.

unlikely in fact to have any real impact on the case". The work involved, however, creates huge costs and major delays in economic crime cases.[52]

iv) The test is further said to give rise to particular difficulty for HMRC, though here with regard to the data it holds in its dual role as a revenue collection department and law enforcement agency. By way of example and as described to us, a common defence in "carousel fraud" cases, where fraud is often concealed amidst seemingly legitimate international trade, is that of the "innocent dupe"; namely, the defendant is an innocent businessman caught up in fraud all around him. In support of this defence, a request is then made for the prosecution to reveal to the defence all material suggesting that HMRC had any suspicion or belief that other companies involved in the transaction chains (of which there may be hundreds) were themselves fraudulent. Necessarily, HMRC will have in its possession a vast amount of data relating to such other companies, arising from legitimate business activity and consequential dealings with HMRC. Burdens of such a nature inevitably have resource implications. For instance, the challenge posed has led to HMRC devising a specific protocol (the "Wallbank protocol") with a view to discharging its responsibilities in this area. Examples have been supplied, *inter alia*, as follows. First, of an investigation begun in 2001 and continuing in 2010, involving a disclosure officer working full time on the case since 2003, at various times assisted by 8 assistant disclosure officers (to schedule the material). Secondly, of an alcohol diversion fraud which ultimately collapsed because of the burdens of disclosure, notwithstanding confidence that (disclosure apart) the case would have yielded guilty pleas; seventeen defendants had been indicted, involving at least 26 counsel (17 of whom QCs) for prosecution and defence, with the only issue being disclosure.

[52] See, Jessica de Grazia, *Review of the Serious Fraud Office, Final Report* (June 2008) ("De Grazia") *passim*, in this regard.

v) The onerous nature of the requirement is known to "organised crime" and exploited on behalf of some defendants in large and complex cases – a sustained focus and attack on the prosecution's approach to disclosure (rather than on the substantive issues) may enable the defence to drag out and even cause the collapse of proceedings. Examples given to us[53] include (1) late ambushes around minor disclosure issues; (2) creating a "trail" of ambiguous evidence or even the use of "planted" material; (3) deliberate "sprinkling" of incriminating digital data with material the subject of Legal Professional Privilege ("LPP"); and (4) creating complex business structures spanning several jurisdictions, so ensuring that a successful investigation has to engage in complex matters of mutual legal assistance, creating international trails of "third party material". The question has been raised as to whether procedural rules in this area, designed to help the innocent have become a cloak for the guilty.

57. *(4) Scheduling:*[54] The need for an appropriate "audit trail" of the work done by investigators is recognised. In part, this serves as a safeguard for the accused. Additionally, the importance of appropriate scheduling is highlighted by the fact (contributed to by the structure of criminal prosecutions in this jurisdiction, canvassed earlier) that, in practice, the CPS reviewing lawyer and prosecuting counsel will only rarely examine all the unused material itself, as distinct from the schedule. However, uncertainty on the part of investigators as to what is genuinely relevant, coupled with fear of the consequences of accidentally omitting key details from the contents of schedules has led to longer and more detailed schedules, and a corresponding burden on the investigation and trial process, for all parties Some investigators spoke of their perception that other parties in the criminal justice system required schedules of such detail that they would be uneasy about trying to introduce a degree of proportionality into the scheduling process.

[53] We set these out as expressed to us by the Serious Organised Crime Agency ("SOCA"), the SFO and HMRC; we have not investigated the examples for ourselves.
[54] Paras. 6 and 7 of the Code, set out above.

58. Nonetheless, significant criticism has been made of what is said to be the burdensome requirement of scheduling. While this is a separate concern from that relating to the relevance test at the investigation stage, they are of course inter-related – much of the immediately preceding discussion is equally applicable here. Scheduling has been described as costly in terms of both time and resources – with the principal focus of concern resting upon the perceived need to itemise perhaps thousands of e-mails individually, with sufficient accompanying descriptive detail. Some defence practitioners observed to us that, in their view, schedules can be unnecessarily complicated, either through over-seizure of material in the first place, or through not making appropriate use of block scheduling under para. 6.10 of the Code. Further, our attention has been drawn[55] to a cartel case prosecuted by the SFO[56], in which the schedule was 10,877 pages long; the senior investigator in the case estimated that it had taken 18,214 man hours to create.

59. *(5) The prosecution:* Although our Review has been noteworthy for the responsible tone of observations received, accompanied by remarkably little backbiting, concerns have been expressed as to the performance of all participants in the criminal justice system. We begin with investigators (including disclosure officers) and prosecutors.

60. As to investigators, concerns have been canvassed as to training, experience and quality. It has been said that police officers have difficulty in understanding the likely defence perspective on potential disclosure issues at the outset of an investigation, before the defence is known. Doubts have also been expressed[57] as to the motivation of the prosecution when undertaking work of this nature – i.e., whether the prosecution has the incentive to do a thorough job. Given the nature of an English prosecution, it is self evident that a very great deal hinges on the investigator. As one experienced Judicial consultee[58] remarked, disclosure is only as good as the person doing it.

[55] De Grazia, para.35.
[56] Which ultimately failed, pre-trial, on a matter of law unrelated to this Review.
[57] By experienced, highly responsible (defence) solicitors.
[58] Spencer J.

61. Both solicitors and barristers with experience of defence work spoke of a lack of confidence in the prosecution's performance of its disclosure obligations. It was also said, on the basis of experience, that, by no means infrequently, challenges to prosecution disclosure turned out to be well-founded and productive.

62. Prosecutors have been criticised for a failure to grip the essentials of a case – a reluctance to narrow down charges to the *really* good points – so missing the opportunity to narrow the ambit of disclosure obligations (amongst other things).

63. Ms De Grazia[59] has commented adversely on the institutional structure of the English prosecution, when contrasted with the US system.[60] She has remarked, graphically:

> "Whereas England built a strong independent police force that also prosecuted, its former colony built a strong, independent prosecution service that also investigated. "

The split structure of an English prosecution contributes, she suggests, to a lack of "ownership" in the prosecution case, lower motivation and the inability of the *prosecutor* to exercise appropriate direction and control over the investigation. She emphasises that critical decisions as to the scope of disclosure may well have to be taken at the very beginning of the investigation and would benefit from the input of the prosecutor. In short, too much power is left with the investigators (who are not or not necessarily legally trained) and too little control is vested in the prosecutor. Cooperation between prosecutors and investigators, the hallmark of the integrated US model, is, she contends, not (or not always) present in this jurisdiction.

64. Examples continue to occur of prosecution failure in the disclosure process. Each such failure contributes to the persistent lack of confidence in the prosecution's performance of its disclosure obligations and thus to heightened (and justifiable) defence interest in probing this issue. Simply by way of example:

[59] I.e., both in the report (De Grazia) and in other observations to us.
[60] See below.

i) The collapse of the Office of Fair Trading ("OFT") airline cartel case[61] turned squarely on difficulties encountered by the prosecution in the sphere of disclosure. It is fair to note that such cartel cases are capable of giving rise to complex issues going to (*inter alia*) parallel international investigations, the treatment of immunity or leniency in return for information and LPP with regard to internal investigations by in-house or external lawyers for companies caught up in such investigations. Solutions will not necessarily be straightforward.[62]

ii) The recent, highly publicised, collapse of the "axe murder" prosecution[63], on the face of it, because investigators were overwhelmed by the scale of their disclosure obligations. In a press release explaining why the prosecution was not continued, the Crown Prosecution Service said, "In December 2009, the police revealed a large amount of material to us that had not been considered for disclosure before… Officers assured the court that there was no further unconsidered material. The judge was considering this matter when, on Friday 4 March 2011, the police revealed further material that had not been previously considered. We have decided that a prosecution cannot continue in these circumstances. We cannot be confident that the defence necessarily have all of the material that they are entitled to…"[64] The case was admittedly most unusual, involving the fifth investigation into the crime and covering a period of some 24 years. Apparently and properly, over 750,000 documents needed to be considered for disclosure to the defence.

iii) In *R v Olu, Wilson and Brooks* [2010] EWCA Crim 2975; [2011] 1 Cr App R 33, the Court was severely critical of a disclosure exercise relating to material generated by the investigation – so *not* one giving

[61] *R v George* (7 December 2009, Unreported).
[62] For instance, though, at first blush, it would be tempting to suggest a stipulation for a blanket waiver of privilege as a condition of leniency/immunity, that, as has been explained to us by the OFT, may not be feasible: (1) because of the need for consistency internationally; (2) because of the undesirability of an applicant for leniency/immunity finding himself in a *worse* position than he might otherwise have been in. See, however, the critical observations contained in *"How Dishonesty Killed the Cartel Offence"*, Andreas Stephan, [2011] Crim LR 446.
[63] *R v Rees and others* (11 March 2011, Unreported).
[64] CPS News Release, 11/03/2011 - http://www.cps.gov.uk/news/press_releases/111_11/

rise to the more difficult problems occasioned by material taken into the possession of the police in the course of the investigation.[65] Giving the judgment of the Court, Thomas LJ said this:

> " 42. …Despite the volume of such material that a modern investigation generates and records, difficulties should not have arisen if the relevant issues had been identified and disclosure carried out in accordance with the CPIA and Guidelines in a 'thinking manner' and not a box ticking exercise.
>
> 43. It is evident that the practice... was to supply all the unused non sensitive material to the CPS at the same time as the schedule was served on the defence; all unused statements were not listed in the schedule but simply served irrespective of whether these met the disclosure test. This practice has [since] been abandoned…
>
> 44. It is self evident that those who dealt with the matter dealt with it without taking fully into account the proper approach to disclosure in relation to investigative material. The current disclosure regime will not work in practice in such a case unless the disclosure officer is directed by the Crown prosecutor as to what is likely to be most relevant and important so that the officer approaches the matter through the exercise of judgment and not simply as a schedule completing exercise. It is the task of a CPS lawyer to identify the issues in the case and for the police officer who is not trained in that skill to act under the guidance of the CPS. This did not happen in this case…
>
> 46. We also recognise that a failure to disclose the material documentation prior to a trial has two adverse consequences for the defence. Without proper disclosure a defence advocate cannot plan how the trial is to be conducted and what to put to the witnesses called by the Crown. Secondly, disclosure during the trial distracts a defence advocate from the proper and expeditious conduct of a trial…"

This passage is valuable for a number of reasons. First, its reiteration of the need for compliance with the CPIA regime.[66] Secondly, its emphasis on the need for judgment and its criticism of the "box

[65] It may be noted that, notwithstanding the failures with regard to disclosure, the Court remained satisfied as to the safety of the conviction and the appeal was dismissed.
[66] See, *R v H and C (supra).*

ticking" approach adopted by the investigator. Thirdly, its insistence on the need for cooperation between prosecutor and investigator, involving the prosecution lawyer furnishing direction and identifying the issues.

iv) *R v Malook* [2011] EWCA Crim 254; [2011] 3 All ER 373 is another decision relating to documentation produced by the police in the course of investigations, as opposed to pre-existing material seized by the police; again, therefore, there was less reason for difficulties to arise. The criticism here (at [35] of the judgment) concerned deficient record keeping, coupled with the disclosure officer lacking a proper understanding of the obligations of disclosure. The Court repeated the observations previously made in *Olu (supra)*.

65. *(6) The defence:* Notwithstanding its very real importance, the principal concern under this heading can be almost summarily stated: the need for early engagement by the defence, so assisting in the identification of the real issues in the case. Criticism focussed here on defence failures to contribute to this process, followed by later and continuous "sniping" at suggested shortcomings in prosecution disclosure. It may be noted that in *R v Brook and Fraser*[67], Gloster J plainly saw the need to devote an entire section of her summing-up to placing defence criticisms of prosecution disclosure into proper perspective. It would appear that uninformative and late defence case statements continue to present problems; see, for example, *Olu (supra)*, at [47].

66. *(7) Legal Aid:* A theme of this Review is that when considering how the operation of the disclosure regime is to be improved, the criminal justice system needs to be looked at as a whole. Legal aid is one part of the system; any consideration of defence performance cannot exclude taking into account how solicitors and barristers are paid for undertaking work on disclosure. By way of obvious example, one disincentive in this jurisdiction telling against adopting the "keys to the warehouse" approach[68] is that while it may well generate savings in the prosecution budget, there is every likelihood that it will

[67] Unreported, July 2010
[68] Apart from any others.

increase the costs of legal aid. Moreover, given the understandable readiness to freeze the assets of suspected criminals, it remains overwhelmingly likely that the defence in large criminal cases will be funded by legal aid rather than privately.[69]

67. A concern sometimes suggested is that some defence legal teams "churn" work on disclosure to increase legal aid payments. In fairness, the limited scope for any such misuse of the system must be kept in context.

68. In most cases, legal aid payments for criminal defence work fall to be dealt with under the Litigators' Graduated Fee Scheme and the Advocates' Graduated Fees Scheme (collectively, the "GFS"). Under the GFS, while the number of pages of prosecution *evidence* is one of the main factors determining the calculation of the overall fee, there are no separate payments for consideration of *unused* material. There is or has been a debate between the profession and the Legal Services Commission ("LSC") as to whether this means that there is no payment for considering unused material or whether, as the LSC puts it, there are swings and roundabouts with payment for such work forming part of the payment for the case as a whole. However this may be,[70] it follows that there is no incentive for inflating the time spent on unused material in cases covered by the GFS. It should though be noted that under the GFS, additional hearings (e.g., for abuse of process applications) do attract separate payment for advocates.

69. A separate payment scheme applies to Very High Cost Cases ("VHCCs").[71] The VHCC scheme involves "case budgeting" on a case by case basis, under the control of a LSC "contract manager". To recover payment, the contract manager must approve the case budget prior to the litigator or advocate undertaking the work in question. VHCCs are categorised in terms of the seriousness of the case, which impacts on rates of payment. Where payment is

[69] Cf. the experience in the US; see below.
[70] It is not a topic for the review.
[71] The VHCC scheme applies to litigators where the trial is likely to exceed 40 days in length and, exceptionally, to some 25-40 day cases. For advocates, this scheme applies to cases where the trial is likely to exceed 60 days in length.

refused by the contract manager, there is a peer-led appeal panel, including senior practitioners.

70. Under the VHCC scheme, specific payment is made for reviewing unused material – indeed the number of pages of prosecution material, here including unused material, will be a determinant of the sum paid to defence representatives. As we understand it, some disputes between practitioners and the LSC relate to the amount of time budgeted for reading the material; for example, should the practitioner be allotted 5 minutes or 30 seconds for each page of unused material? Here, separate payment for consideration of unused material has given rise to concern, especially when seeking to quantify material served electronically in terms of "pages". But, plainly, budgetary control in such cases is a matter of real importance and will be explored below – both as to the role of the LSC and that of the Court.

71. Before leaving this topic for the moment, it is necessary to emphasise the need for a measured consideration of the costs incurred under the legal aid system. First, if once material is scheduled by the prosecution, there is obvious difficulty in denying the defence the opportunity of considering the schedules and the material (if properly disclosable). Secondly, concern has also been expressed that legal aid payments are so unsatisfactorily low as to lead to a decline in the quality of those who are prepared to undertake such work[72]; over and above considerations of fairness, unsatisfactory work on disclosure can readily lead to expensive adjournments or worse at a later stage of the proceedings. Thirdly, hard-fought efficiency gains and savings can very easily be lost in consequence of a single high profile case of miscarriage of justice.

72. *(8) The Judiciary:* As will be apparent from the survey of the present disclosure regime, the Judiciary's case management role is of the first importance for its proper operation. Although uniformly expressed with great courtesy, there clearly are concerns that not all Judges are gripping disclosure issues with the necessary firmness. As with prosecutors, there is said to be, on occasions, a tendency to take the easy option – granting a disclosure request can be simpler than undertaking the analysis called for under the CPIA as to

[72] Obviously, not a concern applicable to privately funded defence work.

whether the disclosure in question is properly warranted. It has repeatedly been observed that Judges with case management skill and the necessary determination to take charge of the issues make a striking difference to the conduct of proceedings.

73. *(9) The legal framework:* Three matters arise here for consideration:

i) The use of cooperating witnesses;

ii) Discounts for guilty pleas;

iii) Sentencing levels.

A full discussion of any (let alone all) of these topics is plainly beyond the scope of this Review; but some mention must be made of them; disclosure obligations in large cases cannot be considered in a vacuum.

74. As to the use made of *cooperating witnesses*, the view has been expressed that this jurisdiction has still much to learn.[73] This is especially so, by contrast with the experience gained in the US. There are, inevitably, considerable dangers attached to the use of cooperating witnesses[74] but, if properly and effectively deployed, the benefits are obvious. In the present context, a cooperating witness can lead prosecutors to the real issues in the case, so providing significant assistance in reducing the scale of the disclosure exercise.

75. Insofar as an appropriate practice of *discounts for* pleas encourages guilty pleas and so, *inter* alia, reduces the burden of disclosure exercises, it plainly has much to contribute to the disposal of heavy and costly criminal cases. This jurisdiction has resolutely set its face against "plea bargaining" – opting instead for increasingly settled levels of discounts[75] for early guilty pleas and the development of "*Goodyear*" indications.[76] Acute concern as to agreements struck by the prosecution in this area is understandable on both

[73] See, De Grazia, *Mainstreaming the use of assisting offenders: how to make SOCPA 2005, section 73 and section 74 work* [2011] Crim L.R. 357-376.
[74] Consider the experience of the use of "super-grasses" in this jurisdiction.
[75] See, the *Guideline of the Sentencing Guidelines Council*, "*Reduction in Sentence for a Guilty Plea*", set out in *Archbold* (2011), Second Supplement, at K-1 *et seq.*
[76] *Goodyear* [2005] EWCA Crim 888; [2005] 1 WLR 2532.

constitutional and moral grounds[77] but does highlight the complexity involved in striking the appropriate balance between effectiveness and principle in the fight against economic crime.

76. Closely related to the topic of discounts for pleas is that of *sentencing levels*. All other things being equal, a sizeable discount from an otherwise lengthy term of imprisonment is more attractive to a defendant considering his options than a modest discount from a low sentence after trial. While sentencing levels are plainly outside the scope of the review, it is noteworthy that there are in this jurisdiction very significant differences between the maximum sentences for violent, sexual and drugs crime on the one hand and economic crime on the other.[78]

77. *(10) Guidance:* Almost without exception consultees commented on the plethora of "guidance", amplifying the CPIA scheme; the near unanimous call was for a consolidation of such guidance, ideally accompanied by a reduction in its length. The brevity of the treatment of this issue here is no reflection on its importance and we return to it later.

78. *(11) The ability to prosecute serious economic crime:* This issue serves to bring together many of the underlying concerns already covered. The burden of prosecution disclosure should not be such as to make it impracticable to bring major prosecutions or to require so considerable a commitment of resources as to reduce the operational effectiveness of the agency in question in other areas. The seriousness of this issue needs no underlining.

[77] See, *Innospec* [2010] Crim LR 665 and *Dougall* [2010] EWCA Crim 1048; [2010] Crim LR 661.
[78] See the Table at ***Annex C***.

IV. Disclosure in Civil Proceedings

79. A very brief look at disclosure in civil proceedings is warranted, in particular because there to – especially in the specialist jurisdictions[79] – the disclosure of electronic materials is a developing area and one giving rise to no little difficulty. In seeking to benefit from the experience of civil courts, it is, however, essential to keep in mind that case management in civil cases has the advantage of sanctions which cannot be utilised in criminal cases; by way of obvious example, in a civil case, a recalcitrant party is at risk of a strike out or summary judgment. Moreover, almost invariably in the Commercial Court, disputes will be privately funded, so that the costs of disclosure are in large measure[80] a matter for clients and market forces rather than a burden on public funds. Even so, it will be helpful to consider whether there are lessons for the review in the experience of disclosure in civil proceedings.

80. Disclosure is dealt with in *CPR, Part 31*[81]. Unless the Court otherwise directs, an order to give disclosure is an order to give *standard disclosure*.[82] Rule 31.6 defines standard disclosure:

> "Standard disclosure requires a party to disclose only –
>
> (a) the documents on which he relies; and
>
> (b) the documents which –
>
> (i) adversely affect his own case;
>
> (ii) adversely affect another party's case;
>
> (iii) support another party's case;
>
> (c) the documents which he is required to disclose by a relevant practice direction."

[79] The experience of the Commercial Court will be used as our example.
[80] It is also necessary – and a continuing focus of the Commercial Court – to keep costs under control with a view to maintaining the competitiveness of London internationally, as a centre of and indeed world leader in dispute resolution.
[81] Supplemented by *Practice Direction 31A* ("PD31A").
[82] Rule 31.5.

81. As provided by rule 31.7, when giving standard disclosure, a party is required to make a "reasonable search" for documents falling within rule 31.6 (b) or (c). Rule 31.7 goes on to deal with the reasonableness of a search, as follows:

> "(2) The factors relevant in deciding the reasonableness of a search include the following –
>
> (a) the number of documents involved;
>
> (b) the nature and complexity of the proceedings;
>
> (c) the ease and expense of retrieval of any particular document; and
>
> (d) the significance of any document which is likely to be located during the search.
>
> (3) Where a party has not searched for a category or class of document on the grounds that to do so would be unreasonable, he must state this in his disclosure statement and identify the category or class of document…"

Rule 31.10 governs the procedure for standard disclosure and provides for a party to serve a "list of documents", such list to include a "disclosure statement" (rule 31.10(5))[83]. A disclosure statement, *inter alia*, sets out the extent of the search which has been made to locate the documents which the party is required to disclose (rule 31.10(6)(a)).

82. Disclosure gives rise to a continuing duty in civil proceedings (rule 31.11). The Court has power to make an order for "specific disclosure" – which, broadly, means what it says: an order to disclose documents or classes of documents specified in the order (Rule 31.12). The party applying for specific disclosure[84] must satisfy the Court (by reference to the pleadings and the issues) as to the relevance of the documents sought and that the documents in question are or have been in the control of the party from whom they are sought: see, the discussion at 31.12.2. The Court's power to order specific disclosure is discretionary; in exercising that power, the Court will take into

[83] Though these requirements may be dispensed with by agreement in writing: rule 31.10(8).
[84] An application typically made when the requesting party believes that the disclosure given by the disclosing party is inadequate: see, PD31A, para. 5.1.

account all the circumstances of the case and, in particular the "Overriding Objective" (CPR Part 1) – and thus proportionality: *ibid.*

83. Disclosure is dealt with specifically in the *Admiralty and Commercial Courts Guide*[85] ("*the ACC Guide*"). Generally (*ibid*), the Court will seek to ensure that disclosure is no wider than appropriate; anything wider than standard disclosure will need to be justified – and the Court is encouraged to consider whether less costly alternatives to standard disclosure might suffice. In the Commercial Court sphere, it is well recognised that the disclosure of electronic documents gives rise to acute concern and the topic is dealt with both in *Practice Direction 31B* [86] and the *ACC Guide*.

84. For present purposes, it is worth noting the "general principles" to be borne in mind by the parties and their legal representatives, when considering the disclosure of electronic documents:[87]

> "(1) Electronic Documents should be managed efficiently in order to minimise the cost involved;
>
> (2) technology should be used in order to ensure that document management activities are undertaken efficiently and effectively;
>
> (3) disclosure should be given in a manner which gives effect to the overriding objective;
>
> (4) Electronic Documents should generally be made available for inspection in a form which allows the party receiving the documents the same ability to access, search, review and display the documents as the party giving disclosure; and
>
> (5) disclosure of Electronic Documents which are of no relevance to the proceedings may place an excessive burden in time and cost on the party to whom disclosure is given. "

85. Reverting to the *ACC Guide*, the parties and their legal representative are obliged to discuss the disclosure of Electronic Documents before the first Case

[85] *Civil Procedure*, Vol. 2, 2011, 2A-39, at 2A-80 *et seq.*
[86] *Civil Procedure*, Vol. 1, 2011, 31BPD.1 *et seq*.
[87] *PD31B*, para. 6.

Management Conference ("CMC"). The *ACC Guide* provides (at E2.5) that such discussions should include (where appropriate) the following matters:

> "(1) the categories of Electronic Documents within the parties' control, the computer systems, electronic devices and media on which any relevant documents may be held, storage systems and document retention policies;
>
> (2) the scope of reasonable search for Electronic Documents required by rule 31.7;
>
> (3) the tools and techniques (if any) which should be considered to reduce the burden and cost of disclosure of Electronic Documents, including –
>
> (a) limiting disclosure of documents or certain categories of documents to particular date ranges, to particular custodians of documents, or to particular types of documents;
>
> (b) the use of agreed Keyword Searches;
>
> (c) the use of agreed software tools;
>
> (d) the methods to be used to identify duplicate documents;
>
> (e) the use of data sampling…
>
> (g) the use of a staged approach to the disclosure of Electronic Documents;
>
> (4) the preservation of Electronic Documents with a view to preventing loss of such documents before the trial;
>
> (5) the exchange of data relating to Electroinic Documents in an agreed electronic format using agreed fields;
>
> (6) the formats in which Electronic Documents are to be provided on inspection and the methods to be used;
>
> (7) the basis of charging for or sharing the cost of the provision of Electronic Documents…..
>
> (8) whether it would be appropriate to use the services of a neutral electronic repository for storage of Electronic Documents. "

86. As recognised by Jackson LJ in *Review of Civil Litigation Costs, Final Report* (December 2009)("*Jackson*"), disclosure is recognised as a major source of

costs in commercial litigation.[88] A noteworthy recommendation[89] is that of the "menu option" – a move away from standard disclosure as the default position; the objective is to avoid disproportionate costs by encouraging a tailored and flexible approach to disclosure in commercial (and some other) cases. A further and for present purposes likewise noteworthy recommendation[90], is the need for more training in e-disclosure.

87. Discussions with leading firms of solicitors[91] underlined the almost unlimited ability to retrieve information, given technological advances. It follows that the scale of the problem as to disclosure of electronic materials can only increase – a problem compounded if and to the extent that commercial parties switch from e-mail to, for example, platform-specific messaging; whereas e-mails are generally stored on the sending and receiving computers, with some platforms (such as messaging conducted via Bloomberg Professional), messages are stored on remote servers, subject to third party data retention policies. Such messages can take significantly longer to retrieve. The need therefore for increased focus on relevance, cooperation between the parties as to the parameters of disclosure of electronic materials, the use of search terms and the like, is all the more pressing. While it is possible to "outsource" the interrogation of digital material, at a price, to commercial companies with technical expertise, the question has been raised as to whether that is doing no more than outsourcing the effort while allowing the problem to continue; it might (it has been said) be preferable to target the underlying problems which result in a disproportionate expenditure on disclosure.

88. It will be apparent that there is much in all of this material relating to disclosure in civil proceedings, which, suitably adapted, merits consideration when reviewing the operation of the disclosure regime in criminal cases

[88] See, ch. 27, at paras. 2.1 – 2.8 and ch. 37, *passim*.
[89] Ch. 37, para. 4.1.
[90] *Ibid.*
[91] Freshfields Bruckhaus Deringer ("Freshfields") and Slaughter & May.

V. The Experience of Other Jurisdictions

89. With a view to obtaining a comparative perspective, we were anxious to explore the workings of other legal systems – necessarily, within the limits of available time and resources. Our interest lay both in common law and (what may be termed) Strasbourg-compliant civilian systems. With regard to the former, we travelled to New York for extensive and intensive meetings with investigators (including the FBI), state and Federal prosecutors, defence attorneys and Judges. So far as concerns the latter, one of us travelled to the Netherlands and Germany, for similarly intensive meetings, on this occasion with Ministry of Justice officials and Judges. We express here our gratitude for the warmth of the welcome accorded to us and the readiness to make time available to discuss areas of interest. A list of those with whom we consulted in these jurisdictions is at ***Annex B***. For our part, the visits were of great value in forming a rounded view of the topic, though we remain acutely aware of the inherent limitations of so compressed and impressionistic a comparative inquiry.

90. *(1) The US*[92]*:* A notable feature of the US system[93] is the integrated working of prosecutors and investigators. Investigators work under the direction and guidance of prosecutors. Both the US Attorney's Office for the Southern District of New York ("SDNY") and the Manhattan District Attorney's Office ("DANY") use their own investigators to conduct many investigations although they also work with Federal and State law enforcement agencies respectively, such as the FBI and the New York Police Department. As described to us[94], prosecutors and investigators work together, "seamlessly" as a team. Moreover, the pivotal position of prosecutors is underlined by their having "case ownership" - handling cases from investigation to and including conduct of the trial. The correlative expectation is that prosecutors will meet

[92] We are, again, most grateful to Ms De Grazia for the overview of the workings of the US system.
[93] Both Federal and State, see below.
[94] Meeting with Cyrus Vance Jr, the DANY.

high standards and that they will conduct themselves with an independent ethos.[95]

91. As already observed, the operation of a disclosure regime cannot be considered in a vacuum. As described to us (and so, admittedly, anecdotal), there is an emphasis in the US, in a complex white collar investigation and prosecution, on targeting a potential cooperating witness – perhaps a "middleman" in the fraud. The target may then be faced with the choice of risking a possibly draconian sentence or cooperating with the prosecution, in the expectation of a significant discount in his sentence. Assuming the target opts in favour of cooperation, he will know enough about the fraud to point investigators to the real issues – so dramatically reducing the burden of disclosure and encouraging others to enter guilty pleas. The features thus highlighted are, accordingly:

i) An emphasis on finding a cooperating witness to "crack open" the fraud;

ii) The possibility of a high sentence if cooperation is declined and conviction follows;

iii) The expectation of a significant reduction in sentence, should the target cooperate – the "plea bargain";

iv) The upshot is a reduced disclosure burden and a high guilty plea rate, encouraged by sentence levels (high), significant discounts for pleas and the knowledge that an "insider" to the fraud will or may be assisting the prosecution.

92. It is beyond the scope of the review to explore the advantages and disadvantages of such a system[96]. The "plea bargain" should not, however, be misunderstood. It was emphasised to us[97] that it was a loose term; the

[95] We were told that a career as a Federal or State prosecutor in New York and Washington is viewed with similar gravitas to working for a "Magic Circle" law firm.
[96] A high guilty plea rate and a reduced disclosure burden are obviously attractive. The use of cooperating witnesses is not straightforward and "plea bargaining" carries its own constitutional and moral complexity.
[97] We are particularly grateful to US District Judge P. Kevin Castel for this explanation.

agreement between prosecutor and defendant is simply that the prosecutor will make the court aware of the defendant's cooperation. The agreement does not bind the court *but* the practice is well established so that it is possible to anticipate the likely sentence discount. The prosecutor does not make suggestions to the Court as to sentence but the Court is aware that unless a substantial discount is available, defendants will be less willing to cooperate - and that such cooperation is in the public interest. We were told that, in practice, non-violent crimes attract higher discounts. The credit given to the cooperating witness remains conditional at all times upon the truthfulness of his assistance and continuing compliance with such other conditions as may be imposed (for example, that he does not commit further offences). In the light of the prosecution's disclosure obligations (see below), the prosecutor has an interest in the cooperating witness making full disclosure of his own criminality. For completeness, our understanding is that there is minimal judicial oversight of plea agreements, save that the agreement (as already underlined) does not bind the Court.

93. Against this background, we turn directly to disclosure matters. The US has, of course, both Federal and State systems. Our focus is on the Federal system – as the Federal Constitution sets a minimum standard for the rights of a defendant to a fair trial; State Constitutions can increase but not detract from rights guaranteed by the Federal Constitution. For present purposes, the prosecution's discovery obligations in criminal cases under the US Federal system may be summarised as follows:

    i) There is a relatively narrow obligation under Federal Rules of Criminal Procedure, Rule 16 ("*Rule 16*"); it requires disclosure to the defendant of oral, written or recorded statements he has made to law enforcement officials in addition to certain expert reports. Oral statements by the defendant must only be disclosed if the government intends to use the statement at trial and, in relation to the defendant's written or recorded statements, there is a qualification that the prosecutor must either know of the statement in question or (with due diligence) should know of it.

ii) In accordance with Title 18 of the U.S. Code, para. 3500 (a) ("*the Jencks Act"*), there is no obligation to disclose the statement of a prosecution witness or prospective prosecution witness until the witness has given evidence in chief at the trial. The aim was to discourage witness tampering. That said, our understanding is that in practice such statements will usually be produced some time in advance of the trial – as no court would tolerate the adjournments which would otherwise result.

iii) Although there is said to be no general constitutional right to discovery in criminal cases, the US Supreme Court has recognised that defendants have a "due process" right to disclosure of exculpatory evidence. In *Brady v Maryland* 373 US 83 (1963) 87, the Court held that:

> "…the suppression by the prosecution of evidence favourable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

Subsequently, in *United States v Bagley*, 473 US 667 (1985) 682 the Court explained that evidence was "material" only if:

> "…there is a reasonable probability that, had the evidence been disclosed to the defence, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."

Accordingly (at p.675), the *Brady* rule did not require the prosecutor to deliver his entire file to the defence – but only to disclose evidence favourable to the defendant that, if suppressed, would deprive him of a fair trial. *Brady* was based on the requirement of due process; its purpose was not to displace the adversary system as "the primary means" by which truth was uncovered – but to ensure that a miscarriage of justice did not occur.

iv) Closely related to *Brady*, is the rule in *Giglio v United States*, 450 US 150 (1972), namely, that due process required prosecutors to disclose to the defence any information that tended to impeach the credibility of prosecution witnesses.

94. Pausing there, by way of a broad generalisation, it may be said that the US approach to discovery is less formalised than the English disclosure regime under the CPIA. At first blush at least, the *Bagley* "materiality" test is narrower than the CPIA test for disclosure; the US test appears to focus on a "reasonable probability" of affecting the *outcome* of the trial rather than that "which might reasonably be considered capable of undermining the case for the prosecution… or of assisting the case for the accused". That said, we are doubtful that the difference between the tests would prove significant in practice.[98] Putting the test for discovery to one side, in the US, in large measure, reliance is placed on prosecutor-led investigations identifying documents to be disclosed and complying with their obligations to do so. If or when a miscarriage of justice occurs, attributable to failures of prosecution disclosure and involving non-compliance with *Brady/Giglio* obligations, it is treated as grave professional misconduct.

95. Disclosure of "unused material" is not part of US terminology. Nor is there, so far as we could ascertain, any duty on the prosecution to search for possible exculpatory materials. As expressed to us, were it otherwise, not only would there be serious resource implications for prosecutors but this would be a difficult task for prosecutors to undertake, given the absence of any requirement for a defence case statement. In any event, if put more colloquially – as it was to us - the prosecution was not there to do the job of the defence. On any view, therefore, while *Brady* obligations applied to evidence of which prosecutors were aware, its ambit did not or not self evidently extend to materials of which, arguably, the prosecution should have

[98] At a time when decisions have to be taken whether to give disclosure/discovery, we anticipate it would be a brave prosecutor who chose not to give discovery based on a prediction of the impact of the material on the outcome of the trial, despite the material in question being reasonably capable of undermining the prosecution case or assisting the case of the accused. Although the different tests might suggest the possibility of different results when it comes to (after the event) appeals, bearing in mind the overriding importance in the English system of the "safety of the conviction", we suspect that here too the difference between the tests would prove more theoretical than practical.

been aware – though at least some of those with whom we spoke suggested that the last word had not been said on this topic. It appeared to us that, in complex document intensive cases, some use was *de facto* made of the "keys to the warehouse" approach – but concerns were expressed both that such an approach would not discharge the prosecution's discovery obligations and that it would be preferable to adopt a more focussed approach to discovery.[99] With a view to reducing the scale of the task, judgment and restraint were called for when seizing material.[100]

96. So far as concerns "scheduling", we did not discern anything like the detailed requirements contained in the Code and Guidelines (set out above). Our impression is that there was a requirement to catalogue the decisions taken and itemise selected material, but no more.

97. As earlier foreshadowed, consideration of disclosure requires or is improved by an understanding of the funding of legal defence costs. In this regard, we were interested to learn that there was a greater likelihood of defendants being privately represented in high-end criminal prosecutions than might be the case in this country. Our impression is that this may be attributable to a greater readiness to freeze a defendant's assets in this jurisdiction. When defence costs are publicly funded, this is overseen by the Court and funding is allocated to attorneys admitted to the "Criminal Justice Act Panel" ("the panel"). Admission to the panel is competitive and prized; the expectation is that panel members would conduct themselves responsibly when spending public money. It would seem, however, that matters do not rest with such expectations; we were made aware of a pilot scheme utilising a "Case Budgeting Attorney" ("CBA") to advise the courts as to the approval of individual claims, to ensure consistency and that expenditure is reasonable and proportionate.[101] As explained to us, the aim of case budgeting was not to constrain the defence but rather to require defence lawyers to assess the

[99] Meetings with the FBI and with Judge Lohier and others.
[100] An approach which involved leaving nothing but the wallpaper in premises searched was the subject of particular adverse comment by the FBI; such an investigator would be characterised as "Mr. Wallpaper" – not a term of approbation.
[101] Meeting with Mr. Jerry Tritz, 2nd Circuit, CBA. The role of a CBA would appear to be analogous to that of a contract manager at the LSC.

proportionality of expenditure. The concept of case budgeting was welcomed by responsible defence attorneys as defining the framework in which the case will be conducted and providing a "top-down" emphasis on cutting costs.[102]

98. We encountered a considerable emphasis on the uses of technology. As suggested to us[103], advances in technology could assist in reducing the costs of and improving the efficiency of discovery. Outsourcing was perceived to be valuable in this regard. The management of electronic material remained, however, a matter of significant concern, not least for defence attorneys; we were told that the format of the material supplied varies in quality and accessibility.[104]

99. Overall, we were struck by the robust approach of all concerned to discovery in US criminal cases. Certainly, the burdens of discovery do not appear to stand in the way of relatively expeditious and successful white collar prosecutions.[105] If anything, the view expressed to us was that discovery in criminal cases in the US presented less difficulty than discovery in civil cases.

100. *(2) The Netherlands:* A basic principle of the Dutch criminal justice system is that all participants in criminal proceedings make use of one and the same collection of relevant information, documents, reports and the like – namely, "*the dossier"*, as it is known once passed by the police to the public prosecutor. The centrality of the dossier, in some ways akin to a trial bundle, does not, however, dispose of or resolve questions of disclosure; self evidently, once material finds its way into the dossier it has been disclosed. However, certain relevant documents may temporarily be withheld in the interests of the investigation.

[102] Meeting with Mr. Ricco and Mr. Savitt, both panel defence attorneys.
[103] Meeting with Judge Scheindlin of the 2nd Circuit.
[104] Meeting with Messrs. Ricco and Savitt, *supra*.
[105] See, most recently, the *Rajaratnam* case – commented upon in the *Financial Times*, editorial of 12th May, 2011, "Rajaratnam's Guilt" and article of 16th May, 2011, "The walls have ears".

101. It is convenient to deal at once – if only to put to one side – another term with which the English legal system is unfamiliar, namely, the "*investigating Judge*". The investigating Judge plays an important pre-trial role in preparing the evidence and the papers for the trial, as the trial is largely conducted on paper and witnesses are rarely seen. But the investigating Judge has no particular role with regard to disclosure. Under forthcoming legislation reforming the rules concerning "the dossier", the investigating Judge will have the power to rule on any disputes as to what is to go into the dossier. The investigating Judge cannot be the trial Judge, given his pre-trial role.

102. The public prosecutor is in charge of and leads criminal investigations; the police carry out the investigations under the supervision and authority of the prosecutor. The prosecutor is obliged to observe strict objectivity; he must not strive simply to convict the accused but must investigate the truth and, in so doing, also ascertain facts which exculpate the accused.

103. As we understand it, there is no obligation *as such* on the prosecution to search for exculpatory material. But the prosecution must disclose what they find; all exculpatory material thus found by the prosecution must be included in the dossier. Moreover, the prosecution cannot operate on the basis of turning a blind eye to available exculpatory material and risks criticism if they approach an investigation with a blinkered or closed mindset.

104. The police and the prosecutor prepare the dossier but the defence can apply for additional documents to be included. Apparently, a defence request to add "unused" (police material) to the dossier can only be declined on the basis of irrelevance or the protection of an important public interest. Exculpatory

material is no less relevant than incriminating material. In the near future, as already noted, in the event of a dispute in this regard, a ruling will be possible from the investigating Judge. At the moment, any dispute with respect to *"the dossier"* can only be resolved during the substantive proceedings.

105. With regard to defence costs, legal aid lawyers are paid a flat fee per case – with cases divided into a number of different categories depending on complexity and work load.

106. The Netherlands is a jurisdiction familiar with cases of serious and complex fraud and other large-scale, document heavy investigations and the problems to which they give rise. As we understand it, the Netherlands faces problems with which the English system is not unacquainted: a mass of documentary material, late disclosure and adjournments. There too, it has been said that disclosure can turn on the quality of the (police) investigator undertaking the initial examination of the seized materials.

107. We were informed of forthcoming legislation which aims to reduce delay, enhance defendants' rights of access to materials not included in the dossier and strengthen the role of the investigating Judge – it would appear at the expense of the prosecutor.

108. Fascinatingly for this Review, although the terminology in the Netherlands is very different from our own and its legal system approaches questions of discovery from a very different starting point, the problems it is seeking to address are familiar and similar to those encountered here. One matter is clear – there is no instant solution by way of the "dossier" and the "investigating Judge".

109. *(3) Germany:* It would appear[106] that the German system faces over-lengthy trials, beset with adjournments. The underlying reasons for these difficulties (to which we shall shortly come) are those which in this jurisdiction we would classify, at least in part, as disclosure problems. Intriguingly, however, in Germany, they are not perceived as such.

110. As we understand the German system in outline:

i) In larger criminal cases, the prosecution run the investigation, utilising the police as "auxiliaries".

ii) Considerable care is taken to limit the amount of material seized.

iii) The prosecution is under a duty to search for and seize exculpatory material; art. 160(2) of the German Code of Criminal Procedure provides as follows:

> "The public prosecution office shall ascertain not only incriminating but also exonerating circumstances, and shall ensure that evidence, the loss of which is to be feared, is taken."

iv) There are no statutory requirements as to the contents of the dossier (with which German law too is familiar) but the compilation of the dossier is governed by two principles: first, truth; secondly, completeness.

v) The dossier is (as described) "like a book with numbered pages". The defence is entitled to inspect it. Further, the defence can make suggestions for materials to be included in the dossier but cannot require inclusion.

vi) In what are described as "interim proceedings", the dossier will come before the Judge when the prosecutor decides to "lay the accusation"

[106] If anecdotally.

(i.e., to proceed). The dossier is then considered on paper, not orally. The Judge has power to dismiss the case but, it is said, that would be exceptional. The Judge also has power to order further investigation, a power which is exercised on occasions. (It may be noted that the Judge in these interim proceedings will be the trial Judge – not the "investigating Judge"; the matter may go before the investigating Judge but only on a specific prosecution motion, such as an application for surveillance measures.)

111. Case management, extending to the conduct of the trial, is very much a matter for the trial. The Judge rather than the lawyers is in control of the trial. In Germany, trials are oral – but there is no cross-examination as in the English system. The Judge leads the proceedings and asks the questions; his task is to establish what happened. Both guilt and sentence (if the defendant is convicted) are dealt with at the same time. Judges sit with lay assessors; the number of Judges sitting depends on the seriousness of the case.

112. As to defence costs, the starting point is that it is *mandatory* under German law for a defendant to have legal representation where the likely punishment would exceed one year of imprisonment or when other defendants in the same case also are granted legal representation: see, Art. 140 of the German Code of Criminal Procedure. There is no means testing but the cost of such representation is recouped if possible.

113. We return to the problems with which we began this discussion on Germany. The risk is that an astute defendant will keep his powder dry until trial. Only then will he make evidentiary and documentary requests. There is no requirement to deal with such matters at the pre-trial stage or to give (for example) alibi notices. Applications at trial can extend to requests for expert evidence. The inevitable upshot will be an adjournment or a series of adjournments; trials are said to "last forever". Further, Judges do not appear to have case management powers to curtail proceedings. Still further, the trial process is extended (possibly distorted) by what was described as "funded victim representation". Once again, it can readily be seen that a very different legal system is acquainted with the familiar problems of time consuming

requests for documents. If our understanding is accurate, the particular bane under the German system is that such matters are left until the trial stage.

VI. Discussion

114. *(A) GENERAL:* It is abundantly clear that there is no "quick fix" or instant solution to the concerns expressed as to the operation of the CPIA disclosure regime. If anything, a brief glance at other legal systems confirms that the difficulties are familiar and not confined to the English system[107]. It does not however follow that this jurisdiction is doomed to an unpalatable choice between risking miscarriages of justice or accepting unaffordable documentary excesses. It is instead the theme of this Review that there is room for significant, if incremental, improvement on the part of all concerned. There is the need to do better; there are still too many examples of prosecution disclosure going wrong[108] while, at the same time, too much time and money appears to be devoted to peripheral and disproportionate paper exercises. It is likewise necessary to address the explosion in electronic communications, which was not and could not have been anticipated when the CPIA regime was enacted. It is essential that the burden of disclosure should not render the prosecution of economic crime impractical.

115. As it seems to us, the improved operation of the CPIA regime requires that disclosure should be prosecution led or driven, in such a manner as in turn to require the meaningful engagement of the defence. The entire process must be robustly case managed by the judiciary. The tools are available under the Rules, the Code, the Guidelines, the 2011 Guidelines and the Protocol; they need to be used.

116. While we were, respectfully, impressed with many features of the US system – not least the self confidence in its workings and rather lesser anxiety as to the operation of discovery - we would not propose institutional changes to the conduct of prosecutions or trials in this country, even had it been within our remit to do so. We will instead focus on seeking to ensure that the strengths of the US system are replicated within our differently structured system.

[107] Thus, for example, the "dossier" system does not resolve problems in this area; the system is different but the essential problems remain.
[108] See, most recently and in addition to the instances given earlier, *R v David Barkshire and Others* [2011] All ER (D) 180 (Jul) concerning the activities of a former undercover police officer.

117. We are mindful that we should not advance any proposals which:

i) Simply transfer cost from one public purse to another;

ii) Result in unintended consequences for "routine" (as distinct from very large or complex) cases.

118. *(B) THE PRESENT REGIME: (1) The CPIA test for prosecution disclosure:* We do not recommend making any change to the CPIA test for prosecution disclosure. Given the uncertainty and upheaval generated by any change to the statutory test, we would not have made any such recommendation unless there was very considerable pressure to do so; to the contrary and as already recorded, we did not encounter any criticism of the test itself.[109]

119. *(2) The relevance test at the investigatory stage:* By contrast and as earlier recounted, considerable concern was expressed as to the relevance test at the investigatory stage and, in particular, the lack of any "proportionality" qualification. There is, undoubtedly, force in this criticism of the current test, especially in the context of the volume of electronic communications now generated, so that, on the face of it, the introduction of a proportionality qualification would have much to commend it. But, for the time being at least, we would not be inclined to recommend a dilution of the definition of "material… relevant to an investigation" contained in the Code. In this regard, we are particularly mindful of powerfully expressed concerns, from highly experienced Judges[110], counselling against any relaxation of this definition. The reason for this caution goes back to the risk of miscarriages of justice flowing from investigators, inadvertently or otherwise, ignoring exculpatory material. In this regard, it is to be recollected that the decision as to relevance at the investigatory stage is one which (typically) falls to be made by police officers, not by trained lawyers. It was against this background that, as we understand it, the relevance test at the investigatory stage was deliberately drafted in such wide terms. Tempted as we are to propose the introduction of a

[109] We have noted with interest the US test (see the discussion of *Brady* and *Bagley*, above) but, as remarked, we doubt the true extent of the practical difference between that test and the CPIA test.
[110] In particular, Calvert-Smith and Sweeney JJ, for whose contributions overall we were extremely grateful.

proportionality qualification, we are not persuaded that the time is yet ripe to do so. For our part, we would wish to see a settled period of improved confidence in the prosecution's performance of its disclosure obligations, before contemplating such a change.

120. *(3) Scheduling of unused material:* We turn next to the scheduling of unused material. We cannot help thinking that, with suitable determination, there is considerable scope for greater common sense in scheduling. As in civil proceedings, we would welcome a concerted effort being made to reduce the burdensome exercise which scheduling appears to have become. By way of elaboration:

i) The importance of scheduling is understood, especially given the structure of the typical prosecution in this jurisdiction, distinguishing as it does between the roles of investigators, prosecutors and counsel. The schedule is a formal bridge between the investigator's role and that of the prosecutor. Further and on any view, there is a need (to adopt the terminology used in discussions in the US) to catalogue the decisions taken. We do not therefore quibble with the need for a proper record of seized material, for reasons ranging from ensuring its safekeeping, providing a record or audit trail of actions taken, protecting the defendant and permitting the return of material which need no longer be retained. For scheduling to fulfil these needs, plainly a sufficiency of detail is required.

ii) What we do perceive, however, is scope for improvement in two areas. First, the size of the schedules will necessarily depend on the volume of material seized; taking care to avoid "over-seizure" would (by definition) reduce the burden of scheduling. Secondly[111], there is scope for reducing *excessive* detail in scheduling – a schedule must be a clear record but there is no need for it to become an art form. It cannot be right, to revert to the example already given, that a schedule should run to over 10,000 pages.

[111] On the basis of the observations made to us.

iii) While mindful of the obligations under paras. 6.9 and 6.11 of the Code[112], we see no reason why full use should not be made of para. 6.10 of the Code[113], recognising the practical need to list certain items "in a block and described by quantity and generic title". For our part, especially where investigators are concerned with a mass of electronic materials, all the more so if perceived to be of peripheral interest, we would see very considerable scope for utilising such block listing. We would be disappointed if significant savings in time and cost could not be achieved by a concerted effort in this regard. Moreover, whether listing items individually or in blocks, there must be merit in simplification; the core requirement of a schedule would be fulfilled by a brief indication, in respect of both individual items and those listed in blocks: (a) the source or origin of the item/s; (b) the date recovered; (c) a broad description of the item/s[114]. Plainly, the question of further detail would be case specific and we cannot be prescriptive; but of the need for simplification and abbreviation, we have little doubt[115].

121. *(C) THE PRINCIPAL PROTAGONISTS: (1) The prosecution:* We begin with the prosecution, using the term here to encompass investigators, prosecutors and trial counsel. In our view, improvements in disclosure must – and can only – be prosecution led or driven. To achieve such improvements, it is essential that the prosecution should get to grips with the case from the very outset of the investigation, mindful amongst many other things, of disclosure requirements.

122. *The CPS proposals:* In this regard, we are greatly encouraged by the proposals canvassed with us by the CPS, including the DPP personally. In broad outline, these involve four main strands: (1) the prosecution strategy document; (2) charge selection and indictment; (3) the disclosure management document;

[112] Echoed in para. 29 of the Guidelines and para. 50 of the 2011 Guidelines
[113] See too, para. 51 of the 2011 Guidelines.
[114] We acknowledge with thanks the contribution of Vivian Robinson QC, General Counsel of the SFO, to this summary of what a schedule might contain.
[115] See, further, the very helpful and commonsense approach adopted in paras. 46-49 of the 2011 Guidelines.

(4) the prosecution case statement. While (3) and (4) go to the heart of this Review, it is also necessary to say something about (1) and (2).

123. The "prosecution strategy document" (i.e., (1)) is intended to address[116]:

> "…issues such as: the overall objectives of the prosecution; identification of the key suspects and an agreed plan for dealing with the alleged criminality; specific evidential lines to be pursued; the use of coercive powers; an agreed interview plan; asset preservation and recovery; and a case-specific approach to dealing with disclosure. "

Such a document – plainly an internal prosecution document – would seek to prevent the case from growing in size without proper thought begin given to the overall prosecution objectives. It would furthermore require the (wider) prosecution team to consider such issues at an early stage in the case.

124. As to (2), "charge selection and indictment", this involves early consideration of whom to charge and with what offence/s – considerations of the first importance in shaping and containing the future size of any trial. The selection of charges must of course be consistent with prosecution objectives as articulated in the prosecution strategy document.

125. We turn to (3), the disclosure management document – a document to be provided to the Court and the defence. As explained to us, the aim of such a document is:

> "…to achieve a pro-active and transparent approach, to give the court confidence that the prosecution are complying with their disclosure obligations, and to engage the defence in the disclosure process at an early stage."

It is envisaged that this document would be used to summarise the approach taken by the prosecution in dealing with unused material. For example, where computers have been searched and particular search terms used, the document should explain which terms have been used and why. In appropriate cases, the document could (and in our view should) further be used to explain clearly the limits of the prosecution work on disclosure and why those limits have been set; so if, for example, the prosecution was not proposing to search or search

[116] Documents supplied to us by the CPS in October 2010.

in any detail particular computers which have been seized, the document should set out the reasons for not undertaking the additional work – for example because the computers in question were seen as peripheral, or constraints of time and manpower made it necessary to prioritise apparently relevant material over apparently irrelevant material. Pausing here, it may be noted that the approach envisaged by this CPS proposal accords well with the 2011 Guidelines.[117] The mere production of such a document would have the further beneficial consequence of encouraging reflection as to whether any such seized material needed to be retained (and, if so, why) or could be returned to the party from whom it had been seized. We commend this proposal. As it seems to us, a document of this nature would be of the greatest use (1) in ensuring that the prosecution did get an early grip on its disclosure obligations; (2) in prompting defence engagement; (3) in assisting robust case management. It goes without saying that to achieve its objectives, a prosecution disclosure management document will require careful preparation and presentation, by reference to the individual case. It is essential that the criteria which the Prosecution has applied to the decision-making process in the particular case are clear; a formulaic box-ticking document would be of no use whatever.

126. The prosecution case statement (i.e., (4)), another document to be provided to the Court and the defence, is intended to set out the key issues and evidence in the case – and would seek to assist the Judge in forming a clear view as to the prosecution case. The aim, as expressed to us:

> "…is to narrow the issues in dispute, by inviting the defence to indicate whether they agree, do not agree, or dispute each particular piece of evidence, cross referenced to a case summary. The process is intended to assist trial management and reduce the length of cases."

We see great merit in such an approach, again provided that the prosecution case statement is properly prepared and suitably tailored to the individual case. While sufficient detail will be necessary for the prosecution case statement to be useful, an exercise of judgment will be required; it will be vital that the

[117] See, especially, paras. 46-49

prosecution case statement assists in identifying and narrowing the issues in dispute – but it may not be literally necessary to focus on "each particular piece of evidence", for fear otherwise of an over-lengthy document becoming an end in itself.

127. The importance of these CPS proposals (fully supported as we understand it, by the SFO) to the present review is self evident. The benefits flowing from these proposals will self evidently hinge on consistent prosecution performance – rather than good intentions; in the jargon, it is imperative that the prosecution *delivers* on these proposals. Disclosure obligations turn on the issues in the case. The early identification of those issues and the engagement of all parties in addressing them are critical to a focused approach to disclosure, as well as to keeping the burden of disclosure within manageable bounds.

128. To these CPS proposals, we would add another[118] – the desirability of a separate *"Disclosure Bundle"*, to be produced by the prosecution (in appropriate cases) and continuously updated (if need be), comprised of unused material which the prosecution has identified satisfying the CPIA test for disclosure. Case management would be greatly assisted by an easily accessible bundle containing such material[119].

129. *Cooperation between prosecutors and investigators:* The separate roles of prosecutors, investigators and trial counsel in a typical English prosecution have already been highlighted and contrasted with the integrated working of prosecutors and investigators in the US. We neither have the remit nor would we be minded to propose institutional changes to the structure of the English system so as to replicate the US integrated model here, despite our respect for the manner in which we understand it works. Indeed, where that model is applied here, we have little doubt that the SFO's integrated nature, atypical in this jurisdiction, is amongst its strengths.

[118] Suggested by HHJ Rivlin QC, Hon. Recorder of Westminster and Resident Judge at Southwark - it may be said the "flagship" Court for dealing with complex cases of the kind with which the review is primarily concerned.
[119] See, by way of analogy, the Case Management Bundle used very successfully in the Commercial Court.

130. Instead, we seek to promote, for the typically structured English prosecution, early, sensible and sustained cooperation between prosecutors and investigators, in respect of disclosure. In so recommending, we intend to build on para. 6.1 of the Code, together with para. 32 of the Guidelines (set out above) and take into account the criticisms contained in *Olu (supra)* of the conduct of disclosure in that case, especially at [44]. The recommendation likewise accords with the Manual, incorporating CPS/ACPO guidance and best practice, which emphasises that:

> "29.8 Early contact between the reviewing prosecutor and the investigator and the early appointment of the prosecution advocate is vital in large-scale cases. "

We have in mind the involvement of the prosecutor from the outset of the investigation so that he/she is in a position to influence decisions taken on questions of disclosure (and other matters of investigative strategy).[120] We acknowledge that prosecutors already provide assistance relating to the bringing of appropriate charges but are anxious that such assistance should not stop there. An erroneous initial approach to disclosure may well have a devastating effect on the instant proceedings – with a knock-on effect on public confidence. We underline that our recommendation in this regard is not confined to large and complex cases but should also extend to mid-range cases where the police may well request investigative advice from the CPS.[121]

131. In summary, we would wish to emphasise the importance of prosecutor – investigator cooperation, extending to early questions of disclosure and to encourage the fullest use of the existing framework to its best advantage. While conscious of the arrangements already in place for such cooperation, we would be surprised if, here as elsewhere, there was not room for improvement. Given cooperation of this nature, there is every reason to expect prosecution performance to emulate that achieved by the integrated model in the US, without disturbing the institutional structure of the typical English prosecution.

132. Before leaving this topic, we add the following observations:

[120] Favourable comment was made to us, not least by ACPO, as to the desirability of a "joined up" prosecution approach, with the prosecutor "arriving early and the investigator staying late".
[121] ACPO observations to us.

i) We do not lose sight of the need for clear lines of responsibility between investigators and prosecutors in the typical English prosecution. Nor have we overlooked the benefits of independence as between prosecutors and investigators, which underlie the present English system. Nor, further, do we think that lawyer "led" investigations would be a panacea. But we do not see improved prosecutor – investigator cooperation, addressing early questions of disclosure, as either blurring lines of responsibility or as compromising independence. We see no reason why bringing to bear the skills of a legally trained prosecutor on questions of disclosure should have any of these deleterious consequences, still less inhibit investigators from carrying out their investigatory functions. Further, there could be no difficulty in strengthening the Guidelines in this regard if (which is not apparent to us) it was thought necessary or desirable to do so.

ii) We would go further. We have already mentioned the desirability of early prosecutorial involvement in the investigation. Where possible, we would likewise – and strongly – favour the early involvement of trial counsel. We would also very much wish to encourage the early and ready exchange of views between investigators, prosecutors and trial counsel. In a variety of respects, the separation of police, CPS and the independent Bar constitute strengths of the English system; there is, however, no good reason why this institutional separation should operate to impede the optimal conduct of the case, utilising the strengths of all three institutions to their best advantage.

133. *Investigators:* Vital decisions concerning disclosure will, typically, be taken by police investigators. As already remarked, disclosure will only be as good as the person doing it. It seems to us of obvious importance that proper training in issues of disclosure should be part and parcel of the professional development of a police investigator. Amongst other matters, it is important that such training should focus on what was termed by ACPO[122], "the investigative mindset" – i.e., an inquiring, open-minded approach, capable of

[122] *Practice Advice on Core Investigative Doctrine* (National Centre for Policing Excellence, ACPO, 2005), p. 58 and following.

sensing what might be material from the defence perspective. We would hope for and anticipate[123] support from ACPO in this regard, both as a matter of "best practice" and in the light of the obligation placed on chief police officers under para. 3.3 of the Code (set out above)[124].

134. *Seizing materials:* As already canvassed, the scale of the prosecution task on disclosure is directly affected by the amount of material seized. Here too, the benefits of an investigation carefully focused from the outset, are readily apparent. If care is taken to seize no more materials than are indeed necessary, the subsequent burden on the prosecution can be reduced.[125]

135. *Keys to the warehouse:* Mention has been made from time to time of the "keys to the warehouse" approach. It will have been noted that the Protocol was deeply hostile to this approach and that the Guidelines and the 2011 Guidelines, unlike the 2000 Guidelines, have not adopted it. With respect to the observations made to us in favour of the keys to the warehouse approach[126] and which we have carefully considered, we are not attracted to it. Our reasons are these:

i) As already underlined, it is necessary to guard against any proposal which simply transfers cost from one public purse to another. To an extent, the keys to the warehouse approach does just that. Adopting this approach would or should lead to a reduction in prosecution costs; but, conversely, it is also likely to result in an increase in legal aid costs. Unlike the position in the US – where, as we understand it, much white collar defence work is privately funded – the expectation here must be that defence costs will be funded by legal aid. Although it is correct to say that the GFS does not make separate payment for consideration of unused material[127], this is not so under the VHCC scheme. Even if it could be contended (because of the GFS) that the increase in legal aid costs may not be as steep as might be feared, we

[123] From our discussions
[124] See too, para. 14 of the Protocol.
[125] See above for the US example concerning "Mr. Wallpaper".
[126] From both Ms de Grazia and respected solicitors.
[127] See above

do not see how a significant increase could be avoided in respect of VHCCs.[128]

ii) Matters do not rest there. In principle, we find it difficult to see how a diligent prosecutor could rest content with the keys to the warehouse approach, without wishing to familiarise himself/herself with the same material – thus posing the risk of duplication. Quite apart from the need to comply with the prosecution's CPIA regime disclosure obligations, a diligent prosecutor would wish to ascertain how such material affected the strengths or weaknesses of the prosecution case. An element of abdication might otherwise be involved.

iii) Our discussions in the US, summarised above, did not suggest unqualified support for this approach, or anything like it.

136. *(2) The Defence:* Responsible practitioners acting for defendants have a key role to play in improving the disclosure process; but the nature of that role requires careful, practical analysis and unrealistic expectations are best avoided.

137. In our adversarial system, it would neither be appropriate nor realistic to anticipate that the defence will take the lead in disclosure; as already discussed, that lead can only come from the prosecution. It should further be recollected that the prosecution's obligation to give disclosure under the CPIA – whether under s.3 or s.7 – is not linked to the production of a defence statement[129]; the prosecution must do what it can to ensure the fairness of the proceedings, even if the defence, without good reason, does not furnish a defence statement. Still further, it should be underlined that there can be no quibbling with a defence attack on prosecution disclosure which does not comply with the prosecution's CPIA regime obligations; no proper criticism can be made of such an approach (regardless of the "merits" in the rest of the case) – and if an attack of this nature is successful, the defendant is entitled to

[128] See, further, the strong criticism of this approach in the Protocol, set out above and with which we are in broad agreement.
[129] As strongly emphasised to us by Calvert-Smith J.

the benefit of it[130] and the prosecution has only itself to blame. Perspective must therefore be retained. However, nothing said here should be taken as encouraging inappropriate abuse of process applications, and we anticipate that all such applications will receive the closest judicial scrutiny.

138. But matters do not end there. In our view, a defence refusal to engage in the disclosure process, coupled with persistent sniping at its suggested inadequacies, is unacceptable – and reflects a culture with which the system should not rest content. Neither the fairness of the trial nor the fearless protection of the defendant's legitimate interests warrants such an approach. On the assumption that the CPS proposals (outlined above) are implemented, so that the prosecution does take a grip from the outset on the issues in the case and its disclosure obligations:

i) There is every reason to require the defence to engage meaningfully with the prosecution's stated approach to disclosure. Such an engagement need not be uncritical; but if, for example, it is to be suggested that the prosecution should range wider in its searches, or employ other or additional search terms, a reasoned basis should be advanced. There is also much to be said for the proposal that in appropriate cases the Court should press for involvement from the defendant personally – not merely from his legal representatives.[131]

ii) Similarly, where the defence makes an application under s.8 CPIA and r.22.5 of the Rules, the application must – as the statute and the Rules already require – have a proper foundation.

iii) It is by this route, that there should be scant tolerance of late or uninformative defence statements. For the defence to justify a critical stance to the prosecution's approach to disclosure or to support a s.8

[130] Bearing in mind, of course, that a good many prosecution disclosure failures will not render the trial unfair or a conviction unsafe.
[131] A suggestion from Hooper LJ; there is every reason to expect that in a typical large white collar case the defendant will have a good overall knowledge of the documentation and will be capable of assisting in identifying what is or is not relevant.

application, reference must be made to the issues in the case. Those issues should be properly articulated in a timely defence statement[132].

iv) While we do not go so far as to recommend the introduction of formal pleadings in large complex economic crime cases[133], much practical use can be made of admissions to narrow the real issues in dispute.

139. To recap: the trigger is the prosecution getting its tackle in order; provided it does so, there can, generally at least, be no excuse for a defence failure to engage and at an early stage in the proceedings.

140. In all this, we do not lose sight of the fact that sanctions for defence non-compliance with procedural obligations are necessarily limited in a criminal case. We therefore recommend that the key to reinforcing proper defence engagement in the disclosure process lies by way of professional "best practice". As with other case management improvements to the conduct of trials, the support of the legal profession will be of the first importance. Over and above confidence in the highly responsible nature of the profession, we would expect such support as, first, to repeat, no sacrifice to the defendant's legitimate interests is involved; secondly, there is already an obligation on each participant in a criminal case to conduct that case in accordance with the overriding objective (rule 1.2(1) of the Rules, together with rules 3.3 and 3.10(a), set out above); and, thirdly, because of the real threat to the proper functioning of the criminal justice system in the event that disclosure exercises in large and complex cases come to be seen as simply unaffordable.

141. *(3) The Judiciary:* In our view, robust case management of disclosure matters by the Judiciary comprises an essential part of the improved operation of the disclosure regime. On the basis of the (courteous) observations made to us, our impression is that there is undoubted room for improvement in judicial performance in this area.

[132] When they are, it goes without saying that they should be taken properly into account and given due weight.
[133] Though it could be said that the case against pleadings in such cases is more traditionalist and intuitive than logical.

142. The present regime makes ample provision for such case management. The Rules impose a duty on the Court to further the overriding objective by actively managing the case; active management is defined so as to include (amongst other matters also relevant to disclosure) "the early identification of the real issues": see, r. 3.2 and also r.3.10(a) of the Rules, set out above. The Rules are now augmented by the growing body of authority (see above) illustrating the use which may be made of them for case management purposes. The concluding observations in the Protocol (set out above) lend still further and unequivocal support to judicial case management of disclosure issues. Here, as in other areas of case management, judicial leadership will be indispensable. It is for the Judge to provide leadership and, by doing so, to rally support from the professions.

143. By way of an example, let it be assumed that the prosecution produces a careful disclosure management document, giving a reasoned account of the prosecution approach to disclosure and its limits. As it seems to us[134], there is much to be said for a critical judicial consideration of the proposed approach at an early stage. To do so, will naturally involve the Judge inquiring into the defence position, so engaging the defence too. Such an approach, admittedly "front loading" the judicial case management function is much to be preferred to criticism of the prosecution approach at a late stage in the case – when the position might be irremediable or only remediable at greater cost and with delay.

144. Building further on these thoughts, we envisage, the Judge seeking to insist on the following from the parties[135]:

    i) From the prosecution, clarity in its approach and timeliness in the disclosure of material in its possession; late disclosure must be a matter frowned upon. We can certainly anticipate, subject inevitably to the interests of justice, that a party (whether prosecution or defence) may

[134] And we know from our discussions that it would be welcomed by the CPS
[135] As elsewhere above, we acknowledge here with gratitude the considerable input from HHJ Rivlin QC.

be refused leave to rely at trial on documents disclosed late, in breach of a Court order and without good reason.

ii) From the defence, responsible engagement in the disclosure exercise, such engagement to include the early identification of the principal disputed issues in the proceedings. With regard to the perusal of disclosed unused material, there will be cases were we can see no proper objection to the Judge seeking to limit the time allowed to a designated maximum period[136], subject of course, to a reasoned application for an extension.

145. In promoting vigorous case management of this nature, we recognise (as did those whom we consulted) that many Judges already do so. We further recognise:

i) Practical limitations; thus in some cases, it may be difficult at an early stage to do more than give a general or provisional indication; that said, if the reason is because the issues have not been clarified, the need for such clarification should become apparent and should be insisted upon by the Judge;

ii) The need for Judges to have sufficient time to understand what the case is about and to acquire a "feel" for it; adding to judicial preparation time for any interlocutory hearings is never straightforward but making the time available will be well worthwhile when it comes to the management of disclosure issues in large and complex cases; plainly, the cooperation of Resident Judges and listing officers will be necessary;

iii) The exercise should be substantive and pragmatic, not formulaic; there is no reason why sensible agreement between parties should not be encouraged; we are not advocating some box-ticking approach; what we are against is permitting matters to drift, so that the problems only become apparent at a late stage;

[136] See, below, as to the potential for assistance from the LSC with regard to such rulings..

iv) Even in the best run and managed cases, late developments are sometimes unavoidable; the interests of justice must necessarily be accommodated, even if procedural untidiness results; the intention, however, is to minimise the number of occasions when late developments are truly unavoidable.

146. It goes without saying that where Judges do take robust case management decisions, the CACD should, in general, be slow to interfere.

147. Pulling the threads together, it is for the Judge to set the tone and to manage the case, including its disclosure issues. The framework of the present disclosure regime both entitles and obliges the Judge to do so. The Judiciary has many tasks; the importance of this one should not be overlooked.

148. The matter is one which may well benefit from specific treatment by the Judicial College; we invite the Judicial College to consider doing so.

149. *(D) RELATED TOPICS:* It is convenient under this heading to address (1) legal aid and (2) technology.

150. *(1) Legal Aid:* The operation of legal aid in the disclosure context has already been explained. The principal area of concern understandably relates to the proper control of defence costs in VHCCs (without, of course, prejudicing the fairness of the proceedings).

151. As the LSC well understands, there can obviously be no question of the LSC intruding on the judicial responsibility for dealing with questions of disclosure. Equally, we cannot anticipate any judicial enthusiasm for becoming involved in routine questions of disputed funding, falling within the remit of the LSC and its appeal panels; nor would we regard it as appropriate for the Judiciary to stray into such territory. From time to time, however, there is scope for cooperation between the Judge and the LSC as to the time, costs and approach to be followed in dealing with disclosed material (whether served evidence or unused material). The suggestion to us from the LSC is that the present "ad hoc" cooperation should take place more widely and be formalised so as to provide for a line of communication between the Judge and

the LSC; moreover, there should be scope for the LSC to attend Plea and Case Management Hearings ("PCMHs") where appropriate. We see force in this helpful suggestion and support it in principle.

152. Pausing there, the LSC's role is, primarily at least, to fix reasonable costs for the work to be done by the defence. Its involvement is with the defence and, for this purpose, defence Legal Professional Privilege ("LPP") material may be shared with the LSC.[137] Some of the LSC's work is of course likely to precede any substantial judicial involvement, to facilitate initial work on the part of the defence. The LSC will (or ought) to become acquainted with the true nature of the defence.

153. As it seems to us, in the context of VHCCs, there is considerable scope for cooperation between the LSC and the Judge in best addressing the practicalities flowing from the identification of issues and orders for disclosure. The LSC would be well placed to assist[138] in determining the work required and the time to be allowed to handle substantial volumes of disclosed materials. There is a parallel here, with the work done by CBAs under the US system in advising the Courts.[139] By way of examples only, the LSC could assist the Judge on questions of skim-reading, indexing and sampling. We would anticipate that such assistance would be most welcome to a Judge, seeking to determine the true scale of the task which would result from an order for disclosure and the realistic time period that needs to be allowed. In turn, the Judge could guide the LSC's consideration by highlighting and bringing to its attention the real issues in the case. On occasions, this cooperation could be enhanced and expedited by the attendance of the LSC at a PCMH. Care would necessarily need to be exercised, given the access enjoyed by the LSC to LPP material.

154. In principle therefore, we recommend the adoption of this proposal. We do not think that a rule change is necessitated. But, plainly, the detail requires further consideration. To this end, we would recommend speedy consultation,

[137] Pursuant to s.20, Access of Justice Act 1999.
[138] And, given the reduction in the number of VHCCs, has the capacity to do so.
[139] See above.

in the first instance, between the Bar, Law Society and the LSC, followed by appropriate consultation with the Judiciary. It may be, though we have no wish to be prescriptive, that an extremely brief protocol would be helpful as to the mechanics.

155. *(2) Technology:* Technological advance and the explosion of electronic materials are facts of life in criminal as well as civil proceedings.[140] As foreshadowed, the problem posed by vast quantities of electronic materials is likely to get worse rather than better; it cannot be wished away. Against the background of this avalanche of materials, real effort is required, so that criminal cases can continue to be dealt with fairly, efficiently and expeditiously – in accordance with the overriding objective: see, rule 1.1(2) (b) and (e) of the Rules. From the various materials already summarised, we would seek to distil the following thoughts.

156. First, in a good many cases it needs to be recognised that it is likely to be physically impossible or wholly impractical to read every document on every computer seized. It follows that there can be nothing objectionable to search enormous volumes of material by the use of sampling, key words or other appropriate search tools; indeed, there is no other way and full use should be made of such tools. The Guidelines[141] and, more especially, the 2011 Guidelines[142] deal in terms with such an approach, in a manner not at all dissimilar from that found in respect of civil proceedings, in *PD31B* and the *ACC Guide* (set out above). In *R v Brendon Pearson, Paul Martin Cadman* [2006] EWCA Crim 3366, complaint was made that the Crown had failed to comply with its duty of disclosure in relation to records contained on computers which had been seized from the business under investigation. The police had not read every record contained on the computers. The complaint was rejected. Giving the judgment of the Court, in, with respect, telling observations, Hughes LJ said this:

> "20. In the course of evidence given during the trial on a *voir dire*, a computer expert instructed on behalf of the appellant,

[140] Rule 3.2(2)(h) of the Rules (set out above) enjoins the Court to use technology in case management.
[141] At para. 27
[142] At paras. 41 and following

> when asked how long it would take to read all the computer material that the police had seized, said that it would take a lifetime or more. If the submission is made that it was the duty of the Crown to trawl through every word or byte of this material in order to see whether any of it was capable of undermining the Crown's case or assisting that of the appellant, we do not agree… Where there is an enormous volume of material, as there was here, it is perfectly proper for the Crown to search it by sample or, as here, by key words…"

Hughes LJ went on to add (at [22], in effect anticipating the 2011 Guidelines) that where sampling of voluminous material was undertaken:

> "…it is the more important that it be explained exactly how it has been done and what has not been disclosed as a result."

157. Secondly, the importance of identifying the issues and of the parties cooperating in the exercise is all the more vital in cases with vast quantities of electronic materials. Such cooperation is encouraged by the 2011 Guidelines, specifically at para. 44. Likewise, the detailed requirements of the ACC Guide as to discussions which should precede the first CMC are instructive and, for our part, repay study in the context of criminal proceedings. The task of the Crown in developing a framework for computer searches, in the absence of responsible cooperation from the defence, should not be under-estimated[143]. Here, the Court can (and generally should) give a clear steer as to what is expected from all parties – and, it may be suggested, should generally give short shrift to any party not engaging appropriately.

158. Thirdly and mindful of the US experience, it may be that appropriate use of out-sourcing (certainly in the future) could prove useful in reducing cost, though out-sourcing should not be allowed to obscure the need to maintain control of the exercise, with a view to searches being reasonable and proportionate.[144]

[143] To some extent at least, where this is so, the prosecution is in the dark as to what the real defence/s and issues will be.
[144] 2011 Guidelines, para. 44.

159. Fourthly and again with the US experience in mind, the management of electronic material requires careful attention, in particular with reference to the format of the material supplied.[145]

160. *(E) GUIDANCE:* We have already commented on the plethora of "guidance" amplifying the CPIA, together with the near unanimous call for its consolidation and abbreviation. In principle, we agree entirely – though we feel bound to acknowledge that the reality is more complex.

161. By way of recap, the guidance currently consists of: (1) the Rules; (2) the Code; (3) the Guidelines (now supplemented by the 2011 Guidelines); (4) the Protocol; (5) the Manual. The difficulty in the way of consolidation is essentially practical. Both the Rules and the Code have a statutory foundation.[146] The Guidelines emanate from the Attorney General; the Protocol, from the Judiciary; and the Manual is jointly produced by the CPS and ACPO. To an extent at least, they do very different things – compare, for example, the Rules and the Manual. Consolidation of all five compilations into one – however desirable – seems unfeasible.

162. As it seems to us, the guidance can best be divided as follows:

    i) Statutory material – the Rules and the Code;

    ii) Authoritative source material for use in (and out of) Court by all parties – the Guidelines and the Protocol;

    iii) In-house material – the Manual.

163. It seems plain that legislative intervention would be required in order to consolidate the statutory material. This does not matter greatly so far as the Rules are concerned but is perhaps unfortunate with regard to the Code – given the potential for overlap between the Code, the Guidelines and the Protocol. We apprehend, however, that given the realistic timescale for legislative intervention, for the time being at least, it must be assumed that the statutory material will remain separate and in place.

[145] On this too, see *PD 31B* and the *ACC Guide.*
[146] See, ss. 19, 20 and 21A of the CPIA

164. Insofar as the Manual constitutes, in effect, in-house material, it is principally a matter for the CPS and ACPO. We can also understand why the Manual takes the form it does. That said, with respect and so far as it is a matter for us, we cannot help thinking that the document would greatly benefit from substantial shortening. The danger with a document of the length of the Manual is twofold: first, it discourages sensible and ready reference[147]; secondly, where recourse *is* had to it, there is a danger of promoting a box-ticking approach. For example, there must be a temptation for an investigator to "play it by the book", on the basis that he/she cannot subsequently be criticised for doing so – whereas the individual case may cry out for the exercise of judgment.

165. Where we do see practical scope for consolidation is in the area of authoritative source material for use in (and out of) Court by all parties – the Guidelines, 2011 Guidelines and the Protocol. We appreciate that as the 2011 Guidelines have only just been issued, there may be a degree of resistance to undertaking a further exercise in the immediate future. We would hope, however, that such a natural inclination might give way, recognising the benefits to be had from a single, authoritative, succinct source. In our view, this is a matter to be pursued in the first instance by way of discussions between the Senior Presiding Judge and the Attorney General. We repeat that despite the merits of each of the Guidelines, 2011 Guidelines and the Protocol, we respectfully think that there is simply too much guidance – and that consolidation should have the healthy effect of better concentrating minds on the essentials and desired "culture" of the disclosure regime.

166. We began the review with an Executive Summary; we conclude by summarising our recommendations in **Annex D**.

167. *(F) MISCELLANEOUS MATTERS:* For completeness, we record here two concerns raised with us by ACPO, beyond the scope of this review but which may well warrant consideration by others in the future:

[147] Save where something has already gone wrong and questions of blame have arisen.

i) The operation and proportionality of disclosure in the Magistrates' Court;

ii) Questions as to the disclosure of material held by third parties.

Gross LJ
Stephen H. Smith
London
August, 2011

Annex A – Domestic Consultees

Government

The Lord Chancellor, The Rt Hon. Kenneth Clarke, QC, MP

HM Attorney General, The Rt Hon. Dominic Grieve, QC, MP

HM Solicitor General, Edward Garnier, QC, MP

Judiciary

The Rt Hon. Lord Justice Hooper

The Hon. Mr Justice Fulford

The Hon. Mr Justice Calvert-Smith

The Hon. Mr Justice Sweeney

The Hon. Mr Justice Spencer

The Common Serjeant, HHJ Barker, QC

HHJ Rivlin, QC (Hon. Recorder of Westminster)

Council of H.M. Circuit Judges, Criminal Sub-Committee

Crown Prosecution Service

Keir Starmer, QC (Director of Public Prosecutions)

Malcolm McHaffie, Matthew Wagstaff (Central Fraud Group)

Nigel Gibbs

Serious Fraud Office and other prosecutors

Richard Alderman (Director, Serious Fraud Office)

Vivian Robinson, QC (General Counsel to the Serious Fraud Office, 2009 – 2011)

Josh Ellis (Chief Information Officer, Serious Fraud Office)

David Rawlins (Head of Enforcement, Office of Fair Trading)

James Turnill, Sue Jacobs (Litigation and Prosecution Division, Department for Environment, Food and Rural Affairs)

Financial Services Authority

Police and law enforcement

Chief Constable Jim Barker-McCardle (Essex Police)

Mr Adrian Leppard (Commissioner, City of London Police)

Sir Stephen Lander (Chairman, Serious Organised Crime Agency, 2004 – 2009)

Paul Evans (Executive Director – Strategy and Prevention, Serious Organised Crime Agency)

Steven Mackay (Head of Data Operations, Serious Organised Crime Agency)

Detective Inspector Perry Stokes, Detective Constables Mark Warner and Simon Cordell (Fraud Squad, City of London Police)

Roy Clark (HMRC)

Euan Stuart (HMRC)

Barristers

Peter Lodder, QC (Chairman, Bar Council of England and Wales)

Patrick Gibbs, QC

Christopher Kinch, QC (Criminal Bar Association)

Kate Lumsdon (Criminal Bar Association)

Solicitors

Christopher Murray, Stephen Parkinson, Richard Atkinson (Criminal Law Committee of the Law Society)

Deborah Finkler (Slaughter and May)

Nick Segal, Patrick Swain (Freshfields, Bruckhaus Deringer LLP)

Legal Services Commission

Carolyn Downs (Chief Executive)

David Keegan (Head of High Cost Cases)

Law Commission

Professor David Ormerod (Law Commissioner, Criminal law)

Academia

Professor John Spencer, QC (Selwyn College, University of Cambridge)

United States Attorneys

Jessica De Grazia

Amy Jeffress, Justice Attaché, U.S. Embassy, London

Marcus Asner (Partner, Arnold and Porter LLP, NYC)

JUSTICE

Sally Ireland, Director of Criminal Justice Policy

Annex B – International Consultees

USA – New York

Federal Judiciary

Chief Judge Denis Jacobs (United States Court of Appeals for the Second Circuit)

Judge Raymond Lohier (United States Court of Appeals for the Second Circuit)

Judge Peter Hall (Circuit Judge of the Second Circuit Court of Appeals)

Judge Rakoff (Senior District Judge for the New York Southern District Court)

District Judge P. Kevin Castel (District Judge for the New York Southern District Court)

Judge Scheindlin (United States District Court for the Southern District of New York)

Jerry Tritz (Case Budgeting Attorney, United States Court of Appeals for the Second Circuit)

State Judiciary

The Hon. Thomas Farber (Acting Supreme Court Justice, New York State Unified Court System)

Federal Prosecutors

Preet Bharara (United States' Attorney for the Southern District of New York)

Christopher L. Garcia (Chief, Securities and Commodities Fraud Unit, Office of the United States Attorney for the Southern District of New York)

Jonathan S. Kolodner (Assistant United States Attorney, Chief Complex Frauds Unit, Office of the United States Attorney for the Southern District of New York)

State Prosecutors

Cyrus R. Vance, Jr (New York County District Attorney)

Daniel Alonso (Chief Assistant District Attorney, New York County District Attorney's Office)

Adam Kaufmann (Executive Assistant District Attorney, Chief of the Investigation Division, New York County District Attorney's Office)

Daniel Cort (Chief, Public Integrity Unit)

Frank Fogarty (Assistant District Attorney, Deputy Bureau Chief)

Richard Weber (Deputy Chief, Investigation Division, Chief, Major Economic Crimes Bureau)

Michael Scotto (Deputy Chief, Investigation Division and Chief, Rackets Bureau in the New York County District Attorney's Office)

Robin McCabe (Head of Legal Training)

Law Enforcement

Federal Bureau of Investigation, New York Field Office

Defence Attorneys

Anthony Ricco (Criminal Justice Act panel attorney)

Ephraim Savitt (Criminal Justice Act panel attorney)

Germany

Judiciary

Judge Lothar Jünemann (Presiding Judge at the Regional Court of Berlin)

Judge Peter Faust (Criminal Court Judge)

Ministry of Justice

Klaus Meyer-Cabri (Head of Office for Coordination of EU Legal Policy, Ministry of Justice)

Jürgen Kunze (Senior Public Prosecutor at the Federal Court of Justice)

Michael Neuhaus (Public Prosecutor)

Anne Zimmermann (Public Prosecutor)

The Netherlands

Judiciary

Judge Willem F. Korthals Altes, Criminal Judge, Court of Amsterdam

Ministry of Justice

Adrienne Boerwinkel and Frederik Krips (Senior Legal Advisors)

Annex C – Sentencing Comparison Grid

Table 1 sets out the maximum sentences available for crimes relating to serious violence, drugs and sex offences.

Table 2 sets out the current maximum statutory sentences for some serious economic crime offences.

Offence	Act	Maximum Sentence
Serious Crime		
Murder	Common Law	Life
Grievous bodily harm with intent	Offences Against the Person Act 1861, s.18	Life
Robbery	Theft Act 1968, s.8	Life
Drug Crime		
Possession with intent to supply	Misuse of Drugs Act 1971, ss 5, 25, schd. 4	Life (for Class A drugs)
Importing of Drugs	Customs and Excise Management Act 1979, s.170	Life (for Class A drugs)
Sexual Offences		
Rape	Sexual Offences Act 2003, s. 1	Life
Assault by penetration	Sexual Offences Act 2003, s. 2	Life
Sexual activity with a child	Sexual Offences Act 2003, s.9	14 years
People Trafficking	Sexual Offences Act 2003, ss 57 – 59	14 Years

Table 1: Maximum sentences for crimes relating to serious violence, drugs and sexual offences

Offence	Act	Maximum Sentence
Statutory Fraud	Fraud Act 2006, ss 1 – 4	10 Years
Conspiracy to defraud	Criminal Justice Act 1987, s. 12(3)	10 Years
Theft	Theft Act 1968, s. 7	7 Years
False Accounting	Theft Act 1968, s. 17	7 Years
Bribery	Bribery Act 2010, s. 11	10 Years
Cartel Offences	Enterprise Act 2002, ss 188, 190	5 Years
Money Laundering	Proceeds of Crime Act 2002, s. 334	14 Years
Fraudulent evasion of income tax	Taxes Management Act 1970 , s. 106A	7 Years
Fraudulent evasion of VAT	Value Added Tax Act 1994, s.72	7 Years
Fraudulent evasion of excise duty	Customs and Excise Management Act, s.170(3)	7 Years

Table 2: Maximum sentences for serious economic crime

Annex D – Summary of Recommendations

Our Recommendations may be summarised as follows:

General

(1) Significant, if incremental, improvement is required on the part of all concerned with the disclosure process.

(2) We make no recommendation for (or for consideration of) legislative intervention.

(3) Improvements in disclosure must be prosecution led or driven, in such a manner as to require the defence to engage – and to permit the defence to do so with confidence. The entire process must be robustly case managed by the judiciary. The tools are available under the Rules, the Code, the Guidelines, the 2011 Guidelines and the Protocol[148]; they need to be used.

The present regime

(4) We do not recommend any change to the CPIA test for prosecution disclosure.

(5) For the time being at least, we do not recommend any change to the relevance test at the investigatory stage.

(6) There is considerable scope for greater common sense in scheduling of unused material, so reducing what appears to have become an unduly burdensome exercise. In particular, first, care should be taken to avoid seizing more material than is necessary. Secondly, *excessive* detail in scheduling is to be avoided. Full use should be made, where and as

[148] All as defined above.

appropriate, of para. 6.10 of the Code and para. 51 of the 2011 Guidelines, which permit block listing.

The prosecution

(7) We commend and endorse the implementation in practice of the CPS proposals canvassed with us, seeking to define and limit the scope of investigations from an early stage, in particular those as to the production of a *disclosure management document* and a *prosecution case statement*. We further support the production of a separate "*Disclosure Bundle"*, updated as necessary, comprised of unused material which the prosecution has identified as satisfying the CPIA test for disclosure.

(8) We recommend early, sensible and sustained cooperation between prosecutors and investigators, together, where appropriate, with the early involvement of trial counsel, in respect of disclosure matters. Institutional separation (of investigators, prosecutors and trial counsel, typical in an English prosecution and which has its own strengths) should be used to its best advantage; it should not and should not be allowed to inhibit such cooperation.

(9) Training for police investigators must be of a quality which matches the importance of their role in criminal investigations; it should underline the importance of "the investigative mindset" and should be part and parcel of professional development.

(10) We do not recommend the adoption of the "keys to the warehouse" approach.

The Defence

(11) Provided the prosecution has its tackle in order, it should be unacceptable for the defence to refuse to engage and assist in the early

identification of the real issues in a case, or to refuse to engage with proposed prosecution search terms and parameters for large quantities of material. Defence criticism of the prosecution approach to disclosure should be timely and reasoned; there should be no place for disclosure "ambushes" or for late and uninformative defence statements. Admissions should be used so far as possible to narrow the real issues in dispute.

(12) A constructive approach to disclosure issues should be or become professional "best practice" for defence legal representatives; it involves no sacrifice of the defendant's legitimate interests and in any event accords with the defendant's obligations under the Rules.

The Judiciary

(13) Robust case management of disclosure matters by the Judiciary comprises an essential requirement of the improved operation of the disclosure regime. To this end, Judges should utilise the full range of their case management powers under the Rules, augmented by a growing body of authority and as encouraged by the Protocol. Judges should provide the leadership necessary to ensure support from the prosecution and defence in relation to disclosure matters.

(14) Where appropriate, Judges should be prepared to give early guidance or indications as to the prosecution approach to disclosure (always assuming that approach has been adequately formulated), so necessarily prompting early defence engagement. Judicial case management powers should be understood as extending (in appropriate cases and subject to the interests of justice) both to excluding from the trial material disclosed late (by any party) and to limiting the time available to the defence for the perusal of disclosed unused material.

(15) We invite the Judicial College to consider specific training on judicial case management of disclosure matters.

Legal Aid

(16) We would welcome more widespread and formalised cooperation between the Court and the LSC - extending to attendance by the LSC at PCMHs where appropriate - to assist the Court with addressing the practicalities in time, approach and costs flowing from an order for disclosure and to assist the LSC with the identification of the real issues in the case. The detail of such cooperation should be considered further in consultation between the professions and the LSC, to be followed by appropriate consultation with the Judiciary.

Technology

(17) Full and better use should be made of sampling, key word searches and other electronic methods of interrogating seized material. We commend the approach outlined in the 2011 Guidelines. The Court should give a firm and clear steer as to what is required from all parties, taking into account the provisions already contained in the Rules, the Guidelines and the 2011 Guidelines.

Guidance

(18) Consolidation of the plethora of "guidance" amplifying the operation of the CPIA would be highly desirable. Given, in particular, the likely delays were our recommendation extended to the consolidation of materials requiring legislative intervention, we confine our recommendation to consolidation of the Guidelines, the 2011 Guidelines and the Protocol into a single, authoritative document. This matter should be pursued, in the first instance, by way of discussions between the Senior Presiding Judge and the Attorney General.