JUDICIARY OF
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# Further review of disclosure in criminal proceedings: sanctions for disclosure failure

The Rt. Hon. Lord Justice Gross
The Rt. Hon. Lord Justice Treacy

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# Contents

# Background to the further review

1. At the request of and for the Lord Chief Justice, Lord Justice Gross published his Review of Disclosure in Criminal Proceedings in September 2011. That review was a comprehensive examination of the practical operation of the CPIA disclosure regime and its legislative framework with a focus on cases in the Crown Court generating a substantial amount of documentation, both on paper and electronically.

2. The September 2011 review did not call for legislative change but rather advocated a significant improvement in the application of the existing system by increments, led by the prosecution and supported by robust case management from the judiciary, so that the defence could engage with confidence, and be required to do so.

3. Lord Justice Gross' September 2011 review was welcomed by the Government.[1] At the request of the Lord Chancellor, the Lord Chief Justice asked us to conduct a further review into the specific issue of sanctions for disclosure failure. This review is therefore prepared for and at the request of the Lord Chief Justice. It does not revisit the territory crossed in the September 2011 review, but concentrates on the particular topic of sanctions.

4. This review has been conducted by Lord Justice Gross and Lord Justice Treacy, assisted by Ruth Coffey, barrister, Legal Secretary to the Lord Chief Justice.[2]

# Terms of reference

5. The following terms of reference were agreed:

   - To consider whether the sanctions for disclosure failures, together with judicial case management powers, are adequate to secure compliance with disclosure duties and, if not, whether there are options for strengthening those sanctions, having regard to fair trial rights, practical enforceability and the scale and nature of the problem.

   - To consider, if necessary, the issue of specific guidance

1. Written Ministerial Statement of the Lord Chancellor and Secretary of State for Justice on Thursday 26th April 2012, Hansard 26 Apr 2012: Column 47WS.
2. The assistance of Ms Camilla Barker, clerk to Gross LJ, Ms Lesley Foster, Senior Personal Secretary to the Office of the Senior Presiding Judge, Ms Claire Middleton, clerk to Treacy LJ and Miss Rebecca Williams, Administrative Support to the Criminal Justice Team, is likewise acknowledged here.

# Summary of recommendations

6. In accordance with the terms of reference, this review has focused on sanctions for disclosure failure, by both the prosecution and the defence. We have not revisited the matters considered in the September 2011 review.

7. We do not recommend the creation of any additional sanctions against either the prosecution or the defence.

8. We do recommend that sections 6B and 6D of the Criminal Procedure and Investigations Act 1996 ('CPIA 1996') are brought into force.

9. Throughout the consultation we have encountered consistent support for the recommendations of the September 2011 review, and we urge their swift implementation.

10. We additionally make the following ancillary recommendations:

    i. We recommend that warnings about the consequences of disclosure failures, such as those under section 11 of CPIA, are placed on the PCMH form, and that the judge also provides an oral warning at hearings.

    ii. We recommend that the prosecution articulate in writing any deficiencies of the defence statement, copying the document to the court and the defence and seeking an order from the court, if appropriate, in a process akin to a section 8 application.

    iii. We recommend also that there should be a pro forma so that defence disclosure requests are not made in correspondence but are always in an addendum to the defence statement, justified and signed by both solicitor and counsel.

    We ask the Criminal Procedure Rule Committee to consider making amendments to the Rules and recommending amendments to the forms under the Practice Direction to facilitate these ancillary recommendations.

11. Further, we recommend that listing officers, working in consultation with Resident Judges and the allocated trial judge, ensure that sufficient time is allotted for judges to prepare and deal with prosecution and defence applications relating to disclosure, particularly in more complex cases.

# Methodology

12. This review has been undertaken through a combination of individual meetings and group discussions with people from across the criminal justice system. We are grateful to all those who have taken the time to meet with us and in some cases, produced helpful written contributions. A full list of those consulted can be found at Annex B. Combining their experiences and insights with our own analysis, both of the existing statutory provisions and case law and of other potential sanctions, gives us confidence that all of the options that are compatible with the overriding imperative of a fair trial have been considered fully.

13. In conducting this review, we have not undertaken a quantitative assessment of the incidence of disclosure failure. However, in consulting with those involved with the criminal justice system, we have gained a qualitative understanding of the scale of the problem.

14. From the start of this review, we have been emphatic that it consider failures by both the prosecution and the defence, and the sanctions against both parties. It is fair to say that the concerns expressed to us about failures by the prosecution outweighed in large measure the concerns about defence failures. We are also conscious that disclosure is a dynamic process, and defence failures may sometimes be caused by prosecution delays.

# Defence disclosure

15. The two key places in which the defendant is invited to set out his case prior to the trial are in interview under caution and in the defence statement.

16. The interview or the accused's response to questioning is presented as part of the prosecution's case against the defendant.

17. Since the coming into force of section 34 of the Criminal Justice and Public Order Act 1994, the jury has been permitted to draw an adverse inference from a defendant's failure to mention in interview a matter that is later relied upon in court.

18. The defence statement, a creation of the Criminal Procedure and Investigations Act 1996 ('CPIA 1996') is a requirement in the Crown Court once the prosecution case has been served, its service being triggered, under section 5, by the prosecution's compliance or purported compliance with section 3, service of initial disclosure. There is a continuing duty of review on the prosecution (section 7A) but once a defence statement has been served, the defence may also make applications to the court for further material to be disclosed by the Crown under section 8.

19. The content of the defence statement is dictated by section 6A of CPIA 1996; it must include: the nature of the accused's defence, including any particular defences on which he intends to rely; the matters of fact on which he takes issue with the prosecution; why he takes issue with the prosecution; particulars of the matters of fact on which he intends to rely for the purposes of his defence; and 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. The defence statement must also give particulars of any alibi, including the details of any alibi witness.

20. In addition to the defence statement, the defence must also supply the court and prosecution with the details of any defence witnesses that are to be called at trial.

21. Section 11 of CPIA 1996 provides for sanctions for defence statement failures of comment and inference; those are the only sanctions available.[3] We see no reason why the defence statement should not be capable of forming part of the prosecution's case; indeed, statutory power to this effect can be found in section 6E of CPIA 1996. Logically, since the defence statement is deemed to be made with the defendant's authority, it is thus akin to comments he may make in interview.

22. The key question to consider at this stage is therefore: what is the purpose of the defence statement? We consider it to be to prevent 'ambush defences'.

23. The burden of proof remains on the prosecution who must prove the defendant's guilt beyond reasonable doubt, and there is no obligation on the defendant to assist the investigation. The defendant's privilege against self-incrimination remains intact, and the defendant is still entitled to require the prosecution to prove each element of the offence.[4] However, neither the privilege against self-

3. Rochford [2010] EWCA Crim 1928; [2011] 1 WLR 534.
4. The Court in Rochford [2010] EWCA Crim 1928 addressed the question 'What is the duty of the lawyer if the defendant has no positive case to advance at trial?'

incrimination, nor the burden of proof nor the right to a fair trial under common law or under Article 6 of the European Convention on Human Rights ('ECHR') include a right of the defence to ambush the prosecution. Defence statements that are timely, sufficiently detailed and responsive to the prosecution case are an appropriate and necessary part of the modern criminal justice system.

24. Certain sections amending the CPIA 1996 have been enacted but not yet brought into force. A number of consultees suggested, and we would **recommend** that the following sections are brought into force.

# Additional statutory requirements

## Section 6B Updated disclosure by accused

25. This section requires the defendant to provide an updated defence statement in a specific time period or a written statement to confirm that there are no changes to the defence statement already served.

26. Although not a sanction, we recommend that this section be brought into force. Its effect is most likely to be felt in the larger cases in which disclosure is most burdensome. It reflects the nature of modern disclosure, as an on-going, responsive process, and will make the use of inferences more precise and therefore more effective. When deciding whether there has been a disclosure failure or not, the defence statement must be judged against what could reasonably be required of the defence, given the evidence and disclosure material served by the prosecution at the time, and given the clarity with which the prosecution case has been presented to them. An updated defence statement would be needed when further material has been served and the prosecution case is clearer, and therefore at a time when it will be reasonable to expect a more precise, more detailed, more fully focussed defence statement. Any defect in the defence statement at that stage will therefore also be clearer and starker.

27. A requirement that the defence provide an updated defence statement is in keeping with the prosecution obligation of continuing review and the duties of the parties actively to assist the court in furthering the overriding objective of the Criminal Procedure Rules by active case management (rr. 1.1, 3.2, 3.3). It will complement the recommendation below, that defence requests for disclosure material are always made in a defence statement or by section 8 application to the court and are always justified by reference to the defence case as set out in the defence statement.

## Section 6D Notification of names of experts instructed by accused

28. This section takes the requirements of defence notification further than section 6C (Notification of intention to call defence witnesses) and requires the defendant to notify the court and prosecution of any expert that the defence instructs 'with a view to his providing any expert opinion for possible use as evidence at the trial of the accused'. Notification is required before the defence has received the report, and hence before the defence knows whether it undermines or assists the defence case. Such a requirement will reduce the incidence of late notification of experts by the defence and will increase the

court and the prosecution's awareness of the defence case, and so reduce ambush. It will complement the Rules on experts in the Criminal Procedure Rules (Part 33) and may promote pre-hearing discussions by experts (r.33.6) and the instruction of single joint experts (rr.33.7, 33.8) with the consequent narrowing of issues for trial and resource savings. We therefore **recommend** implementation.

# Alternative defence sanctions

## General rule to exclude evidence?

29. From our consultation, it is clear that there is no demand whatever for a general exclusionary rule when there has been non disclosure or a failure of appropriate disclosure of a relevant matter by the defence. On discussion, this was the unanimous opinion of all those we spoke with, from both the defence and the prosecution.

30. The possibility of a discretionary power for judges to exclude evidence which would otherwise be admissible, and hence would be relevant to an issue in the case, was discussed and rejected for the following reasons.

31. It was considered contrary to the principles of a fair trial at common law that admissible evidence that might cast doubt in the mind of the jury on the defendant's guilt and hence lead to an acquittal, should be excluded merely because due notification had not been provided. It would potentially permit the conviction of a factually innocent defendant because the evidence to exonerate them could be excluded. Whatever safeguards were put in place and whatever care were to be exercised by the judge, the existence of such a power would carry the risk of serious miscarriages of justice. The first rule for the admissibility of evidence at common law is that it is relevant. To exclude relevant evidence from the jury for a failure to notify would be contrary to the principles of a fair trial at common law. Such a provision would also be contrary to the fair trial requirements of Article 6 of the ECHR.

32. Further, the law of England and Wales has previously had the power to exclude particular types of evidence for notification failures. The power, under section 11 of the Criminal Justice Act 1967, to exclude alibi evidence unless the particulars were provided in an alibi notice, was repealed by section 74(1) of the CPIA 1996[5] and, anecdotally, it appears that those powers, whilst in force, were never used. It would be anachronistic to re-introduce such a power once Parliament has recognised the conflict of such a provision with the common law and repealed it. Moreover, the court will have adequate power to deal with the situation by adjournment, comment or inference. Accordingly, we **reject** a general exclusionary rule.

## Costs and wasted costs?

33. We have considered whether the greater use of wasted costs orders against the defence might encourage the provision of more timely and appropriately detailed defence statements. We have concluded that

5. With savings at s.74(5) such that the old regime still applies to offences for which the investigation commenced before 1 April 1997.

wasted costs orders should not be used more frequently for the following reasons.

34. Wasted costs orders are a penalty against the defence representative, not against the defendant, and therefore can only be appropriately used when it is the representative who is at fault. However, it can be very difficult to determine whether the fault lies with the defendant or with the representative, in particular due to the restrictions of legal professional privilege. There is further the problem of costs. It has been the experience of the courts that it can be vastly more expensive to make a wasted costs order, if the order is resisted as almost all are, than the value of the order itself. This is not a sensible use of limited resources, nor of the valuable time of the court which would be consumed in the necessary hearings.

35. There will be relatively rare circumstances, such as occurred in the case of R v SVS[6], in which wasted costs orders can be used appropriately, but for the reasons given above we **do not advocate** an increase in their use.

## Expansion of contempt?

36. We have also considered whether contempt of court should be available as a sanction against defendants who fail to provide adequate defence statements. As the case of *R v Rochford* made clear, the only sanctions against the defence are those specified in section 11 of the CPIA and contempt is not currently an available sanction. The reasoning for this is set out in the judgement of the Vice-President at paragraph 19 of *Rochford* where, following a brief analysis of the CPIA 1996, the court concluded that it was clear that 'Punishment for contempt is not available in the face of the presence of section 11.'

37. In the course of our consultation, there has been no demand from judges or prosecutors for an expansion of the law of contempt to permit its use in these circumstances. We agree, and **do not recommend** that contempt of court be made available for defence statement failures. The use of contempt carries the same difficulties as the use of wasted costs, both in terms of legal professional privilege, and also the increased costs of further satellite litigation.

38. We are also **doubtful** whether a costs penalty or even a short custodial sentence for contempt of court would be effective in most cases. Many defendants are impecunious and financial penalties would be low. Further, for a defendant facing a lengthy sentence on conviction, and most likely already awaiting trial on remand, the prospect of a short additional custodial sentence is unlikely to be a significant disincentive.

## Professional sanctions?

39. A number of consultees suggested that we consider recommending the use of professional disciplinary sanctions against representatives for defence disclosure failures.

40. We are aware that the professional bodies discipline their members according to their Codes of Conduct, which do not make specific reference to the duties of disclosure. Disclosure failures could involve

6. R v SVS Solicitors [2012] EWCA Crim 319

breaches of the professional codes, and therefore some failures may be disciplined in this way. The case of *Rochford* also answered the question 'Can the lawyer properly advise a defendant not to file a defence statement?' with 'No' and gave some guidance on the duty of a lawyer representing a client with no positive case to advance.

41. We **invite** the professional bodies to consider emphasising that full compliance by all parties with their duties of disclosure is professional best practice and a failure to do so may constitute professional misconduct. However, the same difficulties of legal professional privilege apply as they do for wasted costs orders and contempt of court. In any event, the sins of the lay client are not to be visited vicariously upon the representative.

### Comment and inference under section 11 of CPIA 1996

42. These are the statutory sanctions, prescribed by the 1996 Act. Under section 11(5)(a) 'the court or any other party may make such comment as appears appropriate' and under (b) 'the court or jury may draw such inferences as appear proper in deciding whether the accused is guilty of the offence concerned.'

43. Section 11 defines when subsection 5 is applicable. Usually, the court's permission is not required for another party to make comment under s.11(5)(a). However, s.11(6) and s.11(7) prescribe circumstances in which the court's permission is required for a party to make comment under s.11(5)(a).[7] The reference to 'comment' includes cross-examination, subject to the judge's power to intervene and stop unfair cross-examination, or direct the jury to disregard unfair cross-examination.[8]

44. If there has also been a defence failure to mention a fact in interview in addition to a failure of disclosure under section 11(2), the judge will need to consider whether to use section 11 of CPIA 1996 or whether to give a direction under section 34 of the Criminal Justice and Public Order Act 1994; it will rarely be appropriate for two such directions to be given. Since the defence statement is due to be provided considerably later in the criminal process than the interview takes place, after the prosecution evidence and initial disclosure has been served, the inference under section 11 might be thought to be stronger than the inference under section 34 and therefore section 11 might be used in preference. Section 11(8) sets out matters to which the court must have regard before exercising the powers under subsection 5.

## The development of case law

45. We note that there have recently been a number of authorities that are relevant to this review.

46. In *R v Newell*[9], the Court held that the PCMH form completed by counsel was admissible in evidence, but that, except in rare circumstances, the court should exercise its discretion to exclude the PCMH form

7. Under s.11(6)(b) where the matter omitted from the defence statement is a 'point of law (including any point as to the admissibility of evidence or an abuse of process) or an authority' the court's leave is required before another party may comment.
8. R. v Essa (Daha) [2009] EWCA Crim 43
9. R v Newell [2012] EWCA Crim 650; [2012] 2 Cr. App. R. 10

under section 78 of PACE. The case distinguishes the magistrates' court Trial Preparation Form (the subject of *R v Firth*[10]), which 'provides for the making of admissions' (para 35), from the Crown Court's PCMH form which 'should be seen primarily as a means for the provision of information to enable a judge actively to manage the case up to and throughout the trial and the parties to know the issues that have to be addressed and the witnesses who are to come' (para 33). The different position regarding disclosure in the Magistrates' and Crown courts was noted in the judgement; unless a statement is given voluntarily in the Magistrates' Court there are 'no provisions equivalent to s.11 of the CPIA' (para 35). The different purpose of the PCMH form and the defence statement is clear, the former is primarily an administrative form, the latter a statement of the defence case.

47. This decision and the cases discussed briefly below illustrate how the common law is developing alongside statutory provisions such as the Criminal Procedure Rules, to provide a practical working system while minimising 'trial by ambush'.

48. The case of *R v SVS* has already been mentioned in the discussion above on wasted costs orders. In this case, no defence statement was served until the first day of the trial and on the second day of trial, a second defence statement was served giving a different defence. Despite not having made an application objecting to a hearsay notice served by the prosecution, the defence required a witness to attend who had to be brought from Australia, but was then not challenged in court. The court said that the defendant had been 'manifestly seeking to manipulate the court's process' and 'the appellant firm made itself complicit in the manipulation' (para 24). The wasted costs order for the cost of flying the witness back from Australia was upheld. The court also emphasised that wasted costs are not to punish but to compensate even though there is a penal element to them, as described in the CCPD IV.2.5(i), and stated that the judge's decision was 'not tainted with any illegitimate predisposition to punish the appellant' (para21).

49. The court in *R v Musone*[11] (judgment delivered by Moses LJ) held that there are rare cases in which evidence of substantial probative value can be excluded by the court for breach of the procedural rules, as contained in the Criminal Procedure Rules. The case concerned the admissibility of bad character material relating to a co-defendant under section 101(e) of the Criminal Justice Act 2003. Section 101 contains no power to exclude such evidence on grounds of unfairness, and, as this was not prosecution evidence, section 78 of the Police and Criminal Evidence Act 1984 did not apply. However, no notice had been given in accordance with Part 35 of the Rules, and the judge declined to extend the time limit for such notice. The court concluded that in these particular circumstances, in which 'the appellant had deliberately manipulated the trial process' and deliberately intended 'to ambush his co-defendant' (para 56) the judge had been right to exclude the evidence and had the power to do so.

50. The court held that the judge, in considering whether or not to exclude the evidence 'on grounds of a breach of a procedural requirement' had been entitled to take account of the fact that the evidence, whilst capable of belief and therefore assumed to be true under section 109, was in fact improbable. This case demonstrates a way in which evidence, even that which has probative value can, very rarely, be excluded 'in circumstances where the rules have been deliberately breached' (para 60). While, as discussed above, a general exclusionary power is undesirable, this authority illustrates how the common law may develop nuanced and necessary exceptions.

10. Firth v Epping Magistrates Court [2011] EWHC 388 (Admin); [2011] 1 W.L.R. 1818; [2011] 4 All E.R. 326; [2011] 1 Cr. App. R. 32; [2011] Crim. L.R. 717
11. R v Musone [2007] EWCA Crim 1237; [2007] 1 W.L.R. 2467; [2007] 2 Cr. App. R. 29; [2007] Crim. L.R. 972

51. The case of *R v Ensor*[12] reached a similar conclusion in relation to expert evidence and breaches of Part 24 (now Part 33) of the Rules. In this case the defence 'failed totally to comply with either the spirit or the letter of the CPR' (para 31) by failing to inform the prosecution or the court of a defence expert's report on which they intended to rely. The court stated that 'the defence was in grave breach of the Criminal Procedure Rules' and that this was a 'deliberate tactical ploy' and 'nothing less than an attempt to ambush the prosecution' (para 32). The court concluded that, under section 30(2) of the Criminal Justice Act 1988, the evidence in the report could not be adduced without leave of the court unless the expert were to give oral evidence about the contents and that even if the expert were to give evidence the 'irregular way in which it was sought to adduce this expert evidence' was a reason why the judge was 'entitled to refuse to permit that evidence to go before the jury' (para 34). The current Rules, the Criminal Procedure Rules 2012 at r.33(2), state that 'a party may not introduce expert evidence if that party has not complied with this rule, unless (a) every other party agrees; or (b) the court gives permission', and cite in the guidance notes section 81 of PACE 1984 and section 20(3) of the CPIA 1996.

52. We **consider** that the incremental development of the common law by reference to particular situations is an appropriate mechanism for dealing with relatively unusual problems which arise.

## *R v Bellfield*

53. Prior to the commencement of this review, it had been suggested to us that the distress of the Dowler family at the cross-examination of Mr and Mrs Dowler during the trial of Levi Bellfield was due to defence disclosure failures. We have not conducted an investigation into that case, but we have made enquiries about the disclosure of the defence case and can state that the Dowler family's regrettable and understandable distress, was not due to a disclosure failure.

54. While it is correct that no defence statement was served, the prosecution were informed by the defence well in advance of the basis on which cross-examination would be undertaken and the proper limits of the cross-examination were twice discussed before the judge. The absence of a defence statement therefore had no impact on the preparedness of the prosecution or the court; this was not 'trial by ambush'. The prosecution did not at any stage object to the line of cross-examination or the use of material by the defence which had properly been disclosed to them by the Crown since, although distressing, the questioning was clearly relevant to the defence case and based on evidence that had been served or disclosed by the prosecution.

55. The **limited conclusion** to which we can come is that whatever lessons there are to be learnt from the case of *R v Bellfield*, those are not lessons in relation to disclosure.

12. R v Ensor [2009] EWCA Crim 2519; [2010] 1 Cr. App. R. 18; [2010] Crim. L.R. 731

# Conclusions on defence sanctions

56. Throughout the consultation, we have considered the currently available sanctions and suggestions for alternatives posed by consultees. What has struck us has been the lack of any significant support for further sanctions; although consultees have helpfully considered the topic and brought suggestions to us, there has been no sense that additional sanctions are necessary or practicable, and no credible alternatives to the current sanctions have been proposed.

57. As discussed above, we have considered the possibility of costs or contempt of court, and have rejected these on the grounds of difficulties of use due to legal professional privilege, the cost and distraction of satellite litigation and the unlikelihood of these measures having any practical beneficial effect. We have also considered and rejected the idea of having a general exclusionary power for evidence. In our view, the common law is developing in a practical and nuanced manner and no general power is necessary or desirable.

58. We have considered sanctions through the professional bodies and invite them to consider emphasising professional best practice in the application of the disclosure regime. However, we do not consider that there is any need for a change to the legislation or the rules in this area.

59. We do, however, recommend that sections 6B (Updated disclosure by accused) and 6D (Notification of name of experts instructed by accused) of the CPIA 1996 are brought into force. These are consistent with modern disclosure best practice and with the recent case law.

60. Our key recommendation is for the consistent and sustained implementation of the recommendations of the September 2011 review. Sanctions for defence disclosure already exist within section 11 of the CPIA 1996 and through the court's case management powers and these should used to their full effect.

61. We are reminded that the function and nature of prosecution and defence disclosure are inherently different, as different as their roles are in a criminal trial, due to the structure of the burden and standard of proof in such a trial. A culture that encourages best practice must be emphasised among all parties, defence, prosecutors, investigators, counsel and the courts.[13]

13. This is a necessary part of the process of improvement as described in the September 2011 review and is required to overcome the problems identified by Quirk in her paper 'The significance of culture in criminal procedure reform: Why the revised disclosure scheme cannot work' IJEP 10 1 (42), 1 January 2006.

# Prosecution disclosure

62. As the Terms of Reference make clear, this review was undertaken into sanctions for both defence and prosecution disclosure failures. While we have taken care not to revisit the ground covered by the September 2011 review, it has been notable in our consultations that we have heard significant complaints and concerns about prosecution disclosure failures; disclosure exercises being inadequately resourced, and without an individual taking responsibility for the case to ensure that the disclosure duties are fulfilled. Overwhelmingly the concerns voiced to us in conducting this review have been concerning prosecution failures, not failures of the defence.

63. There is significant support, and a recognition of the necessity, particularly in larger cases, for the disclosure work to be front loaded by the prosecution, in accordance with the September 2011 review. We welcome the joint response of CPS, ACPO, City of London Police, HMRC and SOCA to that review. We also note that there is significant support for the early involvement of both trial counsel and, in appropriate cases, specialist disclosure counsel, in the disclosure and case preparation process, and this is again particularly to be encouraged in large, complex and sensitive cases. There is much force in the point that failure to act early through properly competent individuals can represent a false economy from which a case may never recover.

## Alternative prosecution sanctions

### 'Striking out'/Abuse of process stay applications

64. An application to stay the proceedings against a defendant on grounds of abuse of process due to prosecution disclosure failures is possibly the most well known and certainly the most significant sanction available against the prosecution. However, it ought to be only a remedy of last resort, and there are other remedies available to the trial judge. The judge's priority will be seeing that there is a fair trial.

65. Although such sanctions will always be available in appropriate cases, we are anxious not to encourage the defence to overuse such applications, nor to encourage judges to use such a sanction unless absolutely necessary; there is a public interest in matters proceeding to the conclusion of a trial. Before ordering a stay of proceedings, judges should also consider use of the following alternative sanctions, and whether these can provide a fair trial.

### Admissions under section 10 of the CJA 1967

66. Carefully drafted admissions can be required, so that the jury is informed of what has occurred and can appreciate the consequences of this for the defence.

## Adjournment

67. An adjournment, giving the defence time to consider material and respond can be appropriate and sufficient in some cases.

## Exclusion of evidence under section 78 of PACE 1984

68. Under section 78(1) of PACE the court may 'refuse to allow evidence on which the prosecution propose to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it'. If the prosecution has failed to provide disclosure on a particular aspect of the case, then it may be appropriate for prosecution evidence to be excluded on that aspect under section 78. This may, in certain cases, be a preferable, intermediate measure, avoiding a stay of proceedings and permitting a fair trial.

## Costs

69. Costs can be awarded against the prosecution for disclosure failures. In these circumstances the difficulties of legal professional privilege associated with costs against the defence do not arise. However, in the vast majority of cases, this is simply an exercise in moving money between different public purses, from the prosecution to the LSC legal aid budget.

70. We are conscious of the irony that if additional hearings are required to resolve prosecution disclosure failures, in graduated fee cases the defence will receive no additional payment for attending that hearing. No doubt courts will be alert to this situation.

# Conclusions on prosecution sanctions

71. We **do not recommend** any further, new sanctions for prosecution disclosure failures. The courts already have a range of powers that are quite sufficient to sanction any such failures, and, if considered carefully, will allow for an appropriate balance to be struck in criminal case management and in satisfying the public interest in a fair trial.

72. The recommendations made in the September 2011 review to improve adherence to the disclosure regime have been well received, and we welcome the joint response from CPS, ACPO, City of London Police, HMRC and SOCA. These new procedures now need to be implemented and become familiar, so that what we have identified as best practice becomes standard practice.

73. We therefore **emphasise** that the key recommendation of this review is for the consistent and sustained implementation of the recommendations of the September 2011 review.

# Implementation of recommendations of September 2011 review and ancillary recommendations

## Implementing the 2011 recommendations

74. This review has focused on the specific topic of sanctions for disclosure failures, and we have deliberately not revisited the ground covered in the September 2011 review. However, during the consultation, we encountered consistent support for the implementation of the recommendations of that review; in particular the following matters were emphasised:

i. Consolidation of guidance - we are aware that this work is under way at the AGO and within the Judicial Office and encourage its completion as soon as possible.

ii. Training to ensure a proper understanding of principles - especially amongst those involved at the earliest stages (investigators and prosecution lawyers).

iii. Importance of judicial case management - this was universally emphasised.[14]

## Ancillary recommendations

75. In speaking to numerous people across the criminal justice system we were also able to formulate some additional recommendations which follow.

76. Individual responsibility. We consider that the ownership of responsibility for disclosure, by a specific named officer and lawyer, is vital in ensuring that there is individual responsibility for the disclosure process. We do not consider that collective ownership by a team is sufficient to ensure that disclosure duties are fulfilled.

77. Further matters of case management. We **recommend** that warnings about the consequences of disclosure failures, such as those under section 11 of CPIA, are placed on the PCMH form, and that the judge also provides an oral warning at hearings. We **ask** the Criminal Procedure Rule Committee to consider recommending such an amendment to the PCMH form to the Lord Chief Justice.

78. The prosecution should also take greater responsibility for drawing the court's attention to defence failures. We **recommend** that the prosecution articulate in writing any deficiencies of the defence statement, copying the document to the court and the defence and seeking an order from the court if appropriate in a process akin to a section 8 application. This will facilitate the use of section 11 sanctions

14. Some judges have developed less formal methods of censuring disclosure failures through their case management powers, such as escalating the complaint to the senior partner or Branch Crown Prosecutor, and requesting an explanation for the failure either in writing or in person, sometimes just outside the court's regular sitting hours. So long as the methods remain within the judge's powers, these seem to us to be sensible developments if they are found to be effective locally.

during trial. Such a requirement should perhaps be included in the Criminal Procedure Rules, and we **invite** the Committee to consider such an addition to Part 22 of the Rules.

79. We **recommend** also that there should be a pro forma so that defence disclosure requests are not made in correspondence but are always in an addendum to the defence statement, justified and signed by both solicitor and counsel. Judges should insist on requests being by section 8 application.

80. In order to facilitate proper implementation of the 2011 recommendations, we also **recommend** that listing officers, working in consultation with Resident Judges and the allocated trial judge, ensure that sufficient time is allotted for judges to prepare and deal with prosecution and defence applications relating to disclosure, particularly in more complex cases. A failure to invest time at the disclosure stage may have disproportionate consequences later.

## General observations

81. Impact of funding on disclosure. Many consultees drew to our attention the recent funding cuts, both to the prosecution agencies and in defence legal aid, and the impact that these are already having on disclosure. It should by now be trite to say that effective prosecution disclosure is essential for a fair trial. There has been universal support for front-loading the disclosure work, especially in larger cases, and the early engagement of counsel can also save significant effort later in the case. We welcome the efforts being made by the CPS and others to implement the recommendations of the September 2011 review.

82. Scope for academic empirical research. It appears to us that it would assist greatly if there were a better understanding of the use made by courts of inference directions, and, particularly, how these are interpreted and applied by juries. The sanction under section 11 is an inference direction, and yet there is no academic research available into what impression such directions have on juries. Anecdotally, views differ as to the utility of such a direction. We have **raised this matter** with Professor Cheryl Thomas, Director of the UCL Jury Project.

# Annex A: Table of cases

*Fairclough Homes Ltd v Summers* [2012] UKSC 26; [2012] 1 W.L.R. 2004; [2012] 4 Costs L.R. 760

*Kensington International Ltd v Republic of Congo* [2007] EWCA Civ 1128; [2008] 1 W.L.R. 1144; [2008] 1 All E.R. (Comm) 934

*R v Barkshire (David Robert) & others* [2011] EWCA Crim 1885; [2012] Crim. L.R. 453

*R v Cairns (Alison Louise) & others* [2002] EWCA Crim 2838; [2003] 1 W.L.R. 796; [2003] 1 Cr. App. R. 38; [2003] Crim. L.R. 403

*R v Ensor (Max Angus)* [2009] EWCA Crim 2519; [2010] 1 Cr. App. R. 18; [2010] Crim. L.R. 731

*R. v Essa (Daha)* [2009] EWCA Crim 43; unreported

*R v Grant (Edward)* [2005] EWCA Crim 1089; [2005] 3 W.L.R. 437; [2005] 2 Cr. App. R. 28; [2005] Crim. L.R. 955

*R v H & others* [2011] EWCA Crim 2753; [2012] 1 W.L.R. 1416; [2012] 2 All E.R. 340; [2012] 2 Cr. App. R. (S.) 21; [2012] Crim. L.R. 149

*R v Hackett (David James)* [2011] EWCA Crim 380; [2011] 2 Cr. App. R. 3; [2011] Crim. L.R. 879

*R v Joof (Adam) & others* [2012] EWCA Crim 1475; unreported

*R v Malcolm (Wayne Patrick)* [2011] EWCA Crim 2069; [2012] Crim. L.R. 238

*R v Maxwell (Paul)* [2010] UKSC 48; [2011] 1 W.L.R. 1837; [2011] 4 All E.R. 941; [2011] 2 Cr. App. R. 31

*R v Musone (Ibrahim)* [2007] EWCA Crim 1237; [2007] 1 W.L.R. 2467; [2007] 2 Cr. App. R. 29; [2007] Crim. L.R. 972

*R v Newell (Alan)* [2012] EWCA Crim 650; [2012] 2 Cr. App. R. 10; [2012] Crim. L.R. 711

*R v O & others* [2011] EWCA Crim 2854; unreported

*R v Penner (Steven Henry)* [2010] EWCA Crim 1155; [2010] Crim. L.R. 936

*R v Rochford (Gavin)* [2010] EWCA Crim 1928; [2011] 1 W.L.R. 534; [2011] 1 Cr. App. R. 11

*R v Sandhu (Jasdeep)* [2012] EWCA Crim 1187; unreported

*R v SVS Solicitors* [2012] EWCA Crim 319; [2012] 3 Costs L.R. 502

*R v Thambithurai (Nimalrajah) & others* [2011] EWCA Crim 946; unreported

*R v Wheeler (Leslie)* [2001] 1 Cr. App. R. 10; [2001] Crim. L.R. 744

*R (on the application of Firth) v Epping Magistrates Court* [2011] EWHC 388 (Admin); [2011] 1 W.L.R. 1818; [2011] 4 All E.R. 326; [2011] 1 Cr. App. R. 32; [2011] Crim. L.R. 717

*R (on the application of Sullivan) v The Crown Court at Maidstone* [2002] EWHC 967 (Admin); [2002] 1 W.L.R. 2747; [2002] 4 All E.R. 427; [2002] 2 Cr. App. R. 31; [2002] Crim. L.R. 646

Ruling in R v Mouncher & others:
**http://www.judiciary.gov.uk/media/judgments/2011/mouncher-ruling-1122011**

Ruling in R v Sutherland & others:
**http://www.interpretconsulting.com/RIPA/Cases/R%20v%20Sutherland%20and%20others.pdf**

# Annex B: List of consultees

## Government

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 Calvert-Smith

The Hon. Mr Justice Fulford

The Hon. Mr Justice Sweeney

The Common Serjeant, HHJ Barker, QC

HHJ Atherton (Council of H.M. Circuit Judges, Criminal Sub-Committee)

HHJ Gilbart QC

HHJ Goldstone QC

HHJ Ford QC

HHJ Davis QC

HHJ McCreath

HHJ Radford

HHJ Lyons

## Crown Prosecution Service

Keir Starmer, QC (Director of Public Prosecutions)

Sue Hemming (Head of Special Crime and Counter Terrorism Division)

## Serious Fraud Office

David Green QC (Director)

## Police and law enforcement

Chief Constable Jim Barker-McCardle (Essex Police)

Commissioner Adrian Leppard (City of London Police)

Detective Chief Superintendent Oliver Shaw (City of London Police and Head of Economic Crime)

Trevor Pearce (Director General, Serious Organised Crime Agency)

Stephen Braviner-Roman (Serious Organised Crime Agency)

Donald Toon (Director of Criminal Investigations, HMRC)

## Barristers

Michael Todd QC (Chairman, Bar Council of England and Wales)

Maura McGowan QC (Chairman-Elect, Bar Council of England and Wales)

Max Hill QC (Chairman, Criminal Bar Association)

Michael Duck QC

Jonathan Kinnear QC

Shane Collery

Jonas Hankin

Thomas Payne

Don Ramble

## Barristers (continued)

Rebecca Chalkley

Alison Morgan

Allison Summers

Alexandra Ward

Chris Lowe

Hannah Willcocks

## Solicitors

Stephen Parkinson

Richard Atkinson

## Legal Services Commission

Matthew Coats (Chief Executive)

David Keegan

Francesca Weisman

## Law Commission

Professor David Ormerod (Law Commissioner, Criminal law)

## Academia

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