

Chapter 12: Criminal Justice System

12.1 In this chapter I consider aspects of the criminal justice system which are thrown into prominence in part by the circumstances surrounding the London City Bond cases and in part by my Terms of Reference. While some of what I examine and comment upon in this chapter is specific to HMCE, other suggestions have a more general application across the whole criminal justice landscape. My conclusions have been assisted and informed by the contributions of many people: the responsibility for the views I express is entirely mine.

(i) Disclosure

A Historical Perspective

12.2 The prosecution obligation to make disclosure to the defence in criminal trials has developed with astonishing speed over the last 20 years. Until December 1981 the strict duty of the prosecution was essentially limited to providing the defence with the name and address of any witness from whom they had taken a statement, who could give material evidence, and whom they did not propose to call. Many prosecutors ordinarily additionally made available to the defence the statement itself, and also any statement made by a prosecution witness inconsistent with the evidence he gave at trial. It was further the duty of the prosecution to inform the defence of the fact that a witness on whom they proposed to rely was of bad character. But nothing more was expected of the prosecution.

12.3 In December 1981 the Attorney General issued guidelines on the disclosure of information to the defence in cases to be tried on indictment. [*See (1982) 74 Cr. App. R.302*] In outline the Guidelines provided that all “unused material” should normally be made available to the defence if it had some bearing on the offences charged and the surrounding circumstances of the case. “Unused material” was defined as all witness statements and documents not included in the committal bundles, witness statements of witnesses called at committal and the unedited versions of any composite or edited statements included in the committal bundles. There was discretion not to make disclosure on a number of grounds, including the fact that the statement was sensitive and it was not in the public interest to disclose it. The duty of deciding on all issues of disclosure rested with counsel for the prosecution: there was no scope for judicial involvement.

12.4 The Guidelines were largely superseded by subsequent decisions of the CACD in the miscarriage of justice cases of the early 1990s. The common law evolved so as to crystallise the duty of the prosecution to disclose all “material” or “relevant” unused material. The duty was articulated in *Ward* (1993) 96 Crim. App. R. 1: the prosecution had a duty to disclose any evidence which tended either to weaken

the prosecution case or to strengthen the defence case. *Ward* also made clear that where a claim for PII was to be made it was for the judge, not the prosecutor, to determine where the balance of the public interest lay. The Courts later made clear that the responsibility for determining what material was relevant lay with the prosecutor and not on the Court. In *Keane* (1994) 99 Crim. App. R 1 the CACD defined unused material as that which could be seen on a sensible appraisal by the prosecution:

- i. to be relevant or possibly relevant to an issue in the case;
- ii. to raise or possibly raise a new issue whose existence was not apparent in the evidence the prosecution proposed to use;
- iii. to hold out a real (as opposed to a fanciful) prospect of providing a lead on evidence which goes to (i) or (ii).

12.5 In essence, therefore, until the implementation of the Criminal Procedure and Investigations Act 1996 (CPIA) all unused material which was “*Keane* relevant” was to be disclosed to the defence save where it was subject to a successful application not to disclose on the ground of public interest.

The Criminal Procedure and Investigations Act 1996

12.6 The CPIA essentially implemented the proposals and recommendations of the Royal Commission on Criminal Justice published in 1993 and established following the quashing of the convictions for murder of the Birmingham Six. It was introduced in an attempt to control, reduce and rationalise the extent of disclosure required of the prosecution following the decision of *Keane*, which was seen as somewhat akin to opening Pandora’s box.

12.7 Moving the second reading of the Criminal Procedure and Investigations Bill on 27th November 1995 in the House of Lords, the Minister of State for the Home Office, Baroness Blatch, set out the history of disclosure which had led to the introduction of the Bill and the intention lying behind it. She expressed the view that the duties of disclosure imposed on the prosecution by the courts had been extended much further than anyone may have intended. The result was a system which not only protected the innocent but also made it more difficult to convict the guilty. She said:

The current law requires the prosecutor to disclose to the accused anything which might possibly be relevant to an issue at the trial, whether or not it has any bearing on the defence which the accused relies on at trial. It is open to the accused, if he so wishes, to seek the disclosure of large volumes of material in an attempt at least to delay the onset of the trial, and if possible to uncover some sensitive material which the prosecutor cannot disclose and thereby cause the abandonment of the proceedings.

That is what has happened in practice. In short the current disclosure regime is neither fair, nor efficient, nor effective.

12.8 Similar sentiments were expressed when the provisions of the Bill were considered in Committee. On 30th April 1996 David Maclean MP, Minister of State at the Home Office, pointed out that the law on disclosure was one of the most pressing and difficult problems affecting the criminal justice system. He continued:

The current system does not strike the right balance. It requires too much of the prosecution and not enough of the defendant. That is wrong and we are determined to put it right. Our intention is to provide a system which reduces the unnecessary burdens of the current disclosure requirements, while not denying the defendant access to material he or she needs, which narrows the issues in dispute before the trial and which protects sensitive material more effectively than at present.

12.9 Those intentions enjoyed broad support from all sides of both Houses. The Bill passed into law largely intact. On 1st April 1997 the CPIA came into force. The provisions of the new regime relating to disclosure applied to all cases where the investigation began on or after 1st April 1997. All “relevant” material (i.e. anything which could have a bearing on the case) must be retained by the investigator and revealed to the prosecutor. The Act provides for “primary disclosure” whereby the prosecutor must disclose any unused material in his possession to the defence which in his opinion might undermine the prosecution case.

12.10 Once the prosecutor has given primary disclosure the defendant must then provide a written defence statement to the court and the prosecutor setting out in general terms the nature of his defence and indicating the matters on which he takes issue with the prosecution and the reason for so doing. After the defence statement has been served the prosecutor must make “secondary disclosure” of any additional undisclosed material which might reasonably be expected to assist the defence as disclosed by the defence statement.

12.11 There is provision under section 8 of CPIA for the defence to make application to the court for further disclosure if the defendant considers there is reasonable cause to believe that further material may be available which has not been disclosed. There is a continuing duty on the prosecutor to keep under review throughout the trial the question of whether there is at any given time prosecution material which, in his opinion, might undermine the prosecution case or assist the defence case.

12.12 A Code of Practice issued under section 23 of the Act governs the action to be taken concerning the recording and retention of material obtained in the course of a criminal investigation which may be relevant to the investigation and the preparation of schedules on

which the prosecutor will decide on disclosure issues. In relation to any sensitive material, the Disclosure officer must list on a sensitive material schedule any material which he believes it is not in the public interest to disclose, and the reason for that belief. The Code further provides that the Disclosure officer must certify to the prosecutor that to the best of his knowledge and belief, all material, which has been retained and made available to him, has been revealed to the prosecutor in accordance with the Code.

- 12.13 On November 29th 2000 the Attorney General issued new guidelines on disclosure of information in criminal proceedings. They were adopted with immediate effect. The guidelines are directed to investigators, Disclosure officers and prosecutors and offer detailed guidance on the way in which the CPIA and the Code should be operated. In particular the guidelines emphasise that failure to make proper disclosure may result in a wrongful conviction or a successful abuse of process argument. They further stress that material should not be disclosed which overburdens the participants in the trial process, diverts attention from the relevant issues, leads to unjustifiable delay and is wasteful of resources.

The Scottish System

- 12.14 The system in Scotland is very different. The Procurator Fiscal (as the local representative of the Lord Advocate) is responsible not only for the prosecution of all criminal offences within his jurisdiction but also for the investigation of all criminal offences. In most cases, however, this latter role is confined to receiving reports from the reporting agency – police, customs or whoever – and ensuring that further investigation is carried out as appropriate. In the case of a non-police reporting agency such as HMCE he has the right only to request that particular enquiries are carried out. When the reporting agency submits the final report to the Procurator Fiscal he must assess the report and decide whether there is sufficient evidence to justify proceedings or other action and whether it is in the public interest to prosecute. In the most serious HMCE cases it is probable that he will be consulted at an early stage, and if so will give advice in the course of the investigation.

- 12.15 In all cases where the decision is that the accused person should be prosecuted on indictment the case proceeds to precognition. While the reporting agency submits all the witness statements to the Procurator Fiscal, he will not rely on those statements other than in respect of formal evidence. He or a member of his staff will take a precognition (in effect an interview) of all the crucial witnesses. The process is designed to elicit from the witness all relevant evidence which he or she may have to give in the case. Precognition of a witness is an entirely confidential process: the defendant is neither present nor represented. The process is designed to allow the prosecutor to have a detailed knowledge of the likely evidence of the prospective witnesses in a case. The precognition cannot be

referred to in court or put to the witness if he departs from what he said at precognition. There is accordingly no question of disclosing a witness's precognition to the defence.

12.16 The defence for their part are provided with a list of witnesses but the timing of the process is a matter for the Procurator Fiscal. He is entitled to precognosce any or all of the prosecution witnesses before supplying the details of the witnesses to the defence. The list is authority for the defence to approach the witnesses and take statements from them. Legal aid is available for this process. In the event that a witness refuses to co-operate with the defence solicitor there are procedures to overcome the difficulty.

12.17 It is during the precognition stage that questions relating to the disclosure of evidence to the defence may arise in the Scottish system. There is no statutory framework in Scotland relating to disclosure, no equivalent of the CPIA. The absence of a need for such a statutory framework is said to be due to the role of the Procurator Fiscal in the investigation and prosecution of crime. The Procurator Fiscal is in no sense the legal arm of either the police or any other reporting agency and the courts respect the independent nature of his role.

12.18 The duty on the Procurator Fiscal to disclose information or evidence to the defence was considered in *McLeod v HMA* 1998 SCCR 77. In that case the Appeal Court, comprising five judges, reviewed the Scottish authorities on disclosure and concluded that:

- a. The Scottish system of criminal procedure proceeds on the basis that the Crown have a duty at any time to disclose to the defence information in their possession which would tend to exculpate the accused. When the Crown respond to specific requests from the defence for information (as they do) the Crown is performing its duty to impart information which supports the defence case where they have been made aware of the possible significance of the information for the defence of the accused.
- b. It is possible to have a fair hearing within the provisions of the ECHR even if an accused does not have a right of unrestricted access to documents. A system under which an accused needs to indicate the reason why the documents should be produced is consistent with the requirements of a fair hearing.
- c. The disadvantages to the administration of justice, including to accused persons generally, of the generation of large quantities of paper and their painstaking examination by the defence, against a remote possibility that such an exercise may uncover significant information of which the

defence does not already have the knowledge or the means of knowledge are obvious, not least in relation to the injustice which would be created by undue delay in the commencement and conclusion of trials.

- 12.19 The Scottish system is predicated on trust of the Procurator Fiscals, those responsible for the prosecution, and an appreciation of their total independence and objectivity. It is not significantly different to the system operated in England and Wales before December 1981.

The Present Regime – An Assessment

- 12.20 Despite the best endeavours of the Attorney and the help his Guidelines offer, my clear conclusion is that the present disclosure regime is unsatisfactory. I am not alone in that view. In his Review of the Criminal Courts of England and Wales published in October 2001, Lord Justice Auld recorded that most of those who addressed the issue of disclosure were of the view that the present system is unworkable. He drew attention to the Thematic Review of the disclosure of unused material conducted by the CPS Inspectorate which had found that the 1996 Act was not working as Parliament intended and that its operation did not command the confidence of criminal practitioners.

- 12.21 The Thematic Review highlighted the failure of Disclosure officers to prepare full and reliable schedules of unused material; undue reliance by the prosecutors on Disclosure officer's schedules and assessment of what should be disclosed; and the split of responsibility between investigator and prosecutor in the task of determining what should be disclosed. The Inspectorate's principal recommendations were for a greater involvement of prosecutors in the collation and examination of unused material and, from the start, in deciding on what should be disclosed; more involvement of counsel in the prosecution's duty of continuing review of unused material; and firmer reaction by prosecutors to no or inadequate defence statements. The Inspectorate acknowledged that if implemented those recommendations would have very significant resource implications.

- 12.22 Lord Justice Auld recommended the retention of the 1996 Act scheme of disclosure. He further recommended that there should be automatic primary disclosure of certain common categories of documents by reference to particular subject matters. However, whilst he was content that investigators should remain responsible for retaining, collating and recording any material gathered or inspected in the course of the investigation he took the view that the police should no longer have the responsibility of identifying and considering all potentially disclosable material. That responsibility should be transferred to the prosecutor who should also retain ultimate responsibility for the completeness of the material recorded

by the police and assume sole responsibility for primary and/or subsequent disclosure.

- 12.23 There are, as it seems to me, some practical difficulties in those proposals, in particular the resource implications of prosecutors actually inspecting all the documentation and the practical reality of a prosecutor assuring himself that all material had been presented to him for his consideration.
- 12.24 Plotnikoff and Woolfson, in a report commissioned by the Home Office, confirmed the conclusions of the CPS Inspectorate's Thematic Review. Their study also revealed a mutual lack of trust between the participants in the disclosure process. However, they disagreed with the Inspectorate's recommendation of concentrating more responsibility on prosecutors for the examination of unused material and determination of its disclosability.
- 12.25 Nowhere in the criminal justice system is the mutual lack of trust between the participants in the disclosure process identified by Plotnikoff and Woolfson more apparent than in HMCE cases. In the course of my Review I have heard instances of defence solicitors seeking access to the unused material listed in the schedule provided to them not because the documents listed assisted the defendant but simply in order to check that the material had been accurately described by the Disclosure officer.
- 12.26 An example of the extreme situation which has developed occurred in the course of my Review. It was suggested that I might like to see a presentation demonstrating the investigation and handling of disclosure in a diversion fraud case which is presently being prepared for trial: HMCE thought that the presentation would show that they had learned valuable lessons from the London City Bond cases. I was pleased to be given that opportunity and accepted the invitation. The invitation was first postponed and then cancelled. The Solicitor explained that there might ultimately be an abuse of process application. HMCE were concerned that if they were to create any documentation specifically for the presentation this would be disclosable; in addition they believed that the defence might compel me by summons to give evidence in such an application of what was said at the presentation so that the defence could compare that account with what they had been told. The defence, it was feared, would seek to cause maximum embarrassment for HMCE. Whilst I have no reason to think that such a course would inevitably have been taken by the defence, considered from the Solicitor's perspective the risk was certainly present. I rehearse this dismal anecdote not as a criticism but as a demonstration of the extent to which trust between prosecution and defence has completely broken down, particularly in the context of tactics sometimes employed by the defence in abuse of process hearings.

12.27 I am left with the clear impression that HMCE believe that disclosure is often a tactical game played by defence lawyers in which the lawyers seek not to assist those they represent but to embarrass, disrupt and disadvantage the prosecution process. The defence, on the other hand, consider that HMCE operate in a culture of secrecy; they see the solicitors for HMCE as deliberately unhelpful, evasive and uncooperative, withholding material out of obstinacy rather than a genuine attempt to comply with the law. In that pungent atmosphere of distrust it is hardly to be wondered that each becomes suspicious sometimes to the point of paranoia about the actions of the other.

“Fair, efficient and effective”?

12.28 Baroness Blatch expressed the view that the system of disclosure in operation before the CPIA was neither fair, nor efficient nor effective. (Para 12.7.) It was thought that the obligations imposed on the prosecution were too extensive and the CPIA was intended (my words, not hers) to try to put the genie back in the bottle. In my view the attempt has failed and prosecutors and courts are now faced with the worst of all possible worlds.

12.29 There follows some examples of the difficulties the CPIA creates.

- a. Far from reducing the burdens of the disclosure requirements, the CPIA has vastly increased the amount of lawyer time spent by prosecutors on disclosure issues. Before the Act came into force the issues were straightforward: if the material was *Keane* relevant then (questions of sensitivity aside) it would be disclosed. Now the CPIA regime requires the prosecutor to make a value judgment in relation to every item which appears on schedules of unused material to determine whether it might assist the accused's defence – usually against an inadequate defence statement. In large HMCE cases these schedules can include many thousands of items. It is not, of course, every case, even every serious case, that generates large quantities of documents. But many do. In some of the bigger cases the quantity of unused material is truly prodigious. It is measured not in terms of numbers of lever arch files but rather in terms of volume or even tonnage. There are cases where unused material seized and retained in the course of an investigation fills a large storeroom, or even a warehouse.
- b. Nor do the problems stop there. In a number of investigations there are links between other enquiries and operations. The London City Bond cases provide an illustration of that situation. In order to ensure that there has been compliance with the provisions of the CPIA it may

be necessary for consideration to be given to the unused material which has been generated, seized and retained in other operations. Professional criminals often operate within a spider's web of inter-relating companies, cells, and the like. We were told of one on-going enquiry where the defendants have been arrested and are awaiting trial, where a team of counsel, separate from those prosecuting individual cases, have been engaged with the single responsibility of considering unused material in potentially linked operations to ensure that proper disclosure is made. It is anticipated that it will take them many months to complete this task.

- c. Before trial it is common for the defence to ask the solicitor for the prosecution to disclose particular categories of documents. The prosecutors, alive to their obligation only to disclose material which falls within the statutory regime, seek a justification from the defence for disclosure. That in turn quickly leads to a war of attrition between prosecutor and defence solicitor. The prosecutor may regard the request as a fishing expedition with no sensible justification for the request. The defendant's solicitors regard that attitude as being obstructive and unhelpful. In the present climate it fuels their general mistrust and suspicion. More letters are exchanged and before long any hope of mutual confidence and co-operation in the criminal process has been destroyed. I have seen within the London City Bond cases correspondence files with as many as five letters each day being sent by solicitors acting for a particular defendant seeking documents or explanations about the contents of documents so that the prosecutor is utterly overwhelmed.
- d. The practical problems of applying the CPIA are well known to both judges and practitioners. The following scenario takes place up and down the country every week. A judge is faced with an application on behalf of a defendant for the disclosure of documents in the possession of the prosecution which are not claimed by the prosecution to be sensitive but which are said not to fall within the statutory criteria requiring disclosure. Faced with such an application many judges take a pragmatic approach. They suggest to the prosecution that the documents be disclosed: what harm will it do? asks the judge. It will not do any harm, reply the prosecution, but the documents are not disclosable under the CPIA. If the Judge is to remain faithful to the provisions of the Act he must then determine the application which is likely to involve a lengthy and perhaps complex explanation by the defence about why the documents should be disclosed. The judge before whom the application is made may not be the allocated trial judge, but

even if he is he will by then have only a basic understanding of the facts of that case. He may have many other directions hearings to deal with on that day. The temptation to take a short cut is difficult to resist. The judge accordingly directs disclosure without hearing argument. The defence then require the prosecution to provide copies of the documents which the judge has ordered should be disclosed. There is more wrangling about who should pay for the photocopying.

- e. The CPS, SFO and HMCE now routinely serve on the defence schedules of all unused non-sensitive material as recorded by the Disclosure officer. Some prosecutors, particularly in the SFO, recognising the reality of what is set out above and do not resist demands for disclosure of documents even where in their view they are of no assistance to the defence and do not fall within the statutory criteria. They permit the defence to inspect all the documents listed on the schedule and provide copies of any document in respect of which the defence demonstrate some relevance. In large cases the system is more honoured in the breach than in the observance.
- f. But other prosecutors, including HMCE, take the view that they should seek to comply with the CPIA regime. The Disclosure officer and the prosecuting solicitor carefully consider the statutory test in respect of all material, often a massive undertaking. They frequently find their efforts apparently pointless when counsel, anticipating what will happen at a pre-trial application, advises that everything not in the sensitive schedule should be disclosed: "it will save so much time and trouble if we do that, and it won't do our case any harm". Perhaps counsel takes a more robust line and holds out against disclosure until the Directions Hearing: if he does he is likely to be driven to concede disclosure before the judge. Even if he holds out for a ruling, there are few judges who are prepared to rule that non-sensitive documents which the defence request should not be inspected by them. As one prosecuting lawyer (not from HMCE) put it to me: "We are now spending many times longer over disclosure than we ever did before CPIA: but we are disclosing just as much as we ever did."
- g. In large cases, then, the practitioners are voting with their feet. Judges and advocates do not adhere to the strict interpretation of the Act. And it is hardly surprising that they do not. The disclosure requirement is mandatory: the prosecutor "must" make primary and secondary disclosure. A failure to comply with the statutory obligation founds

many an application to stay the proceedings for abuse: so much easier and safer to disclose everything.

- h. There is the added problem of “creeping disclosure”. There is a continuing mandatory duty on the prosecution to review material for relevance and disclosure even during a trial. Continuing disclosure is a necessary consequence of this duty. Unforeseen issues may arise during the course of proceedings which mean material previously considered not relevant may become disclosable. Usually the material, when understood properly and put in context, is of no assistance to the defence. But rightly the defence require time to examine the new material disclosed to them, consider the impact it may have on their case and perhaps ask for prosecuting witnesses to return for further cross-examination. Days of court time can be lost in this way. Had the material been disclosed initially the defence could have conducted their case aware of it and the prosecution could deal with any issue arising from it in the normal course of the trial.

A Possible Solution

12.30 Lord Justice Auld concluded that reform was needed but that there was no consensus as to what form it should take. My own and much more modest researches entirely accord with his first conclusion. However, there does seem to be a degree of consensus on a possible alternative from those to whom I have spoken.

12.31 There are two essentials in effecting proper disclosure. First, all prosecution material within the meaning of section 3(2) of the CPIA must be recorded, retained and indexed in such a way that it is accessible to the prosecution. That requires an effective document handling system which is properly operated. HMCE now have in place such a system, introduced in the spring of 2002 (see previous chapter). However good the disclosure regime is in theory, any regime is essentially dependent on the initial retention and recording of material, and the efficiency and integrity of those responsible for that task. The second essential is that the material set out on that schedule must be disclosed to the defence if it falls within the statutory test in the CPIA and the prosecution do not obtain an order that the documents should not be disclosed by reason of PII. It is this second aspect that in my view should be re-considered.

12.32 The solution to the difficulties of the present regime identified above may lie in the automatic disclosure by prosecutors of all non-sensitive unused material in the possession of the prosecutor which came into his possession in connection with the case for the prosecution or which he has inspected in connection with the case – the material identified in section 3(2) of the CPIA which is not sensitive. The defence are already provided with a schedule listing

the material: what they do not have at present (certainly in HMCE cases) is access to it unless the prosecutor considers that it assists the defence case as disclosed in the defence statement. The defence know what may assist their case. The prosecution do not, save to the extent that they are informed by the defence statement. The onus of deciding what documents might assist should, in my view, be placed not on those who do not know the answer to that question – the prosecutor - but on those who do – the defence.

- 12.33 How can the defence know what may assist their case without inspecting every piece of paper in the possession of the prosecution? If the schedule is reliable – and any system of disclosure, in particular the present regime, must proceed on that basis - they will be able to disregard most of the unused material. And they will certainly be better placed to identify what may assist them than the prosecutor: they know in detail what their case is, the areas in which unused material may assist them, the areas where there is no challenge to the prosecution case, the areas where their client is not involved.
- 12.34 The suggestion of automatic disclosure received support, often unqualified, sometimes very enthusiastic, from Customs lawyers, Customs investigators, counsel who prosecute and defend in HMCE cases, defence solicitors, and judges at every level from the Circuit Bench to the Court of Appeal. The proposal also found considerable support at the time of Lord Justice Auld’s Review and was seen as a pragmatic solution to the time-consuming task for the investigator and the prosecutor of determining disclosability on the known and expected issues in the case.
- 12.35 In some prosecuting departments that arrangement, informal and unsupported by statute as it may be, is in fact in place. The SFO routinely discloses all such material. Treasury Counsel prosecuting at the Old Bailey routinely do the same. In some large criminal investigations I understand that the defence are permitted access to much of the material contained within the HOLMES computer system used by the Police in such enquiries. And there is a sense of some relaxation of the strict statutory position in the recent Guidelines issued by the Attorney General. By paragraph nine the Guidelines recommend the disclosure of the existence of large quantities of seized but unexamined material and the granting of permission to the defence to inspect that material. Paragraph 40 of the Guidelines suggests the disclosure of linked material falling into a number of categories commonly held by prosecutors whenever it is requested unless there is good reason not to do so.
- 12.36 The objection to this automatic disclosure is essentially that of cost. It is said that automatic disclosure of the HMCE or police investigation file apart from sensitive material in every case could involve enormous and unnecessary cost for the police and

prosecutors. Such savings as might be made in the present task of identifying documents disclosable by reason of their potential materiality would in many instances be eclipsed by the costs of compilation by the prosecution and of examination by the defence of vast volumes of irrelevant material.

- 12.37 I recognise and understand the concern but for my part I am unpersuaded by it. Under the present system the Disclosure officer must inspect, view or listen to all material that has been retained by the investigator and provide a personal declaration that this task has been done (AG Guidelines eight) He must list all that material on a schedule. (Code of Practice 6.2) It is crucial that his description of the documents is detailed, clear and accurate (AG Guidelines nine). If the Disclosure officer complies with those obligations there will be in existence in every case a verified and comprehensive schedule of all non-sensitive material retained by the investigator: my suggestion is simply that the schedule should be provided to the defence (as in fact it routinely is) and if the defence wish to inspect any of the material they should be permitted so to do. For the avoidance of doubt I make it clear that I am not suggesting that the prosecution should routinely provide the defence with copies of all the non-sensitive material: only that permission should be granted if sought for the defence to inspect that material. If the defence wish the material to be copied then provided they can justify the relevance of the material to their defence that request should be met, whether they have inspected the material or not.
- 12.38 The new document handling system described elsewhere will enable schedules of unused material to identify with proper particularity the nature and content of the documents in the possession of HMCE. I acknowledge that much of that material is likely to be wholly irrelevant to any issue arising in the case. But the defence will know (or ought to know) what will be relevant and what will not be relevant. They will be able accordingly to identify with a reasonable degree of precision which documents set out in the unused material schedule require their attention.
- 12.39 It is argued that the consequence of such a procedure would be to cause defence solicitors to spend months trawling through boxes of unused material. If the defence solicitors are justified in pursuing that course in the light of their instructions and the detail of the documents which will have already been provided to them on the schedule then it is entirely proper that they should be able to take that course. If, on the other hand, there was in reality nothing in their client's defence which required them to examine the documents set out in the schedule then the costs of doing so should be disallowed on taxation.
- 12.40 The potential difficulty identified in the preceding paragraph will only arise in very large cases. In normal circumstances the amount

of non-sensitive unused material will be modest. It is in the exceptional cases, where the volume of unused material is very considerable, that concern is understandably expressed. But it is in just such cases that a scheme recently introduced by the Legal Services Commission (LSC) will apply. That scheme is intended to facilitate better control of the cost of legal aid in high cost criminal cases. The definition of a high cost case is one which at the start appears to be likely to cost more than £150,000 or to last more than 25 days. It is a definition which would have applied to most of the London City Bond cases.

- 12.41 In such high cost cases the LSC is empowered to offer a contract to the solicitors acting for the defendant and require that they only take forward the case on the basis of that contract. The contract provides for fixed rates of remuneration which vary according to the nature of the case. In addition, the LSC must agree a work plan put forward by the legal team at three monthly stages of the case.
- 12.42 In any case to which the scheme applies, solicitors will have to satisfy the LSC that they are justified in devoting time and resources to inspection and copying unused material held by the prosecution. If parts of the proposed work plan are considered to be unreasonable and excessive by the LSC, and thus not authorised, the defence solicitors will still be able to examine and copy unused material. However, they will have to bear the cost of doing so within the budgets already allocated, though provision is made for work plan budgets to be renegotiated. Accordingly, the scheme controls both rates and volumes of work. In return the lawyers are paid much earlier, as each stage of the case is completed, and have certainty that they will be paid for all work done. The new scheme would thus provide an effective check on inappropriate and excessive use of the right to access to unused material, were such a right to be given to the defence. The government's intention is that all cases which fall within the definition of a high cost case should be taken within the scheme by 1 April 2004.
- 12.43 Further, increasingly it is anticipated that documents recovered in the course of a major investigation will routinely be scanned and thereafter available for dissemination on a compact disc. Such a process obviates the need for time-consuming and wasteful photocopying, and provides a useful facility to search a database of documentation quickly and effectively.
- 12.44 Might such a system of disclosure encourage defendants to seek out failures by investigators to comply with their own procedures, protocols, codes of practice, guidelines and regulations so as to provide ammunition to mount an application for an abuse of process? The answer is two-fold. First, the present system has hardly discouraged such an attack: the London City Bond cases are proof enough of that. Second, the remedy for the concern lies surely

in proper compliance by the investigators and a rigorous application of the law relating to abuse. If full disclosure reveals corruption or misfeasance such that a prosecution should not be allowed to proceed then the system is fair, not unfair. If full disclosure would make no difference then it could only increase confidence in the prosecution process. As to abuse applications, if the arguments advanced to support them are untenable, the judge should be encouraged to say so firmly and speedily, and supported where proper when he does.

12.45 There can be no return to the days of the 1981 Guidelines, let alone an adoption of the Scottish regime. The criminal justice system now operates and must in my view continue to operate in a landscape of transparency so far as prosecution disclosure is concerned. Some of those to whom I spoke suggested that there might be scope for a two-tier system of disclosure, where the present regime continues to apply in most cases but the more comprehensive system suggested above applies in particular large, complex and serious cases. That creates the difficulty of defining the cases in which the enhanced regime should apply and is difficult to justify in any event: why should there be two standards for disclosure?

12.46 There is in my view clear merit in maintaining the present obligation on the prosecution to give primary disclosure. The defendant must be entitled to know of anything which undermines the prosecution case or, when the Criminal Justice Bill 2003 comes into force, assists the defence case before he is required to provide a defence statement, and the defendant should be provided with that material in the way prescribed by Section 3 of the CPIA. It is at the second stage that I suggest considerable improvements can be achieved in the way described above. Not only would considerable time and effort be saved so far as the prosecution is concerned, but crucially in due time and provided the system is operated efficiently the present mutual mistrust between prosecutors and defence lawyers should be significantly reduced.

12.47 I recognise the timing of this Review is such that it is highly unlikely there will be any opportunity for proper consideration to be given to these proposals in time for their inclusion, even if accepted, in the present Criminal Justice Bill. I further acknowledge that the changes proposed in the Bill are in part aimed at addressing some of the problems raised in this section. However, in the light of the central importance of disclosure in the London City Bond cases and my consequent concentration on that issue, the strength of opinion expressed to me about the inadequacies of the present regime from all those seeking to operate it within the criminal justice system, and the extent of agreement about the measures proposed above I have considered it appropriate to set out my views in detail. It is to be hoped that the new measures in the Bill will achieve a solution of all

the existing problems. If unhappily problems remain, I hope that my proposals will be considered at some point in the future.

- 12.48 *I recommend that if appropriate the disclosure regime is re-considered and consideration given to effecting secondary disclosure by providing to the defence the schedule of non-sensitive material held or inspected by the prosecutor in connection with the case for the prosecution against the accused and permission granted to the defence to inspect any material so disclosed that appeared relevant.*

Public Interest Immunity

- 12.49 The Crown Court (Criminal Procedure and Investigations Act 1996) (Disclosure) Rules 1997 make provision for the procedure to be followed where the prosecution make an application for PII. However the rules of common law governing the approach which should be adopted when a court decides whether to accede to such an application are unaffected by the CPIA. Section 21(2) expressly so provides.

- 12.50 Before a court is required to consider such an application, the sensitive material must be potentially relevant as undermining the prosecution case or assisting the defence case. If the material is not relevant then no application is required. It is for the prosecution, not the judge, to decide whether sensitive material is relevant. In reaching that decision the prosecution will have regard to the defence statement and any additional information provided by the defence. The prosecution is not obliged to consider the sensitive material against defences which are not raised but has a duty to keep all sensitive material under review as a case proceeds. What is not relevant at the outset of a trial may become relevant thereafter. It is axiomatic that all sensitive material in the possession of the investigators or intelligence officers must be disclosed to the prosecuting lawyers.

- 12.51 Within HMCE the new document handling system described elsewhere provides for the retention and recording on a separate schedule of all sensitive material arising out of an investigation. The Disclosure officer, as a result of his security clearance, now has access not only to all sensitive documents seized or created by the investigators but also to the source material held by Intelligence. His duty is to inspect all such material, whether ultimately relevant or not, and to list the material accurately and fully on a sensitive disclosure schedule. The schedule, and where appropriate the documents listed on the schedule, is then considered by the prosecuting solicitor. The schedule is not, under any circumstances, disclosed to the defence. The prosecutor decides, usually in consultation with counsel, first whether each document is in fact properly described as sensitive; second, whether it is or may be

relevant; and third whether an application for PII should be made in respect of it.

- 12.52 If all three conditions are met an application will be made to the court. In order to make a decision as to non-disclosure the court must necessarily study the material in respect of which PII is asserted. The judge must perform a balancing exercise to consider the degree to which relevant material assists the defence. A successful claim to PII recognises that the balance of competing interest, or competing aspects of the public interest, lies in favour of withholding the material. However, if the disputed material may prove the defendant's innocence, or avoid a miscarriage of justice, then the balance comes down resoundingly in favour of disclosure.
- 12.53 The "interests of justice" include "allowing a defendant to put forward a tenable case in the best possible light". It was that expression of the common law, taken from the judgement of the CACD in *Agar* 90 Cr.App.R. 318, which featured prominently in the submissions of defendants in the London City Bond cases. It is not however possible to state a test which can be applied in all cases. Circumstances vary greatly according to the nature of the material in question. The weight of the public interest in favour of disclosure varies even more widely because it depends upon the probable evidential value to the parties seeking disclosure in the almost infinitely variable circumstances of individual cases.
- 12.54 In the context of the London City Bond cases it was the exercise by the judges of this balancing exercise that was of particular importance in explaining why ultimately the CACD set aside the convictions of a number of defendants and ordered re-trials. The judges had conducted the balancing exercise in ignorance of significant factors which might have resulted in a different outcome.
- 12.55 Notwithstanding the regrettable outcome of the London City Bond cases, in my view the present system does provide the proper checks and balances necessary to resolve the competing public interests of withholding material the disclosure of which would harm the proper functioning of a public service such as HMCE and the public interest that justice should be publicly seen to be done, by the reception of all relevant evidence.
- 12.56 The present system depends at bedrock on the integrity and efficiency of investigators and intelligence officers in retaining and recording all sensitive material and the revelation of it to the Disclosure officer. He in turn must ensure that such material is disclosed to the prosecuting solicitor for consideration of its relevance. The prosecutor in his turn must ensure not only that all sensitive material of relevance is placed before the judge, but must be scrupulously fair and objective in presenting his application for PII. As a text-book illustration of how such applications can be dealt

with impartially it would be difficult to better the example of prosecuting counsel in the PII hearings in Operation Fajita Part II. Finally the judge himself must recognise the importance of his role in the process.

12.57 There was perhaps surprisingly very little concern expressed to the Review about the process itself by those who are involved in it, whether as prosecutors, defenders or judges. The perception generally is that judges fully understand the importance of the part they play and the trust reposed in them by the system. Practitioners see them as robust and fair in applying the appropriate test. A few to whom we spoke raised the possibility of the appointment of an independent counsel who could be given access to the material and in effect represent the interests of the defendant. There are, it seems to me, considerable practical and ethical difficulties in the way of such a proposal, and it received little support. It is worth observing that the presence of such a representative would have been of no assistance in the London City Bond cases.

12.58 Counsel instructed to prosecute have the right to expect that neither they nor those instructing them will be deliberately misled by the investigators. But that is not to say that they should unquestioningly accept all they are told. Particularly in PII applications it is important that both prosecuting solicitors and counsel satisfy themselves so far as possible that they have been provided with all sensitive material and all the information which might affect such an application. Counsel and those instructing them must be assiduous and pro-active in investigating fully all possible avenues which might impact on the application they are instructed to make.

12.59 It is only in the knowledge that a rigorous and critical examination of all the circumstances surrounding an application for PII has been made by the prosecution that judges can address the balancing exercise required of them with confidence. Equally, if the present system is to survive, the defence must also be confident that the judge has not been misled, however innocently, by the prosecution.

(ii) Abuse of process

12.60 It is increasingly common in prosecutions involving large-scale investigations particularly of fraud for the defence to apply to the judge to stay the proceedings as an abuse of process. The Crown Court has inherent power to protect its process from abuse. That control includes a power to safeguard an accused person from oppression or prejudice.

12.61 The principles upon which the courts have exercised their discretion to stay proceedings as an abuse are found in the judgment of Sir Roger Ormrod in *R v Derby Crown Court ex parte Brooks* (1984) 80 Cr App R 164 where he said:

The power to stop a prosecution arises only when it is an abuse of a process of the Court. It may be an abuse of process if either (a) the prosecution have manipulated or misused the process of the Court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality, or (b) on the balance of probability the defendant has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable ... The ultimate objective of this discretionary power is to ensure there should be a fair trial according to law, which involves fairness to both the defendant and the prosecution.

- 12.62 The doctrine was extended in later decisions and particularly by the House of Lords in *R v Horseferry Road Magistrates Court ex parte Bennett* [1994] 1 AC 42. In that case the House held that the judiciary have a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and refuses to countenance behaviour that threatens either basic human rights or the rule of law. Categories of conduct now recognised by the courts as being capable of amounting to abuse include entrapment, delay, loss and destruction of relevant material, breach of a promise not to prosecute, abuse of executive power making it unfair to try the defendant, and double jeopardy. The list of categories is not closed.
- 12.63 One consequence of the incremental development of the law relating to abuse of process has been an increase in the number of applications to stay proceedings. As is apparent from the London City Bond cases, such applications often occupy many days of court time. In Operation Fallover, the abuse argument lasted for about 10 days whilst the jury, already sworn, waited to continue the trial. In Operation Fusion the evidence and submissions in the abuse of process applications extended over three months. In the application relating to Operation Manpower the abuse application, with no evidence called at any time, lasted 13 weeks. The hearings before Grigson J in Liverpool began on 2nd September 2002 and continued, with adjournments, until 25th November 2002 at which point the evidence was not expected to be concluded before January 2003, with submissions from the 16 separate legal teams to follow.
- 12.64 Those examples are by no means untypical of other cases within the criminal justice system: some applications to stay proceedings as an abuse of the process last even longer. If it is necessary to expend that amount of court time and the consequential costs in order to ensure that justice is done both to defendants and to the prosecution, then that is the price that must be paid for our system. However, I considered that the frequency and length of abuse of process applications was now such a significant and substantial part of the criminal justice process that it would be helpful to examine present procedures. In that examination I had at the forefront of my mind the need to maintain the integrity of the criminal investigation and prosecution process: if there may have been an abuse of process

such that it is unfair to try a defendant then plainly there must be in place a system to ensure that the allegation is properly considered by the courts.

- 12.65 A number of those who spoke to the Review team commented critically about the present procedures and practices followed in abuse applications. Some criticised the fact that many of the issues raised in abuse hearings did not directly impact on the defences raised in answer to the charges. Further, it was pointed out that in cases involving a number of defendants it was not uncommon for several counsel to argue the same point, with consequent repetition of cross-examination and submissions. In general it was thought that the length of abuse applications could be wholly disproportionate to the issues to be determined.
- 12.66 There is already in place a Practice Direction in relation to abuse of process applications. The Direction was issued by Lord Bingham CJ on 23rd May 2000 ([2000] 2 Crim App R 179), and repeated unamended in the consolidated Directions issued by Lord Woolf CJ on 8th July 2002 ([2002] 3 All ER 904). The Practice Direction provides that in all cases where a defendant in the Crown Court proposes to make an application to stay an indictment on the ground of abuse of process, he must give written notice of the application to the prosecuting authority and to any co-defendant not later than 14 days before the date fixed or warned for trial. The notice must specify the nature of the application and the grounds upon which it is to be made. Once such an application has been made there are automatic directions for the lodging of skeleton arguments and the provision of documents, indexed bundles and authorities. Where appropriate the skeletons must include a chronology of events and a list of *dramatis personae*. The time limits provided by the Practice Direction are expressed to be minimum but may be increased if the Judge so directs.
- 12.67 The provisions of the Practice Direction are comprehensive but experience has shown that they are more honoured in the breach than the observance. There is, anecdotally, little impetus within the judiciary to enforce the Practice Direction, nor, as in so much of the criminal law, is there any effective procedure available to penalise non-compliance. Skeleton arguments are usually served but often only on the day of the hearing itself and the requirements as to indexed bundles of documents, chronologies and *dramatis personae* are rarely fulfilled.
- 12.68 The concern expressed by a number of those to whom the Review team spoke about the proliferation of abuse of process applications appears to be shared by the CACD. In *R v Howell and others* [2003] EWCA Crim 486 (Judge LJ, Hunt & Pitchford JJ) the court observed:

We must emphasise that pre-hearing arguments to exclude evidence, or to terminate the proceedings as an abuse of process, should not succeed simply because the defence may establish that there were imperfections or irregularities in the investigative process, or preparations for trial, which may make, or indeed have made the task of the defence at trial more difficult. If relevant to any issue in the trial, the jury is well able to address such questions, and so attach proportionate weight to them in the process of evaluating the evidence. That indeed is why we have trial by jury.

Too many of the applications currently made to trial Judges to terminate proceedings as an abuse of process overlook these elementary principles, well established by decisions of this Court.

12.69 The court went on to emphasise the exceptional nature of the imposition of a stay on whatever ground and added that notwithstanding the developing jurisprudence and the implementation of the Human Rights Act 1998 the principles are unchanged. The court continued:

We immediately highlight the stark difference between such cases, and those where the prosecution has conducted itself in bad faith, undermining the principle of, and in the process destroying the right of a defendant to a fair trial. In such circumstances, if, notwithstanding the safeguards provided by the trial process itself, the trial will be unfair, which does unfortunately occur from time to time, the trial Judge can be relied on to act robustly and firmly to prevent an abuse of the Court's process.

12.70 There are proposed legislative changes which, if implemented, will impact on the present regime. Clause 28 of the Criminal Justice Bill 2003 inserts a new Section 6A in the Criminal Procedure and Investigations Act 1996 and will require the defence statement to include an indication of any points of law which he wishes to take and any authority on which he intends to rely. By Clause 32 of the Bill the defence statement must include an indication of any abuse of process points. Thus the defence will be required to give notice of abuse of process arguments much earlier than presently required under the Practice Direction. A further and important additional power proposed in the Criminal Justice Bill is the introduction of a right of appeal by the prosecution against an order staying proceedings as an abuse.

12.71 I have consulted widely on the issue and have raised my concerns with all those involved in the criminal justice system. I am satisfied that applications to stay proceedings as an abuse of process have become a commonplace feature in complex prosecutions. There is now a burgeoning industry in this form of satellite litigation. Despite clear judicial authority that the imposition of a stay on such grounds should be an exceptional remedy seldom justified on the

facts, the reality is that applications are successful on more occasions than might be expected.

12.72 All that being said, the ability of the defence to raise issues of abuse of process is a vital tool to ensure that the integrity of the criminal investigation and justice system is maintained. The risk is that attempts to curb the number of pointless applications will prevent a proper consideration of those with real merit. Some respondents to the Review took the view that the powers now available to the courts are quite sufficient to manage abuse applications effectively. In their view the Practice Direction, particularly when allied to the proposed changes contained in the Criminal Justice Bill, provides an effective case management tool. The guidance available from the decisions of the CACD, if given full effect, constrains the circumstances in which an abuse argument may succeed. Judges already have the capacity to pre-empt unmeritorious applications by adopting a more inquisitorial and interventionist approach. Failures to comply with the existing Practice Direction and orders made under it could be dealt with by way of wasted costs orders. There may be a need to emphasise the judicial control of proceedings, perhaps in specific training of judges, but there is no need for any further power to be granted to them.

12.73 However, for the most part those who responded considered that there was scope for increasing the powers available to the court in relation to abuse of process applications. I agree with that conclusion. As distinct from their normal role in criminal trials, in such applications the judge is the decision maker. In our system judges are accustomed to allow a criminal trial to take place in large measure in the way in which the prosecution and defence wish to present their cases to the jury. The jury is the decision-maker and, within limits, advocates must be permitted to develop their case in the way in which they think will best assist those decision makers to reach a conclusion favourable to their case.

12.74 But in abuse of process applications different considerations apply. The judge as the decision-maker should be able to identify clearly and at the outset of the application the issues that arise for his determination and the material which, on the skeleton arguments presented to him, he will require in order to resolve those issues. In a number of abuse applications relating to the London City Bond cases there was a drift apparent in the course of applications made to trial judges. The application might start as an application under Section 8 of CPIA that the judge should order the prosecution to make further disclosure. That then develops into an application to stay the proceedings on grounds which themselves change and transmogrify as time goes by. Days, weeks and sometimes months can be taken up in this process with judges apparently helpless to control the proceedings effectively.

- 12.75 The Courts Bill 2003 proposes that a Criminal Procedure Rule Committee be established. The Committee is to be responsible for reviewing criminal procedure and for making rules of court to determine the practices and procedures for all criminal courts in England and Wales. The Committee will be supported by a full time secretariat, to enable rules to be drafted and brought into force as soon as possible after Royal Assent. Arrangements are being made to establish a Working Group, which will in the meantime assist in important preparatory tasks, such as devising a draft programme of work for the new Committee.
- 12.76 In the light of the fact that in the immediate future a statutory framework will be available to provide rules of procedure in criminal cases I do not consider it appropriate for me to make any detailed recommendations on what rules might be introduced in relation to abuse of process.
- 12.77 *I recommend only that consideration be given by the new Criminal Rules Committee to the introduction of rules, or alternatively issuing by the Lord Chief Justice of Practice Directions, giving judges greater power to control the proceedings before them on all applications in criminal proceedings to be determined by the judge alone.*
- 12.78 Some possible powers which the Rules Committee might wish to consider in respect of applications in criminal proceedings to be determined by judge alone include giving directions that:
- a. A witness statement stands as evidence-in-chief with a specific period of hours allocated for cross-examination and re-examination;
 - b. Hearsay evidence may be received on an application;
 - c. Closing submissions should be in writing and thereafter time limits imposed on oral submissions based on the written material;
 - d. A hearing similar to a Case Management Conference under Rule 29 of the CPR take place in cases where the Judge considers such a hearing to be of advantage;
 - e. The defendants notify the prosecution of any witnesses they intend to rely on in the abuse application or other legal argument.
 - f. The number of counsel arguing an application be restricted. The introduction of such a power is obviously potentially controversial but the proposal should, in my view, be examined carefully. Of course, the position before Mr

Justice Grigson was wholly exceptional. There were applications in respect of four separate trials taking place before him. He suggested that the number of counsel in the Liverpool application could be reduced but that suggestion did not find favour with the defence. Accordingly 33 counsel and upwards of 15 solicitors attended for most of the hearings. In most cases the number of defendants will be considerably less than that before Mr Justice Grigson but nonetheless the Rules Committee may wish to consider whether the Judge should have a discretionary power to restrict the number of counsel involved in an application, leaving those not involved in the argument to be represented by junior or noting counsel only.

- g. The defendant need not attend the hearing of an application, provided he consents;
- h. Where no evidence is called, the application be dealt with by written submissions containing detailed arguments, to be supplemented by brief oral submissions;
- i. Prosecution and defence agree a document setting out admissions and areas that remain in dispute. The defence would then not be permitted to raise arguments or call evidence outside the scope of that document save with the leave of the Court and to the extent that they related to fresh issues that had developed in the course of evidence.

12.79 Such directions would only be made after the judge heard submissions from the parties and in the light of the particular circumstances of the application to be determined.

12.80 One particular area on which I invited observations was whether it was proper for the defence to apply to stay proceedings as an abuse on a factual basis which was inconsistent with the defence statement. I had in mind applications to stay proceedings as an abuse of process on the ground of entrapment where the defendant denied any participation in the offence or denied any criminal involvement in it so that he was not himself suggesting that he had been enticed into the commission of the offence. Can it be right in such circumstances for the defendant to be entitled to argue that notwithstanding it is contrary to his own case the proceedings should be stayed because he was in fact entrapped into committing the offence?

12.81 A few respondents considered there to be merit in that possibility but the majority, including all the prosecuting agencies to whom I spoke, were not impressed by the suggestion. In summary, those opposed to the possibility pointed out:

- there are circumstances in which the courts will stay proceedings as an abuse even when there is no issue about the guilt of a defendant. If that is correct, then a defendant who denies his guilt should not be in a worse position.
- if there has been an abuse of executive authority then the court should not allow the prosecution to use the process of trial at all to determine the question of guilt.
- where the court is satisfied that a defendant was entrapped it should stay the indictment regardless of whether the defendant denies involvement. The court must assume for the purposes of the abuse argument that the substantive prosecution allegation in the indictment is correct.

12.82 There may well be force in these arguments which the Rules Committee will wish to consider. I remain to be persuaded that a defendant, upon whom the burden of proof lies, may assert that proceedings against him should be stayed on the ground that he was entrapped into committing the offence when his own defence is that he did not commit the offence. To my mind that is a step too far. If the arguments prevail of those who consider that the assertion of entrapment should be generally available in circumstances where the abuse upon which the defendant relies in argument is not a part of his substantive defence, then that in itself should serve to emphasise the wholly exceptional nature of the remedy.

12.83 Prosecutors maintain that they face a large number of hopeless, unfounded and apparently inconsistent abuse of process arguments. Paraphrasing Samuel Johnson, one spoke of such applications as “the last refuge of the scoundrel.”¹ They would, I suspect, say the same about some of the defences raised in answer to criminal allegations. It would plainly be wrong for the judge to refuse to hear argument on such applications, however apparently unmeritorious. However, despite the views of those who think the present circumstances are satisfactory I am quite satisfied that there is an urgent need for a more robust framework for the determination of those applications so that the process of determination can be made fairer, swifter, more effective and less expensive than is presently the case.

(iii) Regulation of Investigatory Powers Act 2000 (RIPA)

Intercept of Communications

12.84 Many of the investigations undertaken by Customs are assisted and sometimes driven by intelligence. Much of that intelligence is now obtained by interception of communications.

¹ According to Boswell, Samuel Johnson opined that: “Patriotism is the last refuge of the scoundrel” on the evening of 7th April 1775. The context in which he said it is not known.

- 12.85 The law relating to the interception of communications is set out in the complex and elaborate provisions of the Regulation of Investigatory Powers Act 2000 and the Code of Practice issued pursuant to Section 71 of that Act. In brief, in cases other than interception by consent, the interception of messages passing by a postal service or telecommunications system requires a warrant from the Secretary of State. A warrant may only be issued on the application of a list of high-ranking individuals including the Commissioners of HM Customs & Excise and on the basis of necessity and proportionality.
- 12.86 Before issuing an interception warrant the Secretary of State must believe:
1. That what the action seeks to achieve is one of the purposes specified in Section 5(3) namely that it is:
 - In the interests of national security or
 - For the purpose of preventing or detecting serious crime or
 - For the purpose of safeguarding the economic well-being of the United Kingdom
 2. That it is necessary to undertake the interception to achieve the purpose for which the application is made, and
 3. That the conduct authorised by the warrant is proportionate to what is sought to be achieved.
- 12.87 Substantial restrictions apply to the use of intercepted material. The Act excludes evidence, questioning, assertion or disclosure in legal proceedings likely to reveal the existence (or the absence) of a warrant issued under the Act. Intercepted material cannot be used either by the prosecution or the defence.
- 12.88 The general rule is that intercepted material must be destroyed as soon as its retention is no longer necessary for a purpose authorised under the Act. The purpose most likely to apply to Customs investigations is the preventing or detecting of serious crime. However, the authorised purpose does not extend to gathering evidence for the purpose of a prosecution, so that material intercepted for the purpose of preventing or detecting serious crime may not survive to the prosecution stage. If, however, the material is necessary to ensure that a person conducting a criminal prosecution has the information he needs to determine what is required of him by his duty to secure the fairness of the prosecution then the material should have been retained and be available to the prosecutor.
- 12.89 Section 18(7)(a) provides that intercepted material obtained by means of a warrant and which continues to be available may, for a

strictly limited purpose, be disclosed to a person conducting a criminal prosecution for the purpose of enabling the prosecutor to determine what is required of him by his duty to secure the fairness of the prosecution. The Code makes clear that intercepted material should not be retained against a remote possibility that it might be relevant to future proceedings. The normal expectation is that the material will be destroyed in accordance with the general safeguards provided in the Act. If all intercepted material has been destroyed the Code provides that there is no need to consider disclosure to a prosecutor because there is nothing to disclose to him: no intercepted material remains in existence.

- 12.90 If, however, there is such material still in existence the prosecutor must be informed of the existence of the material and given full access to it. Having had access to the material, the prosecutor may conclude that the material affects the fairness of the proceedings. In these circumstances, he will decide how the prosecution, if it proceeds, should be presented.
- 12.91 Section 18(7)(b) recognises that there may be cases where the prosecutor, having seen intercepted material under sub-section (7)(a), will need to consult the trial Judge. In those circumstances the Judge may be given access to intercepted material where there are exceptional circumstances making that disclosure essential in the interests of justice. Access by the Judge to the material is achieved by the prosecutor inviting the Judge to make an order for disclosure to him, the Judge, alone. However the Judge must not order disclosure to himself unless he is satisfied that the “exceptional circumstances of the case” make disclosure essential in the interests of justice. There is no case law on what constitutes “exceptional circumstances” for the purpose of Section 18(8) and unless the power is exercised in a completely circular way it must be left to the prosecutor to decide whether to disclose the material to the Judge.
- 12.92 The Judge may, having considered the intercepted material disclosed to him, direct the prosecution to make an admission of fact which will be abstracted from the interception but not reveal the fact of that interception. The Code indicates that this is likely to be a very unusual step. The Act only allows it where the Judge considers it essential in the interests of justice. I understand that the Attorney General proposes to issue guidelines on the approach to be taken by prosecutors in applying Section 18 of RIPA in England and Wales.
- 12.93 The potential evidence provided by intercept material can be potent and compelling. The benefit of using such material in criminal proceedings is obviously attractive. It may demonstrate that a defendant’s assertion that he was not involved in an offence is untrue. Occasionally the product might suggest that acts which appear to be criminal are susceptible to alternative explanations at least consistent with innocent involvement. However, in neither

circumstance is the product admissible and in no circumstances are the defence able to obtain access to it.

- 12.94 The only protection available to a defendant is the requirement that the prosecutor must satisfy himself that there is nothing within the intercepted material which would assist the defendant or undermine the case for the prosecution. If the provisions of the Code are applied the prosecutor will only be called upon to perform that duty where at least some of the intercepted material remains in existence. In those circumstances the prosecutor will be given access to the material and meet with the officers who have conducted the interceptions. In advance of the meeting he will set out in writing the way in which he proposes to advance the prosecution case to the Court and the basis of the defence case so far as it is known to him from any defence statement served and the content of any interviews given by a defendant. The officers who have conducted the interceptions consider the material provided to them by the prosecutor and meet with him at the time he is given access to the product.
- 12.95 The purpose of the meeting is to consider first whether any retained intercepted material could have any impact on the fairness of the proceedings in the way defined. He will also investigate whether any destroyed material might have a similar impact. That of course requires the intercepting officers to rely upon their memories. There is no method of checking independently the assertion by the intercepting officers that nothing they have heard would assist the defence in the light of the defence statements and nothing would undermine the prosecution in the light of the way the prosecution proposed to put the case. Ultimately this part of the system depends on the accuracy of the recollections of the intercepting officers, their ability to recall details sometimes months after they have intercepted the material, and their integrity and honesty in bringing to the attention of the prosecutor any relevant matters. In cases where there is no intercepted material still in existence the present regime makes no provision for such a meeting to take place.
- 12.96 The RIPA restriction on the use of intercept material undoubtedly has its imperfections. It may deprive the prosecution of valuable evidence which could destroy an otherwise plausible defence case. On the other hand it may deprive a defendant of support for the case he seeks to advance at trial. Several of those who commented upon the present system were strong proponents for a change, suggesting that the admissibility of such evidence should be allowed for the reasons set out above. What, then, is the justification for the present system?
- 12.97 First the system itself is rigorously supervised. The Act provides for the appointment of an Interception of Communications Commissioner (ICC), whose remit is to provide independent

oversight of the use of the powers provided by the warranted interception regime. The Review Team met and consulted with the present holder of that Office.

12.98 The oversight regime allows the ICC to inspect any warrant application and require justification of its content by the applicant. All material intercepted under the authority of a warrant must be handled in accordance with the safeguards approved by the Secretary of State. The safeguards are made available to the ICC and any breach of them must be reported to him. He undertakes a bi-annual inspection of all those agencies permitted to make application for interception warrants, including the Commissioners of Customs and Excise, and randomly inspects in detail the applications and the enforcement of a substantial number of the warrants issued. He has vetted and approved all the safeguards set out in Section 15 of the Act and also vetted compliance with the Code of Practice.

12.99 The Commissioner himself is acutely aware of the potential injustice that might result if the system was not operated in a scrupulously fair way. He was satisfied that HMCE understood their duties and the inspection system. His own regular inspections of the system and testing of its operation provide an independent scrutiny which does all that can properly be done to police and monitor the existing arrangements. The Commissioner was not aware of any significant problems so far as Customs was concerned. His impression was that Customs officers were fully conscious of their obligations under the Act and the Code, fully alive to the real problems that could ensue if they did not comply properly with the provisions, and vigilant to ensure that the obligations were met.

12.100 Second, the strict statutory criteria which must be met before an interception warrant is granted apply only to the most important Customs cases, targeting major criminal organisations when all other conventional techniques have failed or are unlikely to succeed. In our adversarial system it is probable that use of intercepted material in criminal proceedings would reveal at least in part interception techniques presently used, notwithstanding PII applications. That would be likely to reduce the effectiveness of interception as a method of intelligence gathering. Any exposure in Court of the interception capabilities would highlight methodologies that sophisticated criminal organisations would speedily exploit by adopting counter-interception tactics. Any disclosure of the technical methods used or the investigatory stratagems employed would weaken the value of the resource.

12.101 Third, in reality the product is likely to be of less probative value in criminal proceedings than might at first be thought. It is common for criminals conducting their business over the telephone to use coded or veiled speech and not communicate openly about their

illegal activities. Evidence would frequently be required to interpret the code used to make them understandable to a jury and properly would be challenged in appropriate cases by the defence. There might in addition be difficulties in identifying the speaker in any conversation relied upon by the prosecution.

12.102 Fourth, the disclosure obligations would impose very considerable additional burdens on the prosecution. Under the present disclosure regime all material in an investigation which is in the prosecution's possession in connection with their case must be retained. To meet that requirement every call on every intercepted line would have to be recorded and the recording retained. In some cases the call would have to be translated. There could be a need to transcribe verbatim the content of a number of such calls. To meet those obligations the intercept officers would require the assistance of a team of vetted translators and transcribers. Although the prosecution would only rely on what it considered relevant, it is likely that the defence would seek access to much of the unused material retained by the prosecution.

12.103 The volume of material thus requiring recording and retention and possibly translating and transcribing would be vast. Some investigations may involve interception of a large number of telephone lines over many months. The task of complying with the disclosure regime under the present system, or any system akin to it, would make the use of the intercept product simply impracticable. The time required to prepare for trial and the length of the subsequent trial in any case where there were extensive records of intercept material would in some cases be greatly protracted even beyond the lengths seen in the criminal justice system today.

12.104 It is argued by those who favour the use of intercepted material that defenders would not seek to explore in any detail the full circumstances of interceptions carried out because to do so would be to highlight the extent of the interest being shown by the interceptors in their clients. That argument would not apply to abuse of process applications heard by judge alone, and in my view it is a somewhat optimistic expectation in relation to trials before juries. It is also to be remembered that in many cases involving intercept material there will be a number of defendants, for some of whom it may be an advantage to introduce evidence involving others in the dock.

12.105 In Holland the Courts permit the use of material obtained by interception of communications as evidence in criminal proceedings. However, the process of criminal investigations and trials is very different there. Interceptions are permitted only by order of the court. The interception is undertaken not by investigators but by the phone service providers. All the resulting voice material is then provided to the investigators on CD-ROM or

optical disc. This procedure is perceived to provide the best assurance of the integrity of the intercept material and to ensure that those under investigation cannot avoid interception of their calls.

- 12.106 All the material obtained though interceptions is retained by the investigators and provided to the prosecution. All the conversations are listed. Only those conversations considered by the prosecution to be of relevance are transcribed verbatim. All the voice material is available to be shown to the defence if necessary. Where issues concerning voice identification arise the court will accept evidence of identification from the officer who has listened to the conversations and he will have the recorded voice calls available as corroboration.
- 12.107 The Dutch authorities acknowledge that even this system is very expensive, especially where translations are required, but they consider this to be an acceptable price to pay for having the evidence available. Equally, they recognise that there may be problems when the intercepted callers use codes and slang, but in their judicially controlled system those difficulties are not insuperable. The inquisitorial investigation and trial process in Holland is however very different to accusatorial system operating in the United Kingdom.
- 12.108 In the United Kingdom the statute, the Code of Practice and the stringent supervision presently provided by the ICC combine to assure the existing system so far as is practicable. For so long as our criminal system remains accusatorial I am of the view that there is no realistic scope for the use of intercept material for evidential purposes in criminal proceedings.
- 12.109 The statute, the Code of Practice and the stringent supervision presently provided by the ICC combine to assure the existing system so far as is practicable. For so long as our criminal system remains accusatorial I am of the view that there is no realistic scope for the use of intercept material for evidential purposes in criminal proceedings. That said, it is vital that prosecutors continue to be vigilant to ensure that the provisions of Section 15 are complied with. Where material is made available to them they should not accept at face value an assertion by the intercept officers that there is nothing in the material which has been destroyed which might undermine the prosecution case or assist the defence. Prosecutors must be prepared to challenge and probe such an assertion carefully and fearlessly.
- 12.110 For their part, intercept officers and those supervising them must always be vigilant to ensure that any material which may have the capacity to undermine the case for any subsequent prosecution or assist the defence in such a prosecution is retained. They are urged by the ICC to err on the side of caution in this respect, and he

assures us that he has no reason to believe they do not act in accordance with that advice. The intercept officers must be open with the prosecutors: on them is reposed a heavy duty. The integrity of the system relies on their honesty.

- 12.111 I have received some very limited anecdotal accounts which suggest that intercept officers have not always been as open and frank with prosecutors as might be hoped. That anecdotal evidence, however, related to events taking place a considerable time ago and I have heard no suggestion that in the recent past there has been any secrecy or attempts to hold back information from prosecutors.
- 12.112 There is however a lacuna in the present regime. Where all intercepted material has been destroyed there is no procedure for the prosecutor to be assured that nothing the intercepters have heard undermines the prosecution case or assists the defence. Only where some material still exists will the prosecutor even know of the fact of interception. However, there may be exceptional cases where a defence case is advanced which could not reasonably have been anticipated by the intercepting officers at the time of intercept: any material assisting that case is likely to have been destroyed as having no possible relevance and the prosecutor will know nothing of it nor have any opportunity to learn of it.
- 12.113 HM Customs & Excise recognise that lacuna and have addressed it, notwithstanding that the Code of Practice does not require them to do so. In HMCE cases prosecuting counsel and the case lawyer are informed before the trial that the case is one where intercepts were used, whether or not any intercept material survives. A conference then takes place attended by the intercept officers, the SIO, prosecuting counsel, the case lawyer and the Disclosure Officer. All Customs case lawyers and Disclosure Officers have now been vetted to the necessary security clearance to permit their presence at such a meeting. At the conference any surviving material is inspected by the prosecutor. An assurance is given that no, or no further, material exists because it has been destroyed in accordance with RIPA and that consideration has been given to the prosecution case summary and defence case statements. The conference further considers whether any material still extant or any material previously held is inconsistent with the prosecution case or could assist the defence. The attendance of the Disclosure Officer, who should have a very extensive knowledge of the details of the case, is designed to provide an extra safeguard and back-up for the prosecutor. I am informed both by Customs investigators and by prosecuting counsel who have attended such conferences that the system works well.
- 12.114 It is at least arguable that in all prosecutions where interception has played a part in the detection of the crime, the prosecutor should be informed of that fact and thereafter follow the procedure set out in Paragraph 28 above even where there is no longer any retained

material. There may be sound operational reasons for rejecting this suggestion but in my view it should be examined.

12.115 *I recommend that consideration is given to amending the Code of Practice to make provision for the assurance of the prosecutor where all intercepted material has been destroyed.*

12.116 From my discussions with judges I concluded that the provisions of the Act in relation to the obtaining and use of intercept material is not universally understood. Judges are unlikely to encounter cases in which intercept material has played a part in the investigation often and their experience of the problems and pitfalls surrounding it may be small.

12.117 *I recommend that consideration is given to including the topic (RIPA Part 1) within the syllabus of the Judicial Studies Board refresher course on criminal law.*

(iv) Allocation of Judges

12.118 Many of the cases prosecuted by HMCE are properly described as serious and complex. Such cases call for skilful and effective management by the trial judge if the trial is to be fair both to the prosecution and to the defendants.

12.119 Recognising this, a number of those to whom the Review Team spoke suggested that there should be a ticketing system for judges in the same way as judges are presently ticketed to try serious sexual offences, attempted murder and murder, and serious fraud trials. The object of such a system would be to ensure that HMCE cases of particular complexity and difficulty were tried by judges with a recognised expertise in such work. The ticketing system has obvious strengths but a recent development relating to the allocation of cases makes it unnecessary to introduce a further strand to the present arrangements.

12.120 The Court Service has introduced a scheme designed to assist Listing officers and Resident Judges at all Crown Court centres when decisions are made allocating trials to judges. The introduction follows extensive consultation by Lord Justice Judge, the Senior Presiding Judge, with the DPP, the Criminal Bar Association, and the Criminal Law Committee of the Law Society. The scheme will apply to cases which have unusual elements of complexity or sensitivity and which are beyond the knowledge and experience of a typical Circuit judge or Recorder.

12.121 The intention is to afford either the prosecution or the defence the opportunity to have enhanced input into the allocation process in certain limited cases. In summary, the scheme permits the defence or the prosecuting authority to provide additional information about particular cases to the relevant Presiding Judge in order to assist him

or her in the role of supervising the allocation of cases within the Circuit over which he or she presides. Use of the scheme is optional.

12.122 Either the prosecutor or the defence may write to the Presiding Judge identifying particular characteristics of a case which the writer considers makes it unusually serious, complex or sensitive. The features of complexity and seriousness may be apparent on the face of the papers, for example:

- trials involving cyber crime;
- a requirement for particular accountancy or numerical skills; and
- complex international or cross-border crime.

12.123 There may additionally be complexities not apparent on the face of the papers available to the allocating Court but known to the parties, such as:

- difficult abuse of process arguments;
- Public Interest Immunity;
- covert surveillance; and
- complex intelligence-led investigations.

12.124 A number of HMCE prosecutions can be expected to contain a constellation of such features so that the case could properly be described as exhibiting unusual elements of complexity or sensitivity. The purpose of the letter to the Presiding Judge of the Circuit is a request that he or she steps in to determine the allocation decision because of the special features of the case.

12.125 The letter must be submitted before a judge has been allocated to the case: it is not an appeal against an allocation decision already made. The content of the letter must, of course, be accurate, up to date and reliable. The letter must be disclosed to the defence at the same time as it is sent to the court save in exceptional circumstances. Where the letter is withheld it should say so.

12.126 It will be for the Presiding Judge to determine whether the case is of such seriousness or complexity that he or she should step in and determine the allocation of the judge.

12.127 The use of the new scheme should ensure that where possible such unusually complex cases are tried by judges possessed of the particular expertise and experience necessary. In my view the scheme provides an effective and flexible management tool which should assist both prosecution and defence. It obviates any need to consider further the introduction of the ticketing of judges to try such cases.