DISCLOSURE IN MAGISTRATES' COURTS

A PRELIMINARY ASSESSMENT OF ALTERNATIVE APPROACHES

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C O N T E N T S

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I. INTRODUCTION

One of the recurring themes in research on aspects of case processing in magistrates' courts is the relevance of disclosure practices. As a general concept, advance disclosure of the prosecution case has many admirers: it is believed that such disclosure will help to expedite the resolution of cases, and will help the system to operate more fairly and less expensively. When both sides have a good sense of the prosecution case at an early point, cases in which there is no real dispute about the facts can often be resolved without a contest. And, in cases where there is a real dispute, advance disclosure can help narrow the issues that need to be addressed at a court hearing.

How should the broad agreement on this general concept be translated into practical guidelines governing disclosure in cases that come before the magistrates' courts? Many proponents of disclosure have argued that the best way to do this is simply to require the prosecution to provide the defence with copies of the written statements of prosecution witnesses. There are, however, a number of persons who are sceptical about the desirability of imposing a broad requirement for mandatory disclosure of prosecution witness statements. The sceptics maintain that such a requirement will require major changes in operating procedures in many police forces (only about half of the forces now routinely take and prepare statements in all cases), will introduce unnecessary paperwork and complexity, and will turn out to be yet another cause of delay. They also observe that a great deal of disclosure already takes place informally and that some magistrates' courts have developed more formal mechanisms--various types of pretrial review schemes--that appear to be effective in facilitating disclosure by both sides without imposing heavy administrative burdens on police and prosecuting solicitors.

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During the past year, the London office of the Vera Institute of Justice has been involved in a small-scale research programme aimed at developing information about alternative approaches to the problems of providing disclosure in magistrates' courts. The central focus of this research has been upon pilot schemes designed to test two contrasting approaches to mandatory disclosure of the prosecution case. The first, which got underway in Newcastle-upon-Tyne in November 1982, involves disclosure of a summary of the prosecution case. The second, which commenced operation in H District of the Metropolitan Police (involving cases heard initially at Thames Magistrates' Court) in August 1983, provides disclosure of the statements of prosecution witnesses. In addition to the work on the two pilot schemes, the research has also involved visits to several magistrates' courts in which other types of disclosure schemes are in operation or under consideration.

Neither of the two pilot schemes has been underway long enough to draw firm conclusions about their effectiveness or impact, although some preliminary findings are now available on the Newcastle scheme. However, the process of detailed planning and monitoring of the two pilot schemes, coupled with observation of a range of other approaches to the problem, has been helpful in identifying issues that may warrant consideration in formulating future policy with respect to disclosure. And, somewhat unexpectedly, it has also brought to light some information about patterns of case processing in magistrates' courts and Crown Court that would seem to warrant further inquiry. Succeeding sections of this paper provide a brief review of the background to current controversies regarding disclosure (Section II); discuss the possible objectives of disclosure and the ways in which different types of disclosure schemes--including the two pilot schemes--work in practice (Sections III and IV), and present some tentative conclusions concerning policy development and future research (Section V).

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II. BACKGROUND - THE CONTEXT OF THE CURRENT DEBATE

A. The Report of the James Committee, 1975

When the James Committee undertook its examination of the distribution of business between the Crown Court and magistrates' courts nearly a decade ago, one of the areas upon which it focused particular attention was the extent to which the defendant was entitled to information about the prosecution's case. The contrast was striking: at a trial on indictment, the defendant could see the statements of all prosecution witnesses in advance, but there was no right to any sort of advance disclosure for cases tried summarily. The situation of defendants triable either summarily or on indictment seemed particularly anomalous: if the accused person elected the more expensive Crown Court procedure, he would get full disclosure, but if he elected summary trial, he would not. Moreover, this choice would have to be made without any real knowledge of the prosecution's case; there was no right to disclosure prior to the mode of trial decision. The James Committee felt that a greater measure of disclosure in magistrates' court proceedings "would make a significant contribution toward preventing cases being committed for trial unnecessarily."[1] And, regardless of the extent of that contribution, the Committee took the view that such disclosure was a matter of elementary fairness: it was "most desirable in the interests of justice that defendants should be fully acquainted with the case against them as far as it is practicable to achieve this".[2]

The James Committee's proposed approach to disclosure, which is set out in considerable detail in the report, was to give defendants charged with offences in the "intermediate category" (i.e., triable either summarily or on indictment) a statutory right to receive, on request, copies of the statements of witnesses on whose evidence the prosecution proposed to rely.

Importantly, the defendant (or his solicitor) would have the right to receive the statements before giving consent to summary trial, on the theory that this would enable him to make a more informed and responsible election of mode of trial.[3]

The Committee was emphatic that providing written statements was decidedly preferable to providing a summary of the facts. However, it recognised that in some cases--e.g., where the prosecution witnesses are police officers who, when giving evidence, would rely on the notes contained in their notebooks, or where a witness had refused to make a formal statement--written statements are not prepared. In these circumstances, the Committee felt that a short summary of the facts on which the prosecution relies should be supplied to the defence.[4]

B. The Legislation: Section 48, Criminal Law Act 1977

The James Committee recommended that the defendant's right to the prosecution's statements should be given statutory backing, via legislation that authorised the making of rules governing advance disclosure.[5] This was the course that Parliament followed in the Criminal Law Act 1977, Section 48 of which authorises the making of rules for magistrates' courts dealing with the furnishing of information by the prosecution to the defence.[6]

Section 48 is very broadly drafted. It enables the prescription by rule of the offence or classes of offences to which a disclosure requirement would apply, as well as the method (or methods) of disclosure to be followed. The rules may require that the information provided to the defence can include all or only a prescribed class of the facts and matters of which the prosecutor proposes to adduce evidence; may require that disclosure be made in all cases or only on request; may exempt facts and matters of any

prescribed descriptions from the disclosure requirement; may make the opinion of the prosecutor material for the purposes of any such exemption; and may make different provision with respect to different offences or offences of different classes. Further, the statute explicitly provides that a prosecutor's non-compliance with a disclosure requirement imposed pursuant to Section 48 is not a ground for appeal.

The framework established by Section 48 would seem to permit disclosure to be made in any of a variety of ways--by copies of witness statements, by copies of summaries, by inspection of documents, by oral summary of the prosecution case, or by a combination of two or more such methods. And, if rule-makers thought it desirable, it would seem that disclosure by different types of methods could be authorised for different situations, taking into account factors such as the type of offence involved, the stage of the proceedings at which the disclosure would be made, the availability of particular kinds of evidence and the desirability of expeditious resolution of matters in magistrates' courts. The statute says nothing at all about disclosure by the defence. Reciprocal disclosure--a mutual exchange of information between prosecution and defence--is, however, a major objective of some of the pretrial review schemes that have been developed in recent years. It is doubtful that, in the absence of a specific statutory authorisation, rules requiring disclosure by the defence could be made.

The potential costs of implementing a requirement for mandatory disclosure of the prosecution case were a matter of concern at the time Section 48 was enacted. At the Second Reading debate on the Criminal Law Bill on 3 May 1977, the Minister of State, Home Office (Mr. Brynmor John), commented on some of the implications with regard to costs and organisational impact:

"The calculation that we have received is that for offences

> which are triable either-way if information about the prosecution case were disseminated it would cost £4 million. It would also take up, I understand, a great deal of manpower. While we concede the principle, there is no realistic prospect on both manpower and financial grounds that this can be implemented quickly." 7

C. The Work of the Royal Commission

In June 1977, as the Criminal Law Act 1977 was completing its passage through Parliament, the Government announced that it would set up a Royal Commission on Criminal Procedure, to undertake a comprehensive review of the whole criminal process from the start of the investigation to the point of trial. Since any type of disclosure scheme will be intimately affected by (and will have impacts upon) the way police investigation and ensuing prosecutions are conducted, there is a sense in which virtually all of the recommendations contained in the Royal Commission's 1981 report may have a bearing on how disclosure in magistrates' courts should be structured. Four of the recommendations seem especially relevant:

1. Establishment of an independent prosecution service [8] Regardless of precisely how a prosecution service is organised, the existence of such a service will almost surely increase pressures for early preparation of witness statements by the police. A law-trained Crown prosecutor, charged with responsibility for, inter alia, the continuation of a prosecution after an initial decision to bring a matter before the court, will want to know what the evidence is. Interviews with prosecuting solicitors make it clear that they vastly prefer to see statements rather than summaries. However, they acknowledge that preparation of witness statements is time-consuming and may prove to be unnecessary in a significant percentage of cases. The presence of a prosecutor in a case is also likely to increase the frequency with which some type of disclosure takes place, wholly apart from legal requirements. Lawyers are used to discussing matters that are in dispute with the lawyer on the other side of the case. It is clear that a great

deal of informal disclosure currently takes place in cases where the prosecution is being handled by a lawyer and the defendant is legally represented.

2. Establishment of criteria for prosecution The Royal Commission's recommendation that criteria be established for the exercise of the discretion to prosecute[9] has been implemented through the issuance of guidelines on this topic, formulated by the Attorney General. The guidelines adopt the test used by Director of Public Prosecutions: the prosecutor should satisfy himself that there is a reasonable prospect of a conviction; the existence of a prima facie case is not of itself sufficient.[10] The guidelines stress the idea that whenever there is room for doubt, "every effort must be made to ensure that the decision is reached dispassionately after due deliberation, and by a person experienced in weighing the available evidence".[11] The implications of these guidelines for police practices regarding investigation and initial preparation of cases are significant: they highlight the importance of the initial decision to charge a defendant with a criminal offence, increase the likelihood that a senior officer will be involved in the decision in cases where there is any question as to whether a prosecution should be instituted, and provide a structural incentive for taking and preparing witness statements at an early point in the process.

3. Disclosure of the prosecution case Noting that no-one had suggested that disclosure by the prosecution, when practicable, was not desirable, the Royal Commission endorsed the principle that such disclosure should take place in cases tried in magistrates' courts.[12] The Commission did not make any recommendations concerning the use of statements vis-a-vis the use of summaries for purposes of disclosure. It did, however, note that in some

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police forces a short form summary of the case was commonly prepared for the use of the prosecuting solicitor, and observed that it might be feasible merely to copy the summary for disclosing it to the defence. The Commission felt that requirements for disclosure should operate only on request of the defendant, but made no distinction with respect to the applicability of the principle in different types of offences triable in magistrates' courts.[13]

4. Disclosure by the defence The Commission rejected the notion of a requirement of general disclosure by the defence. However, noting that advance notification of intention to introduce evidence of an alibi is already required in trials in Crown Court, the Commission recommended that the principle of such advance notification be extended to other types of defences which could take the prosecution by surprise.[14] If the recommendation is to be implemented for magistrates' court proceedings, it presumably will require legislation, as it seems doubtful that it could be done through the rule-making power conferred by Section 48 of the Criminal Law Act 1977. To some extent, of course, the question of how to deal with the issue of disclosure by the defence may depend in part upon how rigid the requirement of prosecutorial disclosure is made by rule. It would seem logical that, as the scope of what must be disclosed by the prosecution is increased, the incentive for reciprocal disclosure by the defence will decrease.

D. The Home Office Working Party

Shortly after Section 48 was enacted, a Home Office Working Party was established to consider ways in which implementation might best be accomplished. One of the major problems was that procedures for investigating cases and preparing them for prosecution varied widely among the 43 police

forces in the country. Some of the forces took and prepared witness statements routinely at the outset of a prosecution, but about half of them did not. A survey conducted for the Working Party in 1980 showed that in only 21 of the forces was the prosecution evidence always available in the form of witness statements at the time of taking a plea. In the other forces, the evidence of at least some of the witnesses would be available only in the form of notes in a police officer's notebook or in a case summary prepared by the officer handling the case.[15]

Estimates of the costs of various approaches to disclosure (which would be based upon these different case preparation practices) varied widely. The costs of a disclosure scheme based on summaries were estimated at between £1.5 million and £4.5 million. The costs of a scheme based upon statements were estimated at between £3.5 million and £16.25 million. These estimates related only to the cost of disclosure in either-way cases. The Working Party did not attempt to consider the costs that might be generated by extending advance disclosure to purely summary offences, nor did it try to estimate offsetting savings that might result from systemic changes produced by a disclosure requirement.

In addition to the concern about costs, there were differing views within the Working Party regarding the practical feasibility of differing approaches to disclosure and about the likely impacts of disclosure upon the operation of the criminal justice process. Any type of approach based on statements would seem to have major resource and procedural implications for forces that were relying on summaries and not routinely preparing statements. And, conversely, an approach based on use of summaries—if made applicable on a national basis—would require additional work not already being done in the forces where witness statements were regularly taken and prepared but where summaries were not prepared.

Under the circumstances, the Working Party concluded that it would be desirable to undertake several pilot studies. Through such experiments, it would be possible to learn about the problems involved in implementing a disclosure scheme, to test the validity of some of the initial cost estimates, and to obtain a sense of possible impacts of particular types of disclosure schemes upon election of Crown Court trial, rates of guilty pleas, and delays.

The Working Party included representatives of the Northumbria Police and the Metropolitan Police, and it was agreed that both of these forces would consider participating in pilot schemes. The Home Office arranged for the Vera Institute of Justice to assist in the development and evaluation of the pilot schemes.

E. Development of Pretrial Review Schemes in Magistrates' Courts

In many areas of the country, informal disclosure involving solicitors representing prosecution and defence has long been a common practice. More recently--and especially during the past two or three years--there has been a trend toward providing a more formal structure for such disclosure, particularly in cases where a not guilty plea is entered. It was agreed that, to provide a context for evaluating the two pilot disclosure schemes, it would be useful to take account of the approaches to disclosure that had developed outside the statutory framework, including both methods of providing early disclosure (prior to mode of trial decision) and methods of providing disclosure after entry of a not guilty plea.

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III. DISCLOSURE IN PRACTICE: VOLUNTARY SCHEMES

A. Early Disclosure of a Summary: The Colchester Experiment

One of the earliest experiments with an approach to structured disclosure of the prosecution case was undertaken in Colchester, beginning in the fall of 1980, as part of a broader programme designed to reduce waiting times in the Colchester Magistrates' Court. Prior to the start of the experiment, most defendants granted police bail in Colchester were scheduled to appear in court approximately four weeks after their arrest. At the time of the arrest, only a relatively simple charge sheet--containing a legal description of the offence, basic personal information about the defendant, and little else--would be completed by the police. During the four week interval between charge and first appearance, the officer involved in the case would obtain full statements of all witnesses, prepare a statement of his own involvement in the case, get all of this material typed and assembled together with any reports (on the defendant's prior criminal record and any laboratory analysis), and send the full file to the county prosecuting solicitor. At the first court date, a substantial portion of these cases (approximately two thirds to three-fourths) resulted in a guilty plea. If a not guilty plea was entered, or if the defendant needed to consult with a solicitor, the court would ordinarily adjourn the matter for approximately four weeks. Thus, all police bail cases required a minimum of four weeks from arrest to disposal; those in which the defendant was not prepared to plead guilty at first appearance consumed a minimum of eight weeks.

Under the experimental programme, the period of police bail was reduced from four weeks to seven days in all cases except a small percentage that the police classified as "complex". Instead of a full file containing

typed statements of all police officers and civilian witnesses, the police would prepare an abbreviated file consisting of a short handwritten summary of the case prepared by the arresting officer plus a statement from the complaining witness and the transcript of any statements of the defendant made under caution. All of these documents would be made available by the prosecuting solicitor to a defence solicitor on the morning of the defendant's first appearance. If a defence solicitor felt that the facts were unclear from these papers, a short adjournment (often one week, instead of the four weeks that had previously been routine) would be granted to enable the solicitor to make further investigation and take instructions prior to the defendant being asked to make a mode of trial decision and enter a plea. A duty solicitor scheme was instituted in the court as part of the programme, and the court emphasised to defendants that the duty solicitor was available for consultation--sometimes to the point of requiring the defendant to consult the duty solicitor before accepting a guilty plea.

The Colchester experiment was found to have a number of positive effects. The time of arrest to first appearance was markedly reduced, with a consequent reduction in overall times from arrest to disposal. The percentage of defendants entering not guilty pleas at first appearance stayed about the same after the experiment started, but the percentage of defendants entering no plea at first appearance dropped sharply. The percentage of guilty pleas at first court date increased somewhat, rising to a high of 81% during the January-March period of 1981. For the police, the expense and manpower costs of preparing full files, with typed witness statements, was avoided in the cases when guilty pleas were entered at first appearance.[16]

Whilst there may be some ways in which the situation in Colchester is unique (case volume, for example, is appreciably lower than in densely populated urban areas), the experiment has some important implications for policy

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development with respect to disclosure. In particular, it suggests that it is operationally feasible to develop a system for rapid production of basic information about the prosecution case--including the statements of key witnesses and police officers involved in the case--in a high proportion of cases that are triable summarily.* In Colchester, this type of information has proven to be an adequate basis for making initial decisions about mode of trial and plea at a very early stage in the proceedings, with significant savings in police costs and marked reduction in delays.

B. Disclosure of Witness Statements after a Not-Guilty Plea has been Entered: The Nottingham Model

During the past several years, there has been a proliferation of pre-trial review schemes, in magistrates' courts, designed mainly for use in cases where the defendant has pleaded not guilty. The Nottingham scheme, which has been the subject of several articles and papers,[17] is perhaps the best known, but similar procedures are followed at a number of courts. The precise mode of operation of these schemes varies somewhat from court to court, but basically they involve the holding of a conference at the court--involving the prosecuting solicitor, the defence solicitor, and a member of the court's staff--several weeks before the scheduled trial date. At the conference, each side outlines its case, and the prosecutor will give the defence solicitor an opportunity to know precisely what its witnesses have said in statements.

In Nottingham, the pretrial review (PTR) is set for a Thursday afternoon approximately four weeks after the not guilty plea is entered and four weeks before the date scheduled for trial. A single prosecuting solicitor will be responsible for handling all of the PTR's to be conducted that afternoon (typically 20-30 per afternoon), and will be familiar with the contents

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* Although the police in Colchester prepare a summary of the case, this could just as easily be presented in the form of a statement.

of all of the files. At each PTR conference, the prosecutor orally outlines the prosecution case to the defence solicitor, reading or paraphrasing salient portions of the statements of civilian witnesses. He will also indicate, at this time, which witnesses the prosecution may wish to call in person and which statements they would like to use at trial pursuant to the provisions of Section 9 of the Criminal Justice Act 1967. He then hands the file over to the defence solicitor, with the understanding that the solicitor will read only the marked portions of the file. After the defence solicitor has had a chance to study the file (taking longhand notes or using a dictating machine to mark relevant portions if he wishes), the conference is resumed. Whilst the nature of the discussion will vary from case to case, it typically involves a fairly candid discussion of the substance of the case on both sides. The possibility of a disposal without a contest--through a guilty plea, withdrawal of evidence, bindover, etc.--will be explored. If it seems likely that a contest will be held, decisions are made about which witnesses will be necessary and how much time the case will take. The conference provides an opportunity to identify issues of law that may arise at the trial (thus alerting the clerk's office in advance to do research on these points), and to narrow the facts that are in issue. Prior to the PTR, potential witnesses will have been notified of the scheduled trial date, and asked if they will be available then. If there are problems with that date, an alternative can be arranged and confirmed with the court's listing officer at the time of the PTR.

The evidence so far available on the effects of the pretrial reviews in Nottingham seems to be very positive. Practitioners on both the prosecution and defence side (as well as court staff) find them useful. In a significant percentage of cases the PTR's result in pleas being changed to guilty (sometimes to a lesser charge) or to evidence being withdrawn by the prosecution. In other cases, they serve to focus the attention of the parties

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on the real areas of dispute, help avoid the unnecessary calling of witnesses, and may shorten the time actually required for the hearing. From the court's standpoint, the PTR's have the virtue of providing firm advance notice of which scheduled contests will go ahead as originally set and which will not. The problem of last-minute collapses is thus minimised, and the court is able to make more efficient use of available court time.[18]

The Nottingham approach to pretrial disclosure has been criticised on the grounds that it is a voluntary, non-mandatory practice; the prosecutor is not required to provide disclosure.[19] In practice, however, the lack of a binding legal obligation does not seem to be a problem affecting the pretrial review process. In Nottingham (as in other areas where such schemes have been set up), disclosure is made routinely in the cases where a defendant appears for the scheduled conference. Nevertheless, the question of legal obligation may be important: the nature of the disclosure that takes place may be affected by what is mandatory and what is voluntary.

The voluntary, non-mandatory, nature of the disclosure scheme in Nottingham is closely related to the scheme's emphasis on reciprocal disclosure, and this has been a target of some criticism. While the main burden is on the prosecutor, it is also expected that the defence solicitor will indicate the substance of the defence. Not all defence solicitors are entirely comfortable with feeling under an obligation to discuss their side of the case with the prosecution, but--in the absence of a rule <u>requiring</u> disclosure by the prosecutor--the defence surely derives net benefits from participating in the PTR. Supporters of the scheme believe, however, that some measure of disclosure by the defence is desirable, and that a one-sided requirement for prosecutorial disclosure alone would result in a loss of many of the benefits that result from the pretrial reviews. There might still be other incentives for the defence solicitor to discuss his side of the case with the prosecutor, but it is at least possible that the dynamics of the situation would be

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different if the defence had a legally enforceable right to see the prosecution's witness statements.

Some concern has also been expressed about the focus of the Nottingham scheme upon disclosure after the entry of a not guilty plea. In a high proportion of cases decisions concerning plea (and mode of trial, in either-way cases) are critical, and it would surely be helpful to the defence to have some sense of the prosecution case before making them. Particularly in the absence of information about the prosecution evidence at an early stage, it is possible that the availability of disclosure after entry of a not guilty plea may serve as an incentive for the defence to plead not guilty in order to see the prosecution witness statements. In Nottingham there is a sense that this may happen in a few instances, but that it is not a major problem.

The Wolverhampton Magistrates' Court, which has adopted a slightly modified version of the Nottingham scheme, has addressed the problem of disclosure prior to mode of trial and plea by arranging for "informal" disclosure, by the prosecutor to the defence solicitor, to take place at the time of the defendant's first court appearance. As in the Colchester experiment, the first appearance occurs relatively swiftly (six working days after charge) in cases where the defendant is on police bail. The prosecutor will not ordinarily have a full file at this stage, but it is expected that the information will be sufficient to enable defence decisions to be made concerning mode of trial and plea in a high proportion of cases. If the plea cannot be ascertained, or if the defendant is unrepresented, the case is adjourned for 14 days to enable this to be done.[20]

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C. Disclosure of Witness Statements Prior to Mode of Trial Decision: The Scheme in Leeds

Although courts that operate a Nottingham-type pretrial review scheme may also (as in Wolverhampton) make an effort to see that the defendant has some information about the details of the prosecution case at an early stage, the schemes themselves do not address one of the central points made by the James Committee: the desirability of enabling a defendant in an either-way case to know the substance of the case against him before being asked to make a mode of trial decision.

This concern has, however, been taken into account in the PTR scheme now in operation in Leeds, where an effort is made to provide full-file disclosure prior to the mode of trial decision in cases that are not relatively straightforward guilty pleas. In Leeds, police bail is ordinarily for a period of not more than two weeks. By the time of the defendant's first court appearance, the police have prepared a "mini-file" which typically contains the statement of the complainant or victim plus a short summary of the case. This is sufficient for prosecution of a clear-cut guilty plea, and if a defence solicitor wants a look at the file he can ordinarily see it on an informal basis.

If, at this point, the defendant intimates that a committal or not guilty plea is contemplated, the case is adjourned--usually for a period of about six weeks--to enable all the witness statements to be taken, typed, copied, and served on the defence. The next court date is an omnibus proceeding beginning with a PTR conference that involves the prosecuting and defence solicitors. At the conference, there is opportunity for consideration of a guilty plea, bindover, withdrawal of prosecution evidence, or other uncontested disposal. If there is going to be a contest, agreement can be reached on what witnesses are necessary and what legal and factual issues are in dis-

pute. Following the conference, the mode of trial decision is made formally before the magistrates, a plea may be taken, and--if necessary--a date is fixed for a contested summary trial. If the defendant elects jury trial, the committal can go ahead almost immediately, because a full file has been prepared by the prosecution.[21]

There are obviously some attractive features to the Leeds scheme. It gives the defendant a full view of the prosecution case prior to the mode of trial decision; it provides a structure for the informed consideration of the case (and of possible pleas or other resolution of the case) at a relatively early point in the process; it means that, in cases where committal is a strong possibility from the outset, committal can take place promptly; and it helps in fixing firm trial dates for summary trials and in narrowing the issues in those cases. One possible disadvantage is that the prosecution may have to prepare full files unnecessarily in a significant number of cases, because the defence solicitor would like to see all of the witness statements before advising his client concerning a plea. Whilst there is a feeling that this does occur sometimes, the system of preparing a mini-file (and disclosing it on request) seems to work well enough to keep this from happening too often. Clearly, however, the adequacy of the mini-file is an important element of the scheme: the more adequate the mini-file (in terms of presenting the substance of the prosecution case) the smaller should be the number of cases for which a full file will have to be prepared for a PTR.

A second possible drawback to the Leeds scheme is the time it takes to progress from arrest to the making of a mode of trial decision in any case where a committal or a not guilty plea is a possibility. At a minimum, this period will be at least eight weeks (two weeks on police bail plus six weeks

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from first appearance to PTR). If, as is often the case, a defendant is not represented at first appearance, an additional two or three weeks will be required. And if as is sometimes the case, statements have not been served in time for the PTR, the PTR will have to be adjourned to enable this to be done.

D. Informal Disclosure: Practices in Portsmouth

Although formal or semi-formal pretrial review schemes are now operating in a number of magistrates' courts, they are by no means common. On the contrary, in most places disclosure is unformalized and unsystematic. A great deal of informal disclosure undoubtedly takes place, particularly when solicitors are involved on both the presentation and defence sides, but it is not possible to describe the range of variation that exists.

In at least one urban area--Portsmouth--the possibility of establishing a formal pretrial review system, with pretrial reviews to be held at the magistrates' court in cases where a not guilty plea has been entered, has been considered but not adopted. Solicitors in the Portsmouth area who examined the possibility of a PTR scheme in that court felt that the informal arrangements already in existence were satisfactory; indeed, were preferable to the addition of another step in the process that would involve the court. They recognized, however, that some of the purposes served by PTR schemes such as those in Nottingham and Leeds (including giving the court information about whether the case could be resolved without a contest and, if a contest was necessary, providing information about witnesses and time requirements) were not being met under the totally informal system already in existence. Their proposed solution was to provide that a short one-page form would be filed with the court in advance of the date scheduled for the contest in all cases where a represented defendant had pleaded not guilty. The form, signed by both the prosecuting and the defence solicitors, contains space

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for the following information:

1) Number of witnesses to be called in person
   a) for prosecution
   b) for defence

2) Estimated time of hearing
   a) by prosecution (for prosecution case only)
   b) by defence (for defence case only)

3) Any unusual points of law to be argued, with authorities
   a) by prosecution
   b) by defence

4) Whether an interpreter is required? (Yes/No)
   (Unless stated, the prosecution will provide the interpreter if one is needed.)

5) Any other unusual features which should be known by the Clerk to the Justice
   a) by prosecution
   b) by defence

Although the one-page form provides only a bare minimum of information about the case, it is about all that the court needs for its scheduling purposes. Additionally, the fact that the form is to be completed by both the prosecution and the defence means that there is a built-in reason for the solicitors in the case to communicate with each other, thus providing an opportunity for broader disclosure without specifying what must be disclosed. In fact, the general practice in Portsmouth has been one of rapid case preparation and broad disclosure by the prosecution. Abbreviated files (contining at least a summary, and often the statements of key witnesses) are prepared within 7-10 days in most cases and within 21 days in virtually all cases. The contents of these files will ordinarily be disclosed to defence solicitors upon request, prior to the mode of trial decision. And, in cases where there is a not guilty plea, all statements will ordinarily be disclosed upon request.

The new one-page form has been in use in Portsmouth since February on an experimental basis. The experiment is being monitored by a three-person committee, consisting of representatives of the prosecuting solicitor, the defence solicitors who participate in the Portsmouth Duty Solicitors' Scheme, and the Justices' Clerk. After three months, there was a sense that the system had had several positive effects. Communications between the prosecutors and the court were thought to have improved considerably, particularly with respect to notification to the court about the collapse of scheduled contests. Communications between prosecution and defence were also thought to be better: discussions were taking place earlier in the process, prosecutors were more frequently taking the initiative in contacting the defence, and there was more use of agreed-upon statements pursuant to Section 9 of the Criminal Justice Act 1967. The main problem was that the form had not been filed in about a third of the cases.

Particularly if the problem of the form not being filed routinely can be overcome, the Portsmouth approach has a number of attractive features, especially in a system where (as in Portsmouth) waiting times are already relatively short. It avoids one court appearance, means that a court room is free for other use at the time the PTR would otherwise be held, and allows greater flexibility for the solicitors on both sides to use their time. Communication between solicitors for the prosecution and defence can take place by mail, by telephone, or in person, or by a combination of these methods, without the necessity for scheduling a court date. The court gets the information that it needs for scheduling purposes (provided that the form is filed far enough in advance of the scheduled

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trial date), the solicitors have a natural opportunity for discussion of the case, and costs to the Legal Aid Fund--for travel to and from the PTR and participation in it--are saved.[22] Aside from the problem of failure to file the form, the main drawback to the Portsmouth approach would seem to be that because of its informality, there may be considerable variation in the nature of the disclosure that takes place. The extent of actual disclosure, by both prosecution and defence, is likely to vary with the personalities and practices of the solicitors involved. It should also be noted that this approach (like the more formal PTR schemes) does not address the problem of disclosure to unrepresented defendants.

IV. EXPERIMENTS WITH MANDATORY DISCLOSURE: THE PILOT SCHEMES IN NEWCASTLE AND LONDON

The pilot schemes now underway in Newcastle and London, at the instigation of the Home Office Working Party, differ from the schemes discussed in the preceding section in several ways. Most importantly, advance disclosure by the prosecution is mandatory under both schemes. Although the disclosure procedures are not required by law, they are firmly established by policies of the respective police forces: in Newcastle, by a Divisional Order; in the Met, by a Force Instruction. And in both schemes, the disclosure is unilateral; neither scheme has any provision for disclosure by the defence. Further, both schemes are limited to cases involving either-way offences, on the theory that, consistent with the recommendations of the James Committee, development of a system of advance disclosure in this category of cases should receive top priority.[23]

A. Disclosure by Summary: The Newcastle Scheme[24]

The pilot scheme in Newcastle builds upon a system of police preparation of case summaries that was already in existence in the Northumbria Police Force. It provides for disclosure to a defence solicitor, upon request, of a written summary of the evidence against the defendant, together with information about the defendant's prior convictions and a copy of any voluntary statements made by him to the police.

The police in Northumbria have for many years made extensive use of case summaries, and in most either-way cases have not taken or prepared written witness statements unless (and until) it is clear that the statements will be needed for a committal proceeding or contested summary trial. The underlying theory has been that preparing written or typed statements of police officers at the time of charging is an unproductive use of police

officers' time that could be better spent on patrol or other operational duties, since the statements will not be needed if a defendant pleads guilty (as many do) at the first or second court appearance. Although written statements would be prepared at the time of charge in certain kinds of situation (e.g., statement of the victim in an assault case; statement of the store detective in a shoplifting case), these were exceptions to the general practice. In most other types of either-way cases the police officer who made the arrest or was involved in the case in some other way would simply make notes about the case in his notebook. The notebook would be his principal record of the facts of the case and his involvement in it. During the period between the charge and the defendant's first court appearance (which could be only a few hours if the defendant was being held overnight, but was more likely to be about four weeks), the officer would prepare a summary of the facts for use in subsequent court proceedings. If the police expected that the defendant would plead guilty in magistrates' court (as would usually be the case, for example, if the defendant had made a statement admitting the offence), the summary would be typed on what was known as an "Anticipated Plea of Guilty" form. After the defendant had been charged, he would ordinarily be bailed to appear at magistrates' court on a Monday or Wednesday approximately four weeks in the future. In the four-week interim, the officer in the case would prepare the file, including the case summary.

For the pilot scheme, a new A-4 size case file folder was designed, the top page of which provides space to indicate the defendant's name and address, the charge(s), the date of first appearance in magistrates' court, and a summary of the evidence in the case. At the bottom of the page there is space to indicate whether the defendant has made a voluntary statement, and whether he has any prior convictions. Upon written request from a defence solicitor, this front page is photocopied and provided to the solicitor,

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together with a copy of any statements under caution made by the defendant, a list of prior convictions, and a list of exhibits. The summary of the case includes a description of the incident and an outline of the testimony expected to be given by witnesses. The names and addresses of witnesses are not disclosed; they are identified only as "Witness A", "Witness B", etc. Where a police officer has conducted an interview with a defendant, relevant excerpts (e.g., an admission of committing an offence or a denial) are included in the summary, but a full transcript or statement of the interviewing officer is not provided unless the defendant has made and signed a statement under caution. All of the disclosure forms are typed, except in cases involving overnight custody when there was not sufficient time to get the typing done.

In cases where the defendant is on police bail, the police in the sub-division stations endeavour to have the case files prepared and sent to the Newcastle Division's Prosecutions Department at least seven days in advance of the defendant's first court appearance. This allows two to three weeks for preparation of the file and transmission of it to the Prosecutions Department, and enables the disclosure to be made at or before first appearance if a timely request is received. In the relatively small proportion of cases where the defendant is held overnight in police custody, the police try to have the disclosure material prepared and available for disclosure at court the following day.

After approximately six months of planning and preliminary data collection, the pilot scheme got under way in Newcastle on 1 November 1983. Implementation of the scheme caused no disruption of police operations, and there is a noticeable improvement in the quality of the case summaries prepared after the start of the scheme. The costs of implementation have been low; they are estimated at approximately £5,000 per year, consisting principally of time spent on administration of the scheme by personnel already

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assigned to the Prosecutions Department.

However, although the scheme is feasible and inexpensive in the context of the Newcastle arrest-prosecution system, there are some important features of that system that must be borne in mind in considering whether a system for disclosure via summaries should be instituted on a wider basis. First, the system of preparing summaries is well-established in the Northumbria Police Force. Officers have been trained in the preparation of summaries from the outset of their police careers, and the standard of quality is generally good. In many other police forces, even though summaries may be prepared routinely, this is a function which has historically been a low priority; the case summaries prepared in these forces are often very sketchy and incomplete. Thus, it would seem that for police forces that already have a system of preparing good quality summaries, implementation of this type of disclosure scheme would be easy and inexpensive; where such a system is not already in place, training would be necessary and some re-allocation of police functions and resources would be required.

Second, it is important that the pilot scheme operates in a system that allows plenty of time to prepare, type, and vet the summary in most cases. A four week bail period is the norm. If first appearance were to take place more quickly, the pressures on police would be greater than they are under the Newcastle scheme.

Third, the fact that the scheme has proven inexpensive to implement in Newcastle leaves open the question of whether a disclosure system based on summaries is less expensive, in the long run, than one based on statements--at least in either-way cases. Cases in which a represented defendant in an either-way case is committed to Crown Court or elects summary trial and pleads not guilty present particular problems in this connection. These

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cases make up a large portion of the either-way cases in Newcastle--roughly 35-40% of the total, and well over half of the cases in which a defence solicitor is involved. More than two-thirds of them take over four months to complete. In almost all of these cases, the police will obtain and prepare witness statements, and will usually start to do this only after the mode of trial decision has been made and (in cases where the defendant elects summary trial and pleads not guilty) the plea has been entered. In these cases additional costs (over and above those involved in preparing the short file) will be incurred by the police in locating witnesses, taking statements, and getting these typed, signed, and photocopied long after the time of charge. In addition, there are costs to other elements in the system (and to the police as well) caused by multiple court appearances in these cases. Further analysis along these lines must await the development of data that more accurately indicate the proportion of cases in which this two-stage process takes place, and will require an assessment of the costs involved in this procedure. It seems clear, however, that such a two-stage process can be expensive in some circumstances and that the relative cost of disclosure by summary vis-a-vis disclosure via statements is more complicated that it had seemed at the outset of the research. If statements are going to have to be prepared in any event in a high percentage of either-way cases, it may not be much more expensive to prepare them at the outset of the case where it is possible to do so.

Because of the time lag between arrest and disposal of cases, preliminary analysis of quantitative data on the operation of the scheme has been limited to cases in which the defendant was arrested during the first two months of operation of the scheme. As the operation of the scheme continues, the pool of cases for analysis will become much larger and there will be a firmer basis for drawing conclusions about its impact and potential for broader application.

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B. Disclosure of Statements - the Met Scheme[25]

In preliminary exploration of possible approaches to disclosure, the Metropolitan Police gave serious consideration to experimenting with a pilot scheme for disclosure via summary. Practices with respect to case investigation are appreciably different in the Met than they are in the Northumbria Police Force, however, and these differing practices led to different decisions regarding the feasibility to disclosure by summary.

In the Met, when a defendant has been arrested and charged, the officer in the case (usually the arresting officer) routinely fills out a "Case History Folder" which serves as the principal file folder holding the relevant case papers for the duration of the case. This folder (Form 611) includes a half-page space headed "Brief Facts of Case", as well as space for numerous other items of information. It is completed in handwriting, prior to the defendant's first court appearance. One possible approach to disclosure would have been to use the "Brief Facts" section of Form 611 (or some variant of this) to provide a summary for disclosure prior to the mode of trial decision. After careful consideration, this approach was rejected for several reasons:-

(i) The "Brief Facts" prepared under current procedures appeared to vary widely in quality. Some of them did an excellent job of "telling the story" and outlining the prosecution case in a succinct but thorough fashion. Others, however, were very sketchy and unclear, and did not provide a good sense of the prosecution evidence.

(ii) There were no clear guidelines concerning what ought to be in a summary. Because cases can vary widely in their facts and circumstances, and in what is required to sustain a charge, it would be difficult to develop

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such guidelines and to train officers to prepare the summaries in a form suitable for disclosure.

(iii) Even assuming that guidelines for the contents of a summary could be prepared, it was felt that they should be based upon statements to the extent possible. A supervising officer, reviewing a summary to ensure that it presented an adequate precis of the prosecution case, would often want to check the summary against what was in a statement. Additionally, the hasty preparation of a summary, without a witness statement having been taken, could later leave the police in an awkward position if the witness' statement—when subsequently taken and reduced to written form—did not coincide with the summary.

(iv) It was thought likely that, even if a summary was prepared, defence solicitors would want to see the statements before making a decision about mode of trial or plea.

(v) In a significant percentage of cases (how many was not known), witness statements were already being taken before or shortly after the time a defendant was charged. In other cases (again, the percentage was not known), it would ultimately be necessary to take statements anyway, either because the defendant elected Crown Court trial or because he entered a not guilty plea and a contest was scheduled for magistrates' court. At least in these cases, the careful preparation and vetting of a summary would require additional work not now being done.

In view of this set of problems with using a summary, and taking account of the fact that witness statements would ultimately be required in a significant number of cases in any event, the Met opted instead for a scheme based on disclosure of witness statements. The scheme now underway in H District and Thames Magistrates' Court (East London) follows a two-stage approach to disclosure. First, the statements of the principal prosecution witnesses--those whose evidence forms the basis of the decision to charge--are provided to the defence, upon request, prior to the time a defendant is asked to choose between summary trial and trial in Crown Court. Second, in cases where the defendant elects summary trial and pleads not guilty, the prosecution will also provide the statements of any other witnesses whose evidence it may wish to introduce at trial.

In a related move aimed at expediting the overall court process, the length of time a defendant is on police bail prior to his first court appearance has been shortened from an average of three weeks to a maximum of seven days. The police are not expected to have witness statements prepared for disclosure at first appearance. However, in any case where a defendant does not plead guilty at first appearance, the police aim to have the statements of principal witnesses prepared for disclosure within 21 days following the first appearance. Thus, if a request for disclosure is made promptly following first appearance, it should often be possible for the defence to receive and consider the statements--and thus be prepared to make a decision concerning mode of trial--at the second appearance. The statements served at this time will be photocopies of originals, which may be either handwritten or typed.

The Met's scheme gives explicit attention to dangers that might sometimes arise from early disclosure of witness statements--e.g., possible intimidation or harassment of prosecution witnesses; risk of revealing the

identity of an informer or exposing the existence of another investigation; publication of allegations about the conduct of a party not involved in the case. For cases being tried in Crown Court, the Attorney General's Guidelines on Disclosure of Evidence to the Defence in Cases to be Tried on Indictment take account of problems of this nature. Paragraph 6 of these guidelines gives the prosecution discretion not to make disclosure--at least until Counsel has considered and advised on the matter--in a wide range of such situations. The dangers associated with any type of disclosure may actually be greater in magistrates' court than in Crown Court, because the time frame is much shorter--especially if statements are to be disclosed prior to the mode of trial decision. Whilst it is surely desirable to have disclosure made as early as possible in the court process, the risk of damage is especially great when a case is at an early stage of development and when other investigations involving the same defendant (or close associates) are still in progress.

Given the uncertainties and complete lack of any practical experience with these problems at the magistrates' court level, the pilot scheme has deliberately avoided placing the prosecution under a rigid obligation to disclose statements. At the same time, however, it seemed desirable to use the pilot scheme as a vehicle for acquiring knowledge about the types of situations in which early disclosure of statements seemed problematic to the police. The scheme thus contains a rather broad exception to the disclosure requirements. Disclosure need not be made in any of the circumstances listed in paragraph 6 of the Attorney General's Guidelines or in any other case considered by the supervising officer (usually the Detective Chief Inspector at the station) to be unsuitable for disclosure under the scheme. However, in any case where disclosure is not made when requested, the prosecutor must (1) provide the defendant or his solicitor with written notice of the fact that certain information is not being disclosed and (briefly) of the

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reason(s) for non-disclosure; and (2) prepare a more detailed note, for police records, of the reasons for non-disclosure.

The pilot scheme in H District and Thames Magistrates' Court is comprehensive in scope and has been designed to produce information about issues that are of particular relevance to development of plans for implementation of Section 48 of the Criminal Law Act 1977. In this connection, several aspects of the scheme should be of particular interest:-

1. The scheme's utilisation of statements (instead of summaries) and its provisions for early disclosure of the statements of key witnesses will undoubtedly put pressure on the police to prepare witness statements where this would not previously have been done or (in some cases) would have been done at a later stage in the arrest-prosecution process. The preparation of statements of police officers themselves and the time required for review of statements by supervising officers are matters of particular concern to the police from the standpoint of costs and manpower allocation. It is clearly not feasible simply to photocopy notes made in a police officer's note-book for purposes of disclosure. The officer himself will have to take the time to prepare a legible written statement. And someone in a supervisory position (in the Met scheme, this will ordinarily be the detective chief inspector at the station) will have to take the time to review all of the statements to determine what can be disclosed. Evaluation of the pilot scheme should provide useful information about the

feasibility (in terms of effects on police operations) and the costs for introducing a scheme based on advance disclosure of statements.

2. The scheme's two-stage approach to disclosure responds to several central concerns of the James Committee and the Royal Commission on Criminal Procedure: (1) ensuring that the defendant in an either-way case has adequate information on which to make a mode of trial decision; (2) putting a defendant who elects summary trial in essentially the same position, with respect to obtaining advance information about a case, as one who elects Crown Court trial; and (3) expediting the resolution of cases in magistrates' court. At both stages--prior to the mode of trial decision and (when summary trial has been elected and a not guilty plea entered) prior to trial--the scheme aims at expeditious disclosure of available prosecution evidence. At the same time, it recognises that it often takes considerable time to get some kinds of evidence in a disclosable form and seeks to avoid unnecessary delay in making the mode of trial decision, by requiring the prosecution to disclose the statements of key witnesses at this stage but not insisting on disclosure of full statements of all potential witnesses.

3. In providing for disclosure of statements to unrepresented defendants who request them, the Met scheme goes into an area not reached by the Newcastle pilot scheme or any of the pre-trial review schemes. All of these involve only unrepresented defendants. It is possible that disclosure to unrepresented

defendants may present special problems, and the pilot scheme should help identify these.

4. The scheme's provisions allowing non-disclosure under certain circumstances, but requiring the reasons for non-disclosure to be recorded by the police, should be valuable in identifying the types of situations in which early disclosure of prosecution witness statements appears to present real risks to the witnesses themselves, to third parties, to pending investigations, or to other societal interests. It will be important to have a sense of these types of situations and of the frequency with which they exist in drafting rules implementing Section 48.

5. Disclosure by the prosecution will take place regardless of whether there is any reciprocal disclosure by the defence. By contrast, in the pre-trial review schemes in Nottingham, Leeds and elsewhere, defence solicitors are expected to provide some types of information about the defence case. The Met's scheme should help provide a sense of the extent to which broad mandatory prosecutorial disclosure may affect defence solicitors' willingness to exchange information about aspects of their case.

Before the end of 1983, it should be possible to have a general sense of the feasibility and costs of this approach to disclosure, and to know much more than is known at present about the practical problems involved in mandatory unilateral disclosure by the prosecution. Other types of impact questions, such as the scheme's effects upon court operations and case outcomes,

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will require longer to answer. The principal problem here is the length of time required for cases to go through the court process. For this type of analysis it is important to get as large a sample as possible of cases in which the defendant was arrested after the commencement of the scheme. Outcomes in these cases can then be compared to outcomes in a comparable group of cases not eligible for the pilot scheme (e.g., cases involving similar charges in which the defendants were arrested in H District prior to the start of the scheme). At least several months worth of arrests should be analysed, and it will take time for these cases to work their way through the system.

V. CONCLUSIONS

At the time Section 48 of the Criminal Law Act 1977 was enacted, there was no experience at all with formalised disclosure of the prosecution case--either mandatory or voluntary--in magistrates' courts. There was, of course, a long history of experience with advance disclosure in cases tried on indictment, but disclosure in magistrates' courts presented very different problems. Disclosure would, at least potentially, be required in vastly more cases, and the disclosure might have to be made at a much earlier point in time (in relation to the arrest) than it would usually be made in Crown Court cases. Depending upon the way in which a disclosure requirement was structured--in particular, the range of cases to be covered by the requirement, the form and contents of the disclosure, and the time at which it was required to be made--it could have important implications for the police as well as for prosecutors, defendants and their solicitors, and the magistrates' courts themselves.

Although there is still a great deal that is not known about the effects of different possible approaches to disclosure, some useful experience has been gained through the experimentation that has taken place over the past several years. Our preliminary assessment of these experiments reinforces the notion that disclosure in magistrates' courts is feasible. However, it also points up the complexity of the problem and the difficulty of devising an approach (or set of approaches) that will succeed in achieving the objectives of advance disclosure without at the same time contributing to delays and making the process of case preparation by the police more expensive.

Part of the problem is that there is no universal agreement on the importance of different possible objectives. Whilst there is broad agreement on the general goal of making the process operate more fairly (and on the proposition that advance disclosure of the prosecution case

will contribute to this end), there is disagreement about the extent to which a disclosure scheme should also provide for disclosure by the defence or should stress aims such as narrowing the issues in the case and avoiding unnecessary trials. Further, there is no firm knowledge about the likely impact of any particular type of disclosure scheme upon rates of guilty pleas, elections of Crown Court trial, delays, or costs.

The complexities that become apparent upon even cursory examination of the various disclosure schemes now in operation lend support to the James Committee's recommendation that initial efforts to implement advance disclosure on a national basis should be focused on either-way cases. There are, to be sure, a large number of these (approximately 500,000 in 1981),[26] but the problems would be substantially greater if advance disclosure were to be required in all cases triable summarily. Moreover, as the James Committee stressed, the either-way cases are the ones in which--because of the discrepancy between requirements for disclosure in trial on indictment vis-a-vis trial in magistrates' court--the arguments in favour of advance disclosure in magistrates' court are strongest.

In considering how a disclosure requirement should be structured in either-way cases, the threshold question is what sort of provision should be made for disclosure prior to the mode of trial decision. At this stage, it is possible to focus exclusively on disclosure by the prosecution; until the mode of trial decision has been made and a plea has been entered, the issue of possible disclosure by the defence does not arise. The experience of a number of the disclosure schemes now in operation indicates that it is entirely feasible for the prosecution to provide some disclosure--enough information upon which to make a decision about mode of trial and plea--in most instances relatively soon after arrest. In Colchester and

Wolverhampton, for example, basic information about the case is available for disclosure to the defence within a week after the defendant has been charged. In Leeds, a mini-file is available within two weeks. In Newcastle, a very detailed summary is prepared, typed and edited prior to the defendant's first appearance, and is ready for disclosure within three to four weeks. In the pilot scheme in London, the statements of key witnesses should ordinarily be ready for disclosure in less than four weeks after the charge; often they will be ready in even less time.

By contrast, preparation of a full file--including the statements of all potential prosecution witnesses, all exhibits, and so forth--can be a very time-consuming (and expensive) undertaking. Some kinds of prosecution evidence simply take time to acquire and to put in usable form--especially if forensic evidence is involved or if the evidence is voluminous. Even the statements of ordinary witnesses may take time to obtain if, for example, the individual is in hospital or on holiday. In Leeds, it takes a minimum of 8-10 weeks from arrest to mode of trial decision for the cases where a full file is prepared for disclosure purposes, and there is a general sense that it could not routinely be done very much sooner.

Although there may occasionally be situations in which full file disclosure may be appropriate prior to a mode of trial decision, it would seem desirable to structure a requirement for disclosure at this stage in a way that would avoid adding to delays and, indeed, would contribute to expeditious resolution of these cases. In this connection, the pragmatic approach suggested by the James Committee--i.e., requiring disclosure of witness statements where these have been prepared, but allowing the prosecution to furnish the defence with a summary of the facts where statements have not been prepared (or where the court after an application

by the prosecutor directs that they should not be served)--would seem to warrant serious consideration.

One critical issue with respect to disclosure at this stage is how much emphasis should be placed on the police obtaining and disclosing statements as opposed to relying on case summaries. The pilot scheme in London, which places heavy stress on obtaining the statements of key witnesses quickly, should provide useful information on the feasibility, costs, and benefits of this approach. Preliminary data from the Newcastle pilot scheme suggests that reliance on case summaries may not be much less costly than an approach that seeks to obtain statements at an early point where it is possible to do so. This is because in a high percentage of cases in Newcastle statements must be obtained later--probably at greater cost per statement and at a time when the incident is no longer fresh in the mind of the witness. Further research--in Newcastle and elsewhere--will be helpful.

In considering what approach to disclosure should be adopted in cases where a not guilty plea has been entered, it seems desirable to take account of issues related to possible disclosure by the defence as well as by the prosecution. The experience of the various pretrial review schemes now in operation indicates that disclosure of prosecution witness statements is definitely feasible at this stage from an operational standpoint. The prosecution will ordinarily have had time to obtain and vet the statements of all of their witnesses by this time, and the risks inherent in early disclosure are less serious as the timing of disclosure moves closer to the date of the trial. However, all of the pretrial review schemes outside of London involve reciprocal disclosure. Mutual

exchange of information has been a key component of all of them, and the schemes are intended to result in benefits to the prosecution and the court as well as to the defence.

The pilot scheme in London, which involves mandatory unilateral disclosure of all prosecution witness statements and exhibits prior to a scheduled contest, provides a very different model of disclosure after entry of a not guilty plea. In monitoring the operation of this pilot scheme, it will be important to get a sense of the dynamics of information exchange between prosecution and defence. Clearly, the incentive for disclosure by the defence is not as strong in the London model as in the Nottingham-type PTR scheme, and it will be helpful to know the extent to which disclosure by the defence actually occurs in London. If it is thought desirable to provide for disclosure of certain types of information by the defence, as suggested by the Royal Commission on Criminal Procedure, this may require new legislation since Section 48 is addressed explicitly to disclosure of the prosecution case.

In developing formal arrangements for disclosure in magistrates' courts it may be important to remember that much informal disclosure already takes place. It is very common for defence solicitors to see case summaries and statements of witnesses, even at the very early stages of a case. But practices do vary from area to area, and even within the same court area the extent of disclosure may vary depending upon the particular prosecutor and the particular defence solicitor involved in a case, and upon the case preparation practices of the police. Formulation of some minimum common standards and procedures seems desirable. At the same time, however, it also seems desirable to avoid establishing an overly rigid system of advance disclosure without having a firm sense of the likely impacts.

Some of the most important implications of advance disclosure relate to the practices of the police in investigating cases and initiating a prosecution. This is particularly true with respect to possible requirements for disclosure at an early stage of the proceedings. If there is a requirement for disclosure of statements prior to a mode of trial decision, this is likely to mean that statements will be prepared in an appreciably higher percentage of cases than at present, and at an earlier point in the arrest-prosecution process. More police time will have to be spent in taking statements, writing them up, and reviewing them. Even if a summary is used, instead of witness statements, time will have to be spent in preparation and review of it--the summary will have to be a fair precis of the prosecution case and it will have to have a sound evidential basis. There will be strong pressures on the police to get it right the first time; a mistake may have adverse consequences for the prosecution. Clearly there are costs here, and they may prove to be substantial.

It is possible, however, that there may also be some benefits. For example, the process of preparing a case for early disclosure should lead to rapid review, by a supervising officer or prosecuting solicitor, of just what evidence the prosecution has. The strength of the case can be assessed at that point in the light of the Attorney General's criteria for prosecution. If there are serious deficiencies, it may be possible to fill the gaps by taking additional witness statements; alternatively, an informed decision may be made to amend or withdraw the charges. It will clearly be necessary to invest more police and prosecutorial time in the early stages of a case, but conceivably that may result in less time having to be spent in taking statements at a later time. It may also result in better judgements about instituting or continuing a prosecution, and in fewer court appearances being necessary to deal with the case as both sides have a good knowledge of what the case involves at an early date.

Advance disclosure in magistrates' courts is an area in which there has been almost no prior empirical research. Some research is now underway,[27] and should be helpful in shaping places for initial implementation of Section 48. Particularly if initial implementation effects are limited to either-way cases, further research--focused both on the experience with rules applicable to those cases and on experiments with differing approaches to disclosure in other types of cases triable summarily--should be helpful in shaping future policy in this developing area.

FOOTNOTES

1. Report of the Interdepartmental Committee on the Distribution of Criminal Business Between the Crown Court and Magistrates' Courts Cmnd. 6323 (HMSO, November 1975), para. 212.

2. Ibid., para. 212.

3. Ibid., paras. 219-228; 230.

4. Ibid., paras. 224, 230.

5. Ibid., para. 228.

6. The full text of Section 48 is shown in Appendix A.

7. Hansard, 3 July 1977.

8. Report of the Royal Commission on Criminal Procedure, Cmnd. 8092 (HMSO, January 1981), paras. 7.3 - 7.20.

9. Ibid., paras. 8.6 - 8.11

10. Attorney General's Guidelines, Criteria for Prosecution, para. 4.

11. Ibid., para. 2.

12 Report of the Royal Commission on Criminal Procedure, paras. 8.12 - 8.13.

13. Ibid., paras. 8.14 - 8.15. The Report noted that in cases which were more serious or contentious it might be necessary to develop a different format from the summary. To deal with possible problems that might arise when disclosure was not requested, the Commission proposed that a guilty plea should not be formally entered until after the facts in the case had been read out in the court by the prosecutor; if the accused did not accept the oral summary, this would be regarded as a request for disclosure. This would be a change from existing practice, under which the facts are usually read out after the plea has been taken.

14. Ibid., paras. 8.20 - 8.22.

15. The findings of this survey were discussed in a recent debate in the House of Commons, concerning plans for implementation of Section 48. See Hansard, 7 July 1983, p. 516.

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FOOTNOTES
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16. The Colchester experiment and its results are described in several reports prepared by the London office of the Vera Institute of Justice. See especially the Interim Report (March 1980) and the Consolidated Final Report (May 1981).

17. See, e.g. A. Desbruslais, "Pre-trial Disclosure in Magistrates' Courts: Why Wait?", 146 Justice of the Peace 384 (26 June 1982); G.M. Barnatt, "Section 48 - a Viable Alternative?", 147 Justice of the Peace 117 (19 February 1983); C. Sheppard Pre-trial Review of Evidence in Magistrates Courts (paper prepared for Police College, Bramshill, 1983).

18. Desbruslais, Barnatt, Sheppard, supra note 17; see also J. Baldwin, "Pre-trial Disclosure in the Magistrates' Court", 147 Justice of the Peace 499, 501 (6 August 1983).

19. See, e.g., "Implementing Section 48", letter to the Editor from D. Roberts, 147 Justice of the Peace 220 (2 April 1983, p.220.

20. See C.R. Seymour, Proposals for the Introduction of a System of Pre-trial Reviews (Wolverhampton Magistrates' Court, May 1982).

21. The Leeds system, and preliminary results of its operation are described in "The Leeds Pre-Trial Review System: Report of the Courts Sub-Committee of the Leeds Law Society" (December 1982). See also Baldwin, supra note 18, at pp. 500-501.

22. By contrast, in the more formal PTR schemes, solicitors are typically paid at prevailing rates for time at court. See Desbruslais, supra note 17, at p.384.

23. James Committee Report, para. 219.

24. The discussion of the Newcastle scheme draws heavily on a separate monograph entitled Disclosure by Summary: Report on the Pilot Scheme in Newcastle (London: Vera Institute of Justice, August 1983).

25. This discussion of the pilot scheme in London draws heavily on a separate monograph entitled Report on Development of a Pilot Scheme for Advance Disclosure of the Prosecution Case in the Metropolitan Police District (London: Vera Institute of Justice, August 1983).

26. Including juvenile cases.

27. In addition to the Vera research described in this paper, Dr. John Baldwin is conducting research on pre-trial review schemes now operating in several courts. See Baldwin, supra note 18, at p.501.

SECTION 48: CRIMINAL LAW ACT 1977

Power to make rules as to furnishing of information by prosecutor in criminal proceedings. 1949 c. 101.

48.—(1) The power to make rules conferred by section 15 of the Justices of the Peace Act 1949 shall, without prejudice to the generality of subsection (1) of that section, include power to make, with respect to proceedings against any person for a prescribed offence or an offence of any prescribed class, provision—

(*a*) for requiring the prosecutor to do such things as may be prescribed for the purpose of securing that the accused or a person representing him is furnished with, or can obtain, advance information concerning all, or any prescribed class of, the facts and matters of which the prosecutor proposes to adduce evidence; and

(*b*) for requiring a magistrates' court, if satisfied that any requirement imposed by virtue of paragraph (*a*) above has not been complied with, to adjourn the proceedings pending compliance with that requirement unless the court is satisfied that the conduct of the case for the accused will not be substantially prejudiced by non-compliance with the requirement.

(2) Rules made by virtue of subsection (1)(*a*) above—

(*a*) may require the prosecutor to do as provided in the rules either—

(i) in all cases; or

(ii) only if so requested by or on behalf of the accused;

(*b*) may exempt facts and matters of any prescribed description from any requirement imposed by the rules, and may make the opinion of the prosecutor material for the purposes of any such exemption; and

(*c*) may make different provision with respect to different offences or offences of different classes.

(3) It shall not be open to a person convicted of an offence to appeal against the conviction on the ground that a requirement imposed by virtue of subsection (1) above was not complied with by the prosecutor.

SECTION 48: CRIMINAL LAW ACT 1977

Power to make rules as to furnishing of information by prosecutor in criminal proceedings. 1949 c. 101.

48.—(1) The power to make rules conferred by section 15 of the Justices of the Peace Act 1949 shall, without prejudice to the generality of subsection (1) of that section, include power to make, with respect to proceedings against any person for a prescribed offence or an offence of any prescribed class, provision—

(*a*) for requiring the prosecutor to do such things as may be prescribed for the purpose of securing that the accused or a person representing him is furnished with, or can obtain, advance information concerning all, or any prescribed class of, the facts and matters of which the prosecutor proposes to adduce evidence; and

(*b*) for requiring a magistrates' court, if satisfied that any requirement imposed by virtue of paragraph (*a*) above has not been complied with, to adjourn the proceedings pending compliance with that requirement unless the court is satisfied that the conduct of the case for the accused will not be substantially prejudiced by non-compliance with the requirement.

(2) Rules made by virtue of subsection (1)(*a*) above—

(*a*) may require the prosecutor to do as provided in the rules either—

(i) in all cases; or

(ii) only if so requested by or on behalf of the accused;

(*b*) may exempt facts and matters of any prescribed description from any requirement imposed by the rules, and may make the opinion of the prosecutor material for the purposes of any such exemption; and

(*c*) may make different provision with respect to different offences or offences of different classes.

(3) It shall not be open to a person convicted of an offence to appeal against the conviction on the ground that a requirement imposed by virtue of subsection (1) above was not complied with by the prosecutor.