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Implementing Section 48: Advance Disclosure of the Prosecution Case Options and Issues

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Implementing Section 48: Advance Disclosure of the Prosecution Case Options and Issues

This paper seeks to set forth the principal options currently available for implementing section 48 of the Criminal Justice Act 1977 concerning advance disclosure of the prosecution case to the defence. Drawing upon the results to date of two pilot disclosure schemes developed by the Home Office Working Party on Advance Disclosure and other available information, the paper also sets forth the major policy issues which must be determined in the course of implementing the section.

I. OPTIONS

Whilst there are a much larger number of possible variations, there would appear to be seven principal options available for implementing section 48. The seven principal options are disclosure prior to the mode of trial decision by:

1. Statements
2. A summary
3. A summary plus statements for not guilty cases
4. An expanded summary plus statements for not guilty cases
5. Inspection
6. Statements or a summary at the election of the prosecution (optional policy)
7. An interim optional policy followed by a more permanent uniform policy.

1. Statements

English law has long provided for disclosure in cases tried on indictment. Although the committal procedure was originally created for other purposes, it clearly provides the defence with the basic information about the prosecution case. Since 1967 this information has largely been supplied through the

provision of statements under section 1 of the Criminal Justice Act of that year. This procedure works smoothly and is highly trusted by all parties concerned—the defence, the police and prosecution, and the courts.

It is clear that what the legal profession would like is for Section 48 to result in the provision to the defence of written witness statements similar to those now furnished in committal proceedings. Numerous comments to this effect have been made both at the national and the local level.

It is also clear that statements would be the most useful method of disclosure for the defence. The defence solicitor has at least two different needs for information: first, because clients are often unwilling to tell the truth even to their solicitor, he must assess the account of events he has been given by his client; secondly, he must assess whether the prosecution can prove its case. For both these purposes statements - because they are more specific, detailed and objective - are more useful than summaries. Because they are more useful statements are also more likely than summaries to serve efficiency ends such as increased guilty pleas or decreased elections to the Crown Court.

The principal drawback to providing statements is cost. Many police forces prepare only minimum information at the outset of cases and do not prepare full sets of statements until after the accused has pled not guilty or elected for the Crown Court. Thus for many cases full sets of statements are never prepared. A 1981 survey by the Working Party indicated that the prosecution evidence was always available in witness form in only 21 of the 43 police forces in England and Wales at that time, and it is possible that the proportion is even smaller now.

The disclosure by statements option is now being tested in the pilot disclosure scheme in the Metropolitan Police District.

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2. <u>A Summary</u>

A second major option is for the prosecution to provide the defence with a written summary of the evidence against the accused. This option is now being tested in the Newcastle pilot scheme. The advantage of this option is that many forces already prepare summaries of this kind to assist in presentation of the case at first appearance. The disadvantages are (1) that the legal profession distrusts summaries, (2) that some forces do not now prepare such summaries, and (3) that others which do produce summaries have concerns about the feasibility or wisdom of making the internal summaries available to the defence.

Some forces and some chief prosecuting solicitors believe that cases cannot be properly prosecuted on the basis of summaries. Other forces which produce summaries for initial appearance purposes believe there would be serious problems with using these summaries as the basis for disclosure. The Metropolitan Police, for example, chose not to use the internal summary already being prepared as the basis for disclosure to the defence but rather to require the taking of statements so that they might be disclosed. The force was concerned about the accuracy of the summaries and the extent to which they would be legally sufficient. The Newcastle police, despite having used summaries internally for some time, shared some of these concerns, and felt it necessary to conduct a force-wide training program to improve the quality of the summaries. It is generally agreed in the force that this training did improve the quality of the summaries.

One group that has had experience with disclosure by summary as well as disclosure by statement in the committal proceeding are the defence solicitors in Newcastle. When queried about the comparative merits of disclosure by statements and disclosure by summary, these defence solicitors indicated that they found the summary useful but that given a choice they would prefer statements. For some solicitors the preference was very strong, with the summary

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being viewed as a weak substitute for statements. For other defence solicitors the preference was clearly for statements but in light of the cost implications disclosure by summary was viewed as acceptable.

3. Summary Plus Statements for Not Guilty Cases

Whilst the discussion to date has been dominated by consideration of disclosure through either statements or a summary, there is at least one other attractive option. This option would operate in two stages. The initial disclosure would be made by providing a summary prior to the mode of trial decision. A second disclosure would be made if the accused pled not guilty in the magistrates' court. This second disclosure would be based on statements.

This option is very similar to that now in use in Leeds.[1] Its advantages are that an accused pleading guilty in the magistrates' court obtains as much disclosure as an accused electing for the Crown Court and that full statements do not have to be prepared in every case. The cost is minimal because full statements are already prepared in virtually every not guilty case to aid the prosecuting solicitor. Its disadvantages are that the defence does not have the benefit of statements prior to the mode of trial decision and that at least in Leeds it appears to have been a fairly slow system. Whilst this last defect may be curable, the James Committee ultimately rejected this option:

> "We see some attraction in this proposal. It would give a defendant some knowledge of the case against him before he was asked his choice of mode of trial and asked to plead to the charge. It would limit the number of cases in which witness statements would have to be provided and reduce the work involved in preparing, editing and serving statements. Against that advantage must be set the disadvantage of the extra work involved both in preparing a statement of facts and in serving the witness statements in contested cases. The principal reason, however,

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for regarding this proposal as unsatisfactory is that, in our view, a statement of facts, no matter how conscientiously prepared is not an adequate substitute for witness statements (where these exist) as a means of conveying to a defendant the information he should be given before election and plea. In the majority of cases we would expect a defendant to be able to decide his plea without the assistance of a statement of facts. If he is in doubt as to his plea we think that provision of the witness statements is preferable and, possibly simpler." [2]

4. Expanded Summary Plus Statements for Not Guilty Cases

This option is similar to the summary plus statements option. It would require, however, that the summary provided prior to the mode of trial decision be enriched with a full statement of the defendant interview. This option would thus be very close to the James Committee recommendation that those statements available be provided prior to the mode of trial decision. (This option is also similar in some respects to the papers prepared in Colchester, where charging is based on a summary plus at least one statement.)

Detailed discussion of this option requires consideration of the kinds of evidence used in most criminal cases. Committal papers typically include the following:

(a) Accused's voluntary statement (statements under caution)

(b) Interviews which the police officer has conducted with the accused (questions and answers)

(c) The police officer's own observations and actions (also generally included in the officer's statement)

(d) Loser's statement

(e) Statements of other civilian witnesses

(f) Statements of other police witnesses

Presumably all of these items are routinely prepared in every case in forces in which the prosecution evidence is always available in statement form at the time of plea. In other forces some of these items are routinely prepared in every case, whilst others are prepared only as needed.

(a) Accused's voluntary statement. This is a statement made by the accused after cautioning. It is occasionally written by the accused but is more often written by the officer and signed by the accused. Such statements are present in some but not all cases. When present, they are always written at the time of charging and are therefore available for disclosure. Many forces already routinely disclose these statements upon request by a defence solicitor.

(b) Contemporaneous notes of interview with the accused. Often the defendant will be questioned by the police before being asked to make a voluntary statement. Such questioning may take place on the street or in the police station. Most forces have long required that the officer conducting the questioning keep contemporaneous notes of these interviews. Typically the policy is to require that street interviews be recorded as soon as practicable and that in-station interviews be recorded either at the time of the interview or shortly thereafter.

The Royal Commission on Criminal Procedure recommended that forces instruct officers to review their notes with the accused and secure his signature on them and a number of forces have adopted policies of this kind.[3] In the Metropolitan Police District contemporaneous notes not signed by the accused must be presented to an inspector for review and signature within 24 hours.

In the past most forces have not disclosed contemporaneous notes in the same way they have voluntary statements. Such notes are obviously available for disclosure, however, and some forces (e.g., Nottinghamshire) are now disclosing these statements in much the same way as the voluntary statement.

The need for disclosure of contemporaneous notes and voluntary statements will be affected by the provisions of the Police and Criminal Evidence Bill requiring that in-station interviews be tape-recorded. Whilst it is difficult at this point to indicate the full effects of these proposals, it seems likely that they will make interview evidence more rather than less available for disclosure.

(c) Police officer's own observations and actions. In addition to his contemporaneous notes of interview with the defendant, the officer's statement typically includes an account of his own actions and observations. Some forces require these to be recorded immediately or at

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an early point in the officer's notebook. Many do not, however, require the officer to take the additional step of turning his notes into a statement.

(d) Loser's statement. Force policies diverge more widely as to when a loser's statement is taken. Forces which prepare statements in every case (full file) obviously take this statement as soon as possible. Some forces which do not use a full file nevertheless always take a loser's statement or take such statements in certain kinds of cases. In Northumbria, for example, a loser's statement will always be taken in assault and shoplifting cases, in cases with an out-of-town victim and in cases in which it seems likely that the case will end with a not guilty plea. Whether a statement is taken or not, many forces require that some information concerning the victim be recorded—either in the officer's notebook or in the file.

(e) Statements of civilian witnesses. Forces using full files require statements to be taken from civilian witnesses. Other forces require these to be taken only when there is a not guilty plea or an election to Crown Court or only in specified instances. Most forces require contemporaneous recording in the notebook of the names and addresses of civilian witnesses and many require some recording of the details of what the witness will say.

(f) Statements of other police witnesses. Often there are police witnesses other than the arresting officer or the officer in the case. Typically these witnesses make notes in their notebook about what they have seen and heard but in many forces do not reduce their notes to statement form until it becomes clear that it will be needed.

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From the above discussion it seems likely that most or all forces could - prior to the mode of trial decision - disclose the defendant's voluntary statement, the contemporaneous notes of interview and any tape recording of the interview without major new difficulty (other than that involved in introducing tape recording itself). These items are already prepared or are supposed to be prepared in every case at or near the time of charging. Obviously there would be a need to co-ordinate any disclosure regulation with the requirements for tape recording.

The problem in requiring full disclosure by statements prior to the mode of trial decision comes from the fact that many forces do not prepare statements in every case for losers, for civilian witnesses and for the actions and observations of police officers (as opposed to interviews with the defendant). The expanded summary is a compromise which seeks to provide statements insofar as is easily feasible and a summary for the remainder of the prosecution case. Whilst views vary, some defence solicitors believe that information about what the accused has said to the police is the information most important to the defence in the majority of cases. This option would provide this information in full form in addition to the summary.

As the Newcastle police have for some years disclosed the accused's voluntary statement on request and continued to do so during the pilot scheme, the Newcastle scheme was similar in some respects to the expanded summary option.

5. By Inspection

This is an option mentioned in the Law Society paper which does not involve any written disclosure. Rather defence solicitors are allowed to view part or all of the prosecution evidence or are given an oral summary by the prosecution. This option is based on the Nottingham Pre-Trial Review Scheme which has been copied in a number of areas around the country and which operates only after the mode of trial decision has been made. In cases in which a guilty plea has been entered in the magistrates' court the defence and the prosecuting solicitor meet four weeks in advance of trial. The prosecution voluntarily describes its case partly by showing its file and partly orally. The defence in turn is expected to indicate the broad lines of the defence to be presented. This method of disclosure is possibly efficient for cases involving not guilty pleas. It would be very costly, however, to use this method for disclosure prior to the mode of trial decision. Pre-trial reviews may be useful for purposes other than disclosure but do not appear to be the best method for providing disclosure.

6. Either Statements or Summaries Policy

Each of the five options discussed above would produce a uniform policy in the country concerning advance disclosure of the prosecution case. The sixth option would require disclosure but allow each police force to choose which of the various options it preferred. This option would obviously involve the least disruption to present force policies. It would be contrary to the Working Party's desire for a single, uniform policy and if the minimum disclosure option was based on a summary rather than a summary plus statements, this option probably would not be very palatable to the legal profession. If this option were selected, the form of disclosure should be uniform throughout the particular force rather than within the discretion of each individual officer.

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7. <u>An Interim Optional Policy Followed by a Later Uniform Policy</u>

This option has the advantage of allowing section 48 to be implemented at a relatively early date without great disruption as in option 6, whilst moving toward a uniform policy at a later time. This option would thus allow forces a somewhat longer time to get ready for any major changes in procedure needed to comply with the longer range policy.

II. AN ASSESSMENT OF THE OPTIONS

This section seeks to make a comparative assessment of the feasibility, system effects and costs of the various options.

1. <u>Feasibility</u>

In the sense that each of the options available is something that could be done if the government so wishes, it seems clear that all the options are "feasible". The more practical question, however, is whether the various options could be accomplished without major disruption of other agency and system objectives and within reasonable cost limits.

Whilst there are questions that might be raised about the extent to which the limited experience to date is applicable to other forces and regions, it seems reasonably clear that all of the options—except possibly disclosure by inspection—are also feasible in this second sense.

There were very few administrative problems with disclosure by written summary in the Newcastle pilot scheme. Preparing the summaries was not a problem because the force had been doing this for some time. Nor did the

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police experience any major problems with either the mechanics or the contents of disclosure. There were only a few instances in which the police perceived a need to withhold information in order to protect witnesses or for other reasons and no instances in which disclosure caused harm to witnesses. (It should be noted that the names and addresses of witnesses were omitted from the summaries. In many instances, however, the identity of the witness was known by the defence.)

Disclosure by written summary clearly would have been much more difficult for the Metropolitan Police. Whilst summaries are prepared for the initial appearance as an aid to the case presenting officer, they are briefer and less uniform than the pre-scheme Newcastle summaries. Nonetheless it seems clear that Metropolitan Police officers could be trained to complete adequate summaries without a major disruption of the force.

Disclosure by use of written statements is also clearly feasible. Some police forces already have the prosecution evidence in statement form by the time of disposal and other forces once did so. The experience of the Metropolitan Police pilot scheme to date is that statements can be produced for the purpose of disclosure. Whilst statements were not routinely produced prior to the scheme, they are now being produced in the three stations in H District. One station is finding this easier than the other two largely because it is requiring statements to be produced for cases going past first appearance rather than for all either-way cases.

One branch of the Newcastle force also sought to produce statements for each case. These statements were not served under the pilot disclosure scheme but this branch found that the procedure of taking statements in all cases

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improved the quality of evidence preparation and the quality of supervision and that it had training value.

It seems obvious that if both the summary and the statements options are feasible, the summary plus statements for not guilty cases option is also feasible. The Leeds experience also indicates that this option is feasible. As previously indicated, the inspection option would be difficult to carry out prior to mode of trial decision.

2. System Effects

One of the major purposes of the evaluations of the Newcastle and Metropolitan Police pilot schemes is to assess the impact of disclosure on elections to the Crown Court, guilty pleas and waiting times. Neither evaluation is complete at this time, however.

Newcastle. Preliminary indications from Newcastle--based on data from the first five months of the pilot scheme--suggest that disclosure has increased the rate of guilty plea in the magistrates' court and decreased the rate of election to the Crown Court. Thus guilty pleas went from 52 per cent in the pre-scheme period to 57 per cent in the post scheme period, whilst elections to the Crown Court dropped from 30 to 25 per cent, as shown in Table 1.

When represented and unrepresented cases are analysed separately, the represented cases show an increase in guilty pleas and a decrease in elections to the Crown Court, while the unrepresented cases show no such change, as shown in Table 2. This suggests that the cause of the change is one that like disclosure affects only the represented cases.

TABLE 1

Newcastle Pilot Disclosure Scheme
Method of Disposal in Magistrates' Court
Adult Either-Way Cases

(In percent of disposals)

Method of Disposal	Pre-Scheme (Defendants arrested between 1 July and 31 October 1982)	Scheme (Defendants arrested between 1 Nov. 1982 and 31 March 1983)
Evidence withdrawn	4%	4%
Guilty plea	52%	57%
Contested summary trial		
- Acquitted	1%	1%
- Convicted	3%	3%
Elect jury trial	30%	25%
Prosecution/court committal	10%	9%
Total	100%	100%
Number	(1339)	(1630)

TABLE 2

Newcastle Pilot Disclosure Scheme

Method of Disposal in Magistrates' Court

Adult Either-Way Cases

(In percent of disposals)

Method of Disposal	Pre-Scheme (Defendants arrested between 1 July and 31 October 1982)		Scheme (Defendants arrested between 1 Nov. 1982 and 31 March 1983)	
	Unrepresented	Represented	Unrepresented	Represented
Evidence withdrawn	2%	4%	2%	5%
Guilty plea	93%	35%	94%	40%
Contested summary trial				
- Acquitted	.3%	2%	.1%	2%
- Convicted	1%	4%	1%	4%
Elect jury trial	2%	42%	2%	36%
Prosecution/court committal	2%	14%	1%	13%
Total	100%	100%	100%	100%
Number	(400)	(939)	(517)	(1112)

The likelihood of a link between disclosure and the change in disposal patterns is further enhanced when disposals are analysed by month. This analysis, as indicated in Table 3, shows that as the number of disclosure requests increases, the rate of guilty pleas increases and the rate of elections for the Crown Court decreases.

These results are also confirmed by a survey of defence solicitors in Newcastle. When asked whether disclosure by summary had affected the advice given to clients, most defence solicitors indicated that there had been some modest effects. Defence solicitors indicated that in some instances disclosure had identified holes in the prosecution case. More often, however, they said disclosure showed the futility of contesting the case and led to an early guilty plea.

All the solicitors interviewed indicated that the availability of the summary had not changed their practice greatly but that it had had some impact. Most also identified a desire to obtain full disclosure as the second or third most important reason for electing trial in the Crown Court. (Trial before a jury or the likelihood of a lesser sentence were said to be more important reasons.)

These results are still preliminary. Additional data are being collected and further analysis remains to be performed.

Metropolitan Police. The pilot scheme began on 1 August, 1983. Through 23 November there were 29 known requests for disclosure. As around 800 either-way offences had been charged in H District, the rate of request for disclosure was around 4 per cent, as shown in Table 4.

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TABLE 3

Disposals and Disclosure by Month

Newcastle Pilot Scheme - Represented Cases Only

	Percent Disclosure	Percent Guilty Pleas	Percent Elections for Crown Court
Pre-Scheme			
July - August	-	32	42
Sept. - October	-	37	43
Post Scheme			
Nov.-December	19	38	37
Jan. - Feb.	25	40	38
March	27	43	29

TABLE 4

Disclosure Requests

Metropolitan Police Pilot Scheme

(As of 23 November, 1983)

Station	Requests for Disclosure	Either-Way Cases	Rate of Request
Bethnal Green	5	NA	NA
Leman Street	11	NA	NA
Limehouse	13	318	4%
Total	29	800 (est.)	4%

3. Costs

A. Prior Estimates

Several estimates of the costs of advance disclosure have previously been made. At the time of the passage of the Criminal Law Act of 1977 the then-Government estimated the cost of implementation at £4 million in 1977 prices. This estimate was based on "hasty consultation".

A second estimate was made for the Working Party in 1981 by the Home Office Statistical Department using the results of a special study of three forces and a survey of all police forces. This estimate concluded that the additional cost to the police, in 1980 prices, of disclosing summaries would be £1.5 to £4.5 million and that for disclosing statements £3.5 to £16.5 million. This estimate was very carefully and professionally constructed on the basis of assumptions about disclosure that seemed likely at the time. Experience with the Newcastle and Metropolitan Police pilot schemes, however, has undermined a number of the critical assumptions upon which this estimate was based, as indicated in Appendix A. Among other things it now seems clear that disclosure is not required in every case and that disclosure does not create any vast increase in the number of witnesses. The need for editing also appears to be considerably less than previously expected.

A re-analysis of the 1981 estimate in light of experience with the pilot schemes indicates a cost in 1980 prices of £½ million for summaries and £1.85 million for statements. Of course both prices and the number of cases have increased since 1981.

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Whilst the 1981 estimate recognised the possibility of savings as a result of advance disclosure, it regarded these as speculative and did not attempt to estimate them.

B. Current Bases for Estimation

There are a number of possible bases for making new estimates of the cost of advance disclosure. These include (1) the experience of the Newcastle pilot project, (2) the experience of the Metropolitan Police pilot project, and (3) research undertaken for the Royal Commission on Criminal Procedure.

(1) The Newcastle Experience. Because summaries were already in use in Newcastle there were no costs involved in producing the summaries, other than some one-time training costs. The cost of providing summaries for the first six months of the pilot project, not including training and research costs, was £2,500. Most of this was for vetting and rewriting whilst some was for writing summaries in cases in which full files had been prepared. As 424 summaries were served during the first six months, the cost was about £5.90 per summary.

During the second half of the pilot project more summaries were served at a somewhat lesser cost, and the average cost was about £2.50 per summary. There were also indications that the cost of disclosure might ultimately drop considerably lower than this. The bottom limit is essentially that of copying and transmitting the summary--a cost on the order of £1 at 1983 prices.

(2) Metropolitan Police Pilot Project. This project is based on statements. As the Metropolitan Police regularly produce a full file of statements only for cases involving committals, contested hearings in the magistrates' court or other cases in which a prosecuting solicitor is involved, there are cases, many eligible for disclosure, for which statements are not regularly produced. Producing statements to be disclosed in these cases obviously involves costs.

The evaluation of the pilot scheme has not proceeded far enough to estimate these costs precisely. The experience to date is sufficient, however, to indicate some of the major factors involved in determining the costs. These are: (1) the methods used to produce the statements needed, (2) the methods used to review the statements needed, (3) the number of requests for disclosure, and (4) the number of statements needed for other purposes, such as committals.

The three stations in H District have at various times in the four months of the project followed three different policies regarding the production of statements: (1) taking statements early in all either-way cases, (2) taking statements in all either-way cases going past first appearance, and (3) taking statements later and only when disclosure is requested. Each of these policies has very different cost effects. Initially when it was expected that disclosure would be requested in 50-70 per cent of the cases, the policy was to take statements in all cases or in all cases going beyond first appearance. Later when it became apparent that disclosure was being requested in only 4 per cent of the cases, a policy of taking statements only when requested began to emerge. Because it is generally much quicker and easier to take state-

ments when witnesses are present and have the events fresh in their mind, this last policy is efficient only when the number of requests for disclosure is small.

The question of which of these policies is the most efficient is also affected by the number of statements needed for other purposes. Nearly 20 per cent of all either-way cases end in a committal proceeding for which statements are almost always needed.[4] Similarly, another 10-20 per cent of the either-way cases end in contested hearings for which statements are almost always needed.[5] Taken together these figures indicate that full files are needed in 30 to 40 per cent of all cases without regard to whether disclosure is requested or not.

The cost of producing statements for disclosure cannot therefore be estimated in isolation. While it may be efficient to use a request only policy to produce statements for the 4 per cent of the defendants who request disclosure, it is not at all clear that it is efficient to use a request only policy to produce statements for 44 per cent of the cases.

(3) Royal Commission Research. One of the major uncertainties in estimating the cost of advance disclosure by statement is that of determining how much extra it costs to produce a full file of statements. The Statistical Department estimate for the Working Party quite rightly indicated that this depended upon the number of witnesses involved and determined that the average case involved 2-2½ civilian witnesses and 1-1½ police witnesses. (Defendants were not discussed.) Based on the average case the estimate concluded that each case involved 9-12 hours of work and an estimated cost in 1980 prices of £98 - £127. Estimates were not given for partial files.

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More recently, Gemmill and Morgan-Giles made similar time estimates for the Royal Commission on Criminal Procedure.[6] Using a series of model cases and data from four forces, they estimated that on the average a full file required 7.8 "equivalent constable hours" and a short file 5.2 such hours. While the Royal Commission estimate was produced in essentially the same way as the estimate for the Working Party, it is more recent, more extensive, and more systematic and for those reasons probably better reflects the actual current costs.

C. Current Estimate - Summaries

Most forces now produce a summary of some kind to assist the police or solicitors in presenting the case. Whilst these summaries might have to be improved to be suitable for disclosure purposes, their use for disclosure purposes would not engender any new costs of production.[7] Existing force arrangements also already generally require some vetting of the summary as part of the normal supervision process. In Newcastle the cost of vetting and duplication for disclosure purposes began as £5.90 per case but ended as £2.50 or below.

The national costs are projected in Table 5 based on the Newcastle costs and the Newcastle rate of disclosure (25 per cent). If the rate of disclosure is assumed to be 4 per cent (the present rate of request in East London), the costs are much less--ranging from £102,188 to £43,300.

The most realistic assumptions would appear to be a 25 per cent request rate and a cost of £2 or less per disclosure. (See Appendix B for discussion of the likely request rate.)

TABLE 5

Cost of Disclosure By Summary
Based on Newcastle Experience
Adult Cases Only

Cost per Disclosure	Rate of Request for Disclosure	Estimated National Cost
A. Newcastle costs and Rate of Disclosure		
£5.90 (Initial)	25%	£638,675
£2.50 (Later)	25%	£270,625
B. Newcastle costs and London H District rate of Disclosure		
£5.90 (Initial)	4%	£102,188
£2.50 (Later)	4%	£43,300

NOTE: The Criminal Statistics for England and Wales indicated 433,000 adult defendants were charged with triable either-way offences in 1982. Whilst 70,000 of these charges proceeded by summons, the procedure under the Magistrates' Court Act 1957 by which a statement of facts is served on the defence is not available for use in crime cases.

E. Out-of Pocket versus True Costs

The estimate of cost made for the Working Party was based on new out-of-pocket costs that would be required to implement section 48. For statements this estimate assumed that the principal costs involved would be those incurred by forces not then producing a full set of statements.

This estimate also assumed that there were no costs involved for the forces already producing or disclosing summaries. This principle is adequate for many purposes but seems inappropriate for evaluating the costs of a procedure which is subject to change. Thus whilst it is true that disclosure by statement would produce no new expenditures in Nottinghamshire for producing statements because Nottinghamshire already produces full statements in every case, it seems obvious that a requirement for disclosure would prevent Nottinghamshire from changing its policy in the future to some less onerous system. In real economic terms the foreclosure of that possibility is a "cost".

The costs estimated in this paper are therefore based on "true" costs rather than new "out-of-pocket expenditures". The new out-of-pocket expenditures required would in all instances be less than the estimates given.

F. Current Estimate - Statements

The cost of providing disclosure for all either-way cases for which disclosure is requested depends primarily on the method used by the police for producing statements.

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Essentially there are five possible methods for producing statements. Each of these has different cost effects:

(a) Typed statements for every either-way case

(b) Untyped statements for every either-way case

(c) Typed statements for all either-way cases going past first appearance

(d) Untyped statements for all either-way cases going past first appearance

(e) Typed statements on request.

(a) Typed statements for all cases. This method involves taking and preparing statements for every case, presumably at a very early point in the case. It also involves typing the statements for every case so that they could be served if requested. It is easily the most expensive method of producing statements. Gemmill and Morgan-Giles estimate that this method of preparing statements costs 50 per cent more per case than use of a short file.[8]

The chief advantage of this method is that statements are prepared when fresh and when witnesses are most available. They may be served quickly because they are already in being. This method also enhances the ability of superior officers to supervise the prosecution of cases.

(b) Untyped statements for all cases. In this method the police prepare statements for all witnesses but do not have them typed or fully vetted until there is a need for statements to be served. This method has most of the advantages of method (a) and is considerably cheaper.

(c) Typed statements for all cases going past first appearance. Thirty to fifty per cent of magistrates' court cases appear to be disposed of at first appearance, mostly by guilty plea. This method saves the cost of preparing full files on these cases.

This method requires some procedure for notifying officers about cases going beyond first appearance and results in some statements being prepared when not fresh. Officers are also required to spend some time tracking down witnesses who could have been more easily located nearer the time of the offence. These problems are obviously compounded if the time to first appearance is lengthy.

Use of this method for producing statements does not require that disclosure be limited to cases going past first appearance. Notice of the availability of disclosure could still be given in all cases.

(d) Untyped statements for all cases going past first appearance. This is similar to method (c) but saves the cost of typing and full vetting for many cases.

(e) Request. In this method statements are produced only when needed. This minimises the number of statements produced but means that many statements are taken after the case is cold and creates a great likelihood that the case will be delayed while statements are prepared. Based on experience to date in Newcastle, London and Leeds, requests for disclosure could be expected in about 25 per cent of the either-way cases.

G. Comparing the Costs

Gemmill and Morgan-Giles in a report for the Royal Commission on Criminal Procedure concluded that preparing a typed full file required on the average 7.8 hours when all officer and secretarial time was

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counted in a way that adjusted the actual time spent by the salaries received. This compared with 5.2 hours for short file cases without statements. Full file cases were consequently said to be 50 per cent more expensive than short file cases.

If constable time is arbitrarily valued at £10 per hour, the cost of preparing a short file is £52 and that for preparing a full file £78.[9] Gemmill and Morgan-Giles did not indicate what proportion of the cost of the full file was attributable to typing and vetting but observations suggest that this is an appreciable part of the cost. For the purpose of comparison these costs will be assumed to be 30 per cent or £8 of the extra £26 cost of a full file.[10]

For the purpose of comparison it will also be assumed that the rate of request for disclosure will be 25 per cent of all either-way cases (the Newcastle rate) and that the rate of not guilty pleas in the magistrates' court is 15 per cent. It will also be assumed that an officer who delays the taking of statements and who must therefore locate witnesses and re-familiarise himself with the case creates a cost equal to 5 per cent of the cost of the short file when he comes back into the case within a week or two and at least 10 per cent of the cost of a short file when he comes back a month or more later.[11]

Using these assumptions Table 6 compares the various methods of disclosure, including disclosure by summary and disclosure by summary plus statements. As might be expected, the cheapest is disclosure by summary and the most expensive typed statements for all cases. If the rate of request for disclosure were only 4 per cent, as in the Metropolitan Police pilot project, the request only cost would drop to £53 while the cost for typed statements in all cases would remain unchanged.

TABLE 6

Comparative Disclosure Costs

	Method	Cost per Case	Percent of Cases Involved	Average Cost per Case
1.	No disclosure short file	£52	100%	£52
2.	Summary only	£54	100%	£54
3.	Summary plus statements	£54	85%	
		£78	15%	£59
		Extra Cost (10%)	15%	
4.	Expanded summary plus statements	£54	75%	
		£60	10%	
		£78	15%	£59
		Extra Cost (10%)	15%	
5.	Statements--Typed - all	£78	100%	£78
6.	Statements--Untyped - all	£70	75%	
		£78	25%	£72
7.	Statements--Typed - after first appearance	£52	50%	
		£78	50%	£66
		Extra Cost (5%)	50%	
8.	Statements--Untyped - after first appearance	£52	50%	
		£70	25%	£65
		£78	25%	
		Extra Cost (5%)	50%	
9.	Statements--Request only	£52	75%	
		£78	25%	£60
		Extra Cost (10%)	25%	

<u>Complicating Factors</u>. Table 6 is not the end of the story, however, because 30 - 40 per cent of all either-way cases require full files in most forces without regard to whether there is disclosure or not. Nationally, 17 per cent of all persons aged 17 and over who were charged in 1982 with an indictable offence were committed for trial in the Crown Court. Full statements are prepared for these cases as a matter of course.

Whilst there are no national figures, it can be estimated that another 10 - 20 per cent of adults charged with either-way offences have a contested trial in the magistrates' court. Full files are prepared in virtually all of these cases in order to assist the prosecuting solicitor.

Some of the cases in which a full file is prepared for prosecution purposes are also advance disclosure cases. Based on Newcastle data, however, at least 40 per cent of the advance disclosure cases do not result in either a committal or a contested trial in the magistrates' court. This means that if disclosure is based on statements, the total need for full files is around 40 - 50 per cent of all either-way cases.

Using the same procedure and assumptions as those used in compiling Table 6, it is possible to make a more accurate comparison of the costs of the various methods of disclosure.

The minimum cost that a force would now incur in the absence of a new disclosure requirement is £60 per case, as shown in Table 7. This is based on a production cost of £52 per case for the 70 per cent of all cases which are handled as guilty pleas in the magistrates' court and £78 per case for the 30 per cent which go to committal or a not guilty hearing in the magistrates' court. As there are extra costs the delay in preparing full files on the committal and not guilty cases, these costs are added to the 30 per cent requiring full files.

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TABLE 7

Comparative Disclosure Costs
Based on Total Statements Needed

	Method	Cost per Case	Percent of Cases Involved	Average Cost per Case
1.	No disclosure short file	£52	70%	
		£78	30%	£60
		Extra Cost (10%)	30%	
2.	Summary only	£52	45%	
		£54	25%	
		£78	30%	£60
		Extra Cost (10%)	30%	
3.	Summary plus statements	£52	45%	
		£54	25%	
		£78	30%	£60
		Extra Cost (10%)	30%	
4.	Expanded summary plus statements	£54	60%	
		£60	10%	
		£78	30%	£62
		Extra Cost (10%)	30%	
5.	Statements—Typed - all	£78	100%	£78
6.	Statements—Untyped - all	£70	60%	
		£78	40%	£73
7.	Statements—Typed - after first appearance	£52	50%	
		£78	50%	£67
		Extra Cost (5%)	50%	
8.	Statements—Untyped - after first appearance	£52	50%	
		£70	10%	
		£78	40%	£66
		Extra Cost (5%)	40%	
9.	Statements - Request only	£52	60%	
		£78	40%	£66
		Extra Cost (10%)	40%	

Table 7 assumes that statements are needed for committals or summary trials in 30 per cent of the cases and for an additional 10 per cent for disclosure purposes. If the rate of election for trial and contest in the magistrates' court is higher, the request method becomes more expensive than methods (7) and (8) and the cost of disclosure by summary approaches that of methods (7) and (8).

Under these circumstances the most likely policy to be followed by a police force disclosing statements is production on request or production by untyped statements after first appearance. Any other choice is one that would be made on criteria other than cost.

H. Total Cost of Disclosure

In 1982 there were 433,000 adults proceeded against in magistrates courts for either-way offences. Approximately 70,000 of these adults were proceeded against by summons. As full statements are generally already taken in summons cases, there would be little or no additional production cost involved in making these available for disclosure. There would of course be some copying and despatch costs.

Based on the figures developed and assuming that the defence requests disclosure in 25 per cent of the cases, the total annual cost for disclosure is shown in Table 8. These costs range from £270,625 for summaries to £2,248,000 for statements.

I. Possible Savings

The principal savings which have been discussed in connection with advance disclosure arise out of the possibility that disclosure increases guilty pleas in the magistrates' court and decreases elections for trial in Crown Court and contested hearings in the magistrates' court. Shifts like these could produce savings because of the cost of a guilty plea in the magistrates' court is considerably less than a contested hearing in the magistrates' court or any kind of proceeding in the Crown Court.

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TABLE 8

Annual Cost of Disclosure

	Total Cost
Summary only	£270,625
Summary plus statements	£336,000
Expanded summary plus statements	£389,700
Statements--Untyped - after first appearance	£2,248,000
Statements - Request only	£2,248,000

NOTE: (1) Based on a 25 per cent rate of request for disclosure

(2) Based on 1982 total of 363,000 non-summons either-way cases and 70,000 cummons cases.

(3) Assumes a £1 copying cost for each summons case in which statements are required.

The preliminary indications from Newcastle, as discussed earlier, are that a shift of this kind has occurred during the course of the pilot scheme. If this shift proves to be genuine, the cost savings are likely to be substantial. There are no established figures available indicating the cost of different kinds of criminal case proceedings, but these costs can be estimated, as shown in Table 9. Defence costs in this table are taken from 1982 and 1983 figures supplied by the Lord Chancellor's Office. Prosecution costs for solicitors are estimated at one third of defence costs whilst those for counsel are estimated as equal to defence costs. Police and court costs are estimated on the basis of discussions and other available data including a 1981 paper by Dr. Thomas Church entitled "The Cost of Adjournments in the Magistrates' Courts". Fixed costs such as buildings, utilities and the like are not included.

These figures are obviously not as precise as would be desirable. Even so, as the police costs estimated include only in-court time and as no costs are included for the transport and handling of remand prisoners or for probation officers in court, it is possible the very large costs indicated are still understated.

Based on these figures the savings would be over £600 for each guilty plea case shifted from the Crown Court to the magistrates' court. In Newcastle during the one year period of the pilot scheme the projected savings would be £109,000. As the cost of the pilot scheme not including training was £5,000, the net savings for the year would be over £100,000.[12] (Future disclosure costs would probably be less than the cost to date.)

This does not necessarily mean that the criminal justice budget for Newcastle would decline by £100,000. If the caseload is rising in Newcastle, the likely effect would be to reduce the increase in the budget rather than to bring about an actual decrease. If the caseload is not increasing, the savings could be realised through adjustments to staff over a several year

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TABLE 9

Cost of Various Proceedings

Method	Police	Prosecution	Defence	Court	Total
Guilty plea in Magistrates' Court	6	49	148	40	£243
Contested hearing in Magistrates' Court	40	72	215	120	£447
Guilty plea in Crown Court	20	225	485	120	£850
Late guilty plea in Crown Court	20	311	582	120	£1033
Trial in Crown Court	50	502	985	240	£1777

Note: Defence costs are actual 1982 and 1983 costs in represented cases. Prosecution costs for counsel are estimated as equal to those for the defence whilst solicitor costs are estimated at one third of the defence costs. Police and court costs are estimated.

period. In an accounting sense they are "true" savings as they release resources for other uses—whether that is budget reduction, improvement of existing services, or an offset to other budget changes.

If these savings could be projected countrywide, the net savings would be over £13,000,000 annually for a system of disclosure based on summaries and over £10,000,000 for disclosure based on statements. It would be very wrong, however, to expect disclosure to have as strong an effect elsewhere as the preliminary indications suggest in Newcastle. Even if savings were only half the total suggested by the Newcastle results, however, disclosure would have a positive fiscal effect, as indicated in Table 10.

Just as the costs of disclosure differ by the proportion of defendants who request disclosure, savings can also be expected to vary in the same way. They are consequently likely to be much less for the Metropolitan Police pilot scheme.

Over time the rate of requests for disclosure is likely to be closer to the Newcastle rate than to the present East London rate. Costs and savings are consequently likely to be closer to the amounts projected on these figures.

If savings are estimated on the basis of one-half the Newcastle experience, the largest savings would accrue to the legal aid fund. There would also be considerable savings, however, for the police, the prosecution, the Crown Court and the Magistrates' Court, as indicated in Table 11. The savings to police and prosecution considerably exceed the cost of disclosure by summary and approximate the cost of disclosure by statements. There would also likely be savings to probation and the prison service but these are not estimated.

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TABLE 10

Net Cost Effects of Disclosure
Projected on the Basis of the Newcastle Results

	Cost of Disclosure	Savings at One-half Newcastle Rate	Net Savings
Summary only	£270,625	£6,500,000	£6,000,000
Summary plus statements	£336,000	£6,500,000	£6,000,000
Expanded summary plus statements	£389,700	£6,500,000	£6,000,000
Statements	£2,248,000	£6,500,000	£4,000,000

TABLE 11

Estimated Savings Due to Disclosure

	Savings at One-Half Newcastle Rate
Crown Court	£433,000
Magistrates' court	£433,000
Legal Aid Fund	£3,648,000
Police	£150,000
Prosecution	£1,900,000
Total	£6,564,000

NOTE: The cost of disclosure must be subtracted from these figures to indicate net savings.

III. GENERAL CONSIDERATIONS

1. Upgrading the Magistrates' Court

Disclosure in the Crown Court is by statement. Any implementation of section 48 which does not provide for similar disclosure in the magistrates' court will reinforce the view that the magistrates' court is an inferior court.

This consideration is related to status rather than efficiency and is independent of the impact of disclosure on elections to the Crown Court. Even if it could be shown, for example, that the provision of a summary produced equal or greater reductions in elections to the Crown Court, consideration should be given to whether it might not be better to require the provision of statements.

This consideration is probably satisfied by the provision of statements for not guilty plea cases and does not require the provision of statements prior to the mode of trial decision.

2. Flexibility

It is desirable that any system adopted take account of the future. A requirement that full statements be provided prior to the mode of trial decision would require the police to collect evidence in statement form in most or all cases and would likely foreclose consideration of alternate methods for a half century or more. A Leeds-type option on the other hand would permit full statements to be collected and disclosed but would allow experimentation with other methods of evidence collection and disclosure.

3. Upgrading Police Record-keeping and Evidence

Because the memory deteriorates rapidly over time contemporaneous records of events are more accurate and complete than later records. This would seem particularly true for matters relating to crime. There are advantages to the prosecution, the defence, the public and justice to promote prompt recording

of key events by the police. The prompt taking of statements is one way of accomplishing this goal but by no means the only possible method.

Whilst accounts of present procedures vary, it would appear that present procedures in some forces do not result in prompt recording of all key information. Defendant interviews generally appear to be written down promptly but other key information is sometimes not. Force instructions, of course, typically require all key information to be recorded in the officer's notebook but there are indications that this information is sometimes inadequate or missing.

Even if the disclosure regulation could itself require that key information be recorded early (which is doubtful), the disclosure regulation is not a particularly good method for trying to solve this problem. It does, however, have some bearing. A regulation requiring statements prior to the mode of trial decision would put pressure on police forces to take statements early. This would be particularly true if a requirement that statements be served early were also imposed.

A regulation based on a summary or a summary plus statements would probably have little effect on police recording practices unless the content of the summary was specified in some detail.

The detective chief inspectors in H District are generally agreed that the policy of taking statements at an early point has improved the quality of the prosecution case.

4. Crown Prosecutor

The White Paper and the Royal Commission of Criminal Procedure have recommended the creation of an independent prosecution service. The recommendation also envisages that the prosecution will be responsible for the presentation in court of all cases. This raises the question as to how the police will provide the Crown prosecutor with information about the case.

Many, perhaps most, prosecuting solicitors would prefer to receive a full file of statements for each case. This gives the maximum information both for charging and for proceeding with the case. The police can be expected to resist these demands, however, because of workload.

If there were a desire to resolve or to tilt this issue now in favour of the Crown Prosecutor, the disclosure regulation should obviously be based on statements. Conversely a disclosure regulation based on summaries or on summaries plus statements would tend to strengthen the ability of the police to resist any pressures from the Crown Prosecutor for statements in all cases.

IV. ISSUES

Whilst each of the seven principal options present somewhat different considerations, there are many issues common to all seven options. Some of these issues relate to the basic structure of disclosure while many are matters of detail. These include:

- Application to contested summary trials
- Contents of disclosure
- Applicability of disclosure to unrepresented accuseds
- Applicability of disclosure to summons cases
- Applicability of disclosure to public prosecutions other than police
- Applicability of disclosure to private prosecutions
- Applicability of disclosure to either-way motoring offences
- Applicability of disclosure to summary offences
- Applicability to juvenile cases
- Whether disclosure should be automatic or based upon a request
- Informal disclosure and written versus oral requests
- Whether disclosure should apply at first appearance
- Timing of disclosure and its effect on waiting times
- Methods of notice to the accused
- Disclosure of previous convictions, antecedents and voluntary statements
- Required disclosure
- Withholding disclosure
- Enforcement principles
- Evidentiary value of disclosure
- Relationship to pre-trial review schemes
- Possible revisions of regulation

1. Application to Contested Summary Trials

Whilst the discussions of section 48 have focused principally on disclosure prior to the mode of trial decision, there is also an issue relating to summary trials. Whether the principal method of disclosure is a summary, statements or some hybrid, there is a good argument for full disclosure for cases which actually go to a contested hearing in the magistrates' court.

Because full disclosure is available at the committal stage for cases going to Crown Court both fairness and efficiency would seem to dictate such disclosure in the magistrates' court. In so far as fairness is concerned if full disclosure is useful at the Crown Court as it is conceded to be, it will also be useful for trials in the magistrates' court. From an efficiency point of view providing the same kind of disclosure for summary trials as for committals helps to remove any incentive to elect Crown Court for disclosure purposes.

The workload implications of providing full disclosure at this point are far different from those of full disclosure at an earlier stage. Not only are there fewer cases that reach this stage but also the statements necessary for full disclosure are generally already prepared and available, as they are generally prepared for the prosecuting solicitors in these cases.

The Metropolitan Police pilot scheme requires full committal papers to be served upon the defence when a not guilty plea is entered. This service is made whether disclosure is requested or not. The Leeds Pre-Trial Review Scheme operates in similar fashion. (If disclosure for the mode of trial decision is based on summaries, this procedure might lead to the entry of guilty pleas for the purpose of receiving statements. As statements can already be obtained by electing for Crown Court, however, providing statements for summary contests would not seem to pose new risks.)

2. Contents of the Disclosure

Once a decision is made as to whether disclosure will be based on summaries, statements or some hybrid, consideration will need to be given to what the particular method of disclosure chosen should encompass.

In the Newcastle pilot scheme the force instruction specified to some extent the contents of the summary. Most importantly it indicated that the summary should set forth the evidence concerning each aspect of the charge and the specific language of any admissions made by the accused (rather than the cryptic language "The accused admitted the offence").

If the regulation is built on statements, it will need to specify the level of proof required. The Metropolitan Police scheme requires disclosure of the statements of police officers and other witnesses "whose evidence constitutes a substantial basis for proving the charge". This requires fewer statements than is customary to file with committal papers. Whilst the legal standard required for committal is that of demonstrating a prima facie case, customarily the prosecution serves statements for all the witnesses to be called at the trial as well as a list of any exhibits to be used at trial.

3. Applicability to Unrepresented Defendants

As a practical matter the major advocates for disclosure are the legal profession and persons concerned with the administration of justice. In addition disclosure is most likely to be used by those accused who are represented by attorneys. Section 48 on its face, however, applies to all accused, whether represented or not. This raises a legal question as to whether the statute would permit disclosure to be limited to represented defendants. The Home Office Legal Adviser has indicated that such a course would be contrary to the statute.

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Whilst the Newcastle pilot scheme was limited to accused who were represented by attorneys, the Metropolitan Police pilot scheme permits unrepresented defendants to request disclosure also. To date there have been no such requests and it seems likely that the level of such requests will remain low.

The principal problem with allowing requests for unrepresented accuseds is that there is no solicitor to act as a restraining influence on the accused's conduct toward the witnesses. This is not a problem in so far as disclosure of the accused's own statements are concerned. There could be problems in so far as civilian witnesses are concerned. It may be possible to deal with any such problems through the withholding of disclosure. (See Section 17 below).

4. Applicability to Summons Cases

Around a fifth of all either-way defendants appearing in magistrates' courts are proceeded against by summons. For reasons of convenience summons cases were included in neither the Metropolitan Police pilot scheme nor in the Newcastle scheme. The question therefore arises as to whether these cases should be included in any disclosure regulation.

On principle it would seem difficult to exclude these cases from coverage. The fairness and efficiency considerations are essentially the same as for cases begun by arrest. In addition excluding summons cases might raise the same kind of legal problems as excluding unrepresented defendants. It is also worth noting that because summonses are reviewed by the clerks to the justices or by magistrates prior to issuance, full files are already prepared in many cases.

5. Applicability to Public Prosecutors other than the Police

Section 48 clearly applies to public prosecutors other than the police. This would include the Department of Health and Social Services and other similar agencies. Whilst these agencies have not participated in the two pilot schemes, they should be made subject to any regulation developed for the purpose of implementing section 48. No special rules would seem to be required for these agencies.

6. Applicability to Private Prosecutions

Neither of the two pilot schemes required disclosure for private prosecutions. On principle, however, they should be included in any disclosure regulation. Because these cases have not been subject to the kind of scrutiny that police cases receive before filing the defendants involved may have a greater need for disclosure than those prosecuted by the police. In addition, the language of section 48 seems clearly to apply to private as well as public prosecutions and there could be legal problems if this category were excluded.

7. Applicability to Either-Way Motoring Offences

About 6 per cent of either-way offences are motoring offences such as reckless driving, driving whilst diqualified and certain registration and licensing offences. In 1981, 27,200 of the 426,500 persons aged 17 and over charged with indictable crimes were charged with indictable motoring offences. Either-way motoring offences are formally excluded from coverage in the Metropolitan Police pilot scheme but fully covered in the Newcastle scheme. Section 48 permits distinctions to be made by offence or offence class and thus would permit exclusion of these offences. On principle, however, there is no reason to exclude these cases unless there is a desire to cut down the scope of the new regulation.

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8. Applicability to Summary Offences

Section 48 empowers the Lord Chancellor to issue rules for both summary and either-way cases. Discussion to date, however, has focused primarily on either-way cases. The James Committee and the Royal Commission both suggested that disclosure be made available initially for either-way offences.

Many defence solicitors believe that disclosure should also be available for certain summary crime offences—assault on a police officer, obstruction of a police officer, interference with a motor vehicle and possibly section 5 public order offences. There seems to be general agreement that disclosure is not as important for other summary offences. Both the Leeds and the Nottingham Pre-Trial Review Schemes deal with some purely summary offences. (It should be noted that brief summaries are routinely included in the letters sent to some persons involved in fixed penalty offences and that full files are prepared in many summary cases handled by summons.)

9. Applicability to Juvenile Cases

Neither the Newcastle nor the Metropolitan Police pilot scheme required disclosure for cases involving juveniles unless the juvenile was charged with an adult. Section 48 is general in its terms, however, and does not mention juvenile offenders. Consequently, if there is a legal problem with excluding unrepresented accused, there may also be a legal problem with excluding juveniles.

As juvenile cases are investigated in ways that are generally similar to those used with adults, there would appear to be no major problem other than workload to including them within the disclosure regulation.

To the extent that the rationale for disclosure is fairness there would appear to be no difference on principle between the need for disclosure in

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juvenile and adult cases. To the extent that the rationale is efficiency in the courts there would appear to be some similarities and some differences. Disclosure would seem as likely to encourage guilty pleas in juvenile as adult cases. As juveniles are not entitled to elect trial in the Crown Court, disclosure to juveniles would clearly not reduce elections to Crown Court.

10. Whether Disclosure Should be Automatic or Based Upon a Request

Section 48 specifically authorises the issuance of a regulation limiting disclosure to cases in which the accused requests disclosure or disclosure is requested on behalf of the accused. Section 48 also authorises, however, the requiring of disclosure in all cases.

The James Committee saw no reason to require disclosure in every case and recommended that disclosure be required only upon request. The Royal Commission on Criminal Procedure also endorsed this approach.

Both the Metropolitan Police and the Newcastle Pilot schemes provide disclosure prior to the mode of trial decision only upon request. There are several examples, however, of automatic disclosure. One is the procedure in fixed penalty cases in which a brief synopsis of the case is included in the letter to the accused. A second is committal proceedings where no request is required. In addition, in the Metropolitan Police pilot scheme and in the Leeds Pre-Trial Review scheme disclosure is made automatically for cases in which the defendant pleads not guilty in the magistrates court.

Obviously police workloads will be much smaller if required disclosure is based upon requests.

11. Informal Disclosure and Written versus Oral Requests

Much informal disclosure already takes place under circumstances that are reasonably efficient and fair. Disclosure of this kind should not be prohibited by any new disclosure regulation.

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Formal disclosure under the new regulation should probably require a written request for the sake of regularity, although this may be a matter best left to local control.

The Newcastle pilot scheme required a written request. The Metropolitan Police pilot scheme instructed defendants that a written request was necessary but permitted disclosure based on oral requests as well. Under the Metropolitan Police approach it is difficult to tell whether force records are complete as to whether disclosure has been either requested or given.

12. Whether Disclosure Should Apply at First Appearance

If efficiency were the only consideration, it would be desirable not to require disclosure at the first appearance in the magistrates' court. Many—perhaps half of all either-way cases—are disposed of at the first appearance, largely through guilty pleas. Disclosure to these persons could involve considerable work for the police and risks a reduction in the current rate of guilty pleas.

Fairness considerations, however, argue in favour of making disclosure available to these accuseds. Like other defendants they should, it is argued, know the case against them before pleading guilty.

Legal considerations may also argue in favour of making disclosure available at first appearance. Section 48 on its face applies to all stages of the proceedings and if there is a problem with distinguishing represented from unrepresented accuseds, there may be similar problems with distinguishing accuseds at first appearance and those at later appearances.

The Metropolitan Police pilot scheme does not apply to accuseds at first appearance, whilst the Newcastle scheme did apply to the first appearance. There are no indications thus far in London that accused persons are deciding

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to go past first appearance in order to become eligible for disclosure.

Making disclosure available at or before first appearance need not increase the cost of disclosure even if the disclosure is based on statements. Whilst taking statements for all cases at an early point is more expensive than taking statements only for cases that go beyond first appearance, there is no need to take all statements early in order to allow requests for disclosure to be made at or before first appearance. The Newcastle experience suggests that making disclosure available in this way is not likely to appreciably increase the total number of requests for disclosure and obviously this approach seems fairer than one limited to cases going past first appearance. Making disclosure available in this way may also help to some extent in holding down waiting times.

13. Impact of Disclosure on Waiting Times

It is important that section 48 be implemented in a way that does not increase waiting times or exacerbate court delay. The indications are that in Newcastle disclosure did not increase waiting times and that it may have helped to reduce it. The indications from Leeds, however, suggest that disclosure can delay proceedings if the police wait until the last minute to produce needed statements. Here statements are not produced until 3 - 6 weeks after a plea of not guilty. It may be necessary therefore to consider rules concerning the timing of disclosure.

There are several kinds of rules which might be used. Among these are requiring:

(1) A prompt request and a prompt response.

(2) Disclosure requests to be made within a specified time such as by first appearance, 3 weeks from charge or 4 weeks before the second appearance.

(3) A response within a specified time of the request (e.g., 2 weeks).

(4) Disclosure information to be produced at an early stage for every case.

The first possibility is largely meaningless but might be useful as a statement of intent. Two and three offer some utility but would need to be done carefully. Four seems impractical.

The two pilot schemes used a variety of procedures. Summaries were routinely prepared for all cases in Newcastle and statements for all eligible cases in the Metropolitan Police District. Disclosure in both instances was required reasonably promptly upon request. In H District, for example, statements were ordinarily to be served within 21 days of the accused's first court appearance if the accused was in custody and before the second appearance for those on bail.

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14. Methods of Notice to the Accused

The issue of how notice should be given to the accused obviously depends upon which accused are deemed to be entitled to disclosure. In the Newcastle pilot scheme only accuseds who were represented were eligible for disclosure. Notices were consequently not given to accuseds. Rather meetings were held with the Law Society and other defence solicitors. In the Metropolitan Police pilot scheme unrepresented accuseds are eligible for disclosure after their first appearance in court as are represented accuseds. Notices are consequently handed out by the court usher to each accused - represented or unrepresented - whose case is not completed at the first appearance.

If the regulation makes accuseds eligible at the first appearance, whether represented or not, one possible method of notice is to add language to the charge sheet. If the regulation makes disclosure available at some later point in the proceedings, considerable care will need to be given to the notice issue to ensure that notice actually reaches the accuseds who are eligible.

15. Disclosure of Previous Convictions, Antecedents and Voluntary Statements

Generally the accused's previous convictions, antecedents and voluntary statement are written and available at an early stage of the proceedings, and many forces already routinely disclose upon request previous convictions and the voluntary statement.

The principal reasons for not disclosing previous convictions and the voluntary statement are that the accused already knows about these and does not need disclosure or that it is too expensive to make copies.

Defence solicitors indicate, however, that information concerning previous convictions and the voluntary statement are extremely useful. Generally the antecedent information is less useful and there would appear to be no reason to include this in the disclosure regulation.

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16. Required Disclosure

Present case law in the Crown Court requires the prosecution to disclose certain kinds of evidence without request. If the prosecution knows of a witness who can give "material evidence" but does not intend to call the witness, the prosecution must give the name and address to the defence. Similarly, when a prosecution witness is of known bad character, the defence should be informed of that fact or, at least, informed of convictions affecting the credibility of the witness. There is also some authority suggesting that the prosecution must supply details of previous convictions to the defendant upon request. (See Royal Commission on Criminal Procedure, The Investigation and Prosecution of Criminal Offences in England and Wales: The Law and the Procedure, pp. 70-73).

The applicability of these rules to the magistrates' court is not altogether clear. In the long run, however, it is desirable that the rules be the same for both courts.

If this issue is addressed either in the regulation or the explanatory material, it may be desirable to indicate that exculpatory evidence is always "material".

Generally the evidence which the prosecution has in its possession is that which tends to prove its case against the accused. Even evidence that is flawed by some weakness, such as the bad character or poor perception of the witness, generally tends to prove the case against the accused.

Occasionally, however, the prosecution acquires evidence which positively tends to prove the innocence of the accused ("exculpatory evidence"). Generally when this occurs the prosecution withdraws its charge and drops the case. If this should not occur, however, justice would seem to require that this kind of evidence be made available to the defence. Present case law probably already includes this as "material". Because this concept may be somewhat new to the magistrates' courts, however, it may be desirable to be

more specific about this kind of evidence.

17. Withholding Disclosure

Section 48 explicitly permits the implementing regulation to "exempt facts and matters of any prescribed description" from disclosure and "may make the opinion of the prosecutor material for the purposes of any such exemption".

The most obvious categories for exemption are those specified by section 6 of the Attorney General's Guidelines on Disclosure of Evidence to the Defence in Cases to be Tried on Indictment. In principle there is no reason to require greater disclosure in the magistrates' court for these matters than in the Crown Court and they should therefore be exempted from disclosure.

Both the Newcastle and the Metropolitan Police pilot disclosure schemes went beyond these guidelines in exempting cases from disclosure. Both gave the police the option of exempting in any case in which they believed exemption was necessary. This authority went unused in Newcastle and has been very little used in the Metropolitan Police pilot scheme. The existence of this authority made disclosure more palatable to the police but the provision seems too broad. The basic principle should be parity with the Crown Court.

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18. <u>Enforcement Principles</u>

Whilst the two pilot schemes have been implemented as a matter of policy and have not embodied legal enforcement procedures, it is desirable that the implementing regulation provide for such procedures.

Section 48 itself contains two provisions relating to enforcement. The first indicates that the principal remedy envisioned for non-compliance is adjournment of the proceedings. Thus, subsection (1)(b) authorises the issuance of a regulation "for requiring a magistrates' court, if satisfied that ... /disclosure/ has not been complied with, to adjourn the proceedings pending compliance... unless the court is satisfied that the conduct of the case for the accused will not be substantially prejudiced by non-compliance..."

The second provision (subsection (3)) indicates that "a person convicted of an offence ... (may not) appeal against the conviction on the grounds that a (disclosure requirement)... was not complied with by the prosecutor".

It is not altogether clear whether other remedies might be prescribed in addition to or in substitution for adjournment or whether the requirement for adjournment might be made mandatory rather than discretionary. In as much as the statute is relatively specific about the remedies to be employed the wisest course would appear to be to specify the procedure envisioned by the statute.

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19. Evidentiary Value of Disclosure

Consideration should be given to the evidentiary status of information disclosed by the prosecution. Whilst statements produced for committal purposes are treated as binding on the defence unless the defence indicates otherwise at the committal proceedings, statements provided for advance disclosure would presumably be binding on the defence only if the seven-day notice provisions of section 9 of the Criminal Justice Act of 1967 are complied with. As there are substantial savings for the courts, the police and the public in reducing the amount of in-court testimony by making maximum use of statements produced, the regulation should either encourage or mandate compliance with Section 9. The Metropolitan Police pilot scheme contains a feature of this kind.

At one time there was a concern that summaries might be dangerous for the police because they might conflict with evidence that later emerged at the trial. This does not appear to be a real problem. Summaries would appear not to constitute evidence and therefore would probably not be admissible to prove either the prosecution or the defence case. The defence may be able to use them for cross-examination to some extent but this caused no problems in Newcastle.

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20. Relationship to Pre-Trial Review Schemes

A number of magistrates' courts (Nottingham, Leeds, Bristol, Coventry) have begun pre-trial review schemes in which the prosecution and defence get together to discuss cases. Generally these schemes involve disclosure of the prosecution case to the defence either through inspection or in some instances by statements. Some of the schemes also involve disclosure by the defence to the prosecution. All of the better known schemes apply only to cases in which a not guilty plea has been entered in the magistrates' court.

In effect these schemes generally combine some form of disclosure with a pre-trial discussion of the case. As indicated in section I, these schemes are generally an expensive and cumbersome way to provide disclosure. They nonetheless may have considerable value. The case discussion aspects of the schemes help to limit issues in cases going to trial, inform the court of cases in which a not guilty plea is changes to guilty, and with other important listing matters. They may also encourage guilty pleas through a form of plea negotiations. Whilst the issuance of a disclosure regulation will undoubtedly cause these schemes to change somewhat, they almost certainly will continue and are likely to grow. The explanatory material should indicate that the regulation is not intended to discourage further exploration of the uses of pre-trial review.

22. Possible Revisions of Regulation

Some thought should be given to whether the regulation to be issued is to be a permanent regulation or whether it should be subject to revision from time to time. If revision is to be considered from time to time, does notice need to be given of this and are there any planning steps necessary at this time?

Estimate for Working Party

Summaries: £1.5 million to £4.5 million

Statements: £3.5 million to £16.5 million

310,000 "cases" at 1980 prices based on number of witnesses and estimated time per witness

Assumptions

(1) Disclosure is necessary in 100 per cent of cases

(2) There is no present preparation of statements in committal cases

(3) Disclosure will create an additional number of witnesses

(4) There will be a need for statements of summaries to be edited by solicitors

(5) There is no implementation cost in the preparation of statements or summaries for forces that already prepare these

Not discussed

(1) Defendant interviews--these are generally recorded in statement or near statement form in all cases. These also make up 50 per cent of the pages in committal papers.

Comments

(1) Assumptions (1) - (4) have not been borne out by the experience of the pilot schemes.

(2) Assumption (5) is also not warranted. Forces now producing statements and summaries are expending resources. In the absence of implementation they would be free to spend these resources in other ways.

First Revised Estimate for Statements: £3.5 million

(This assumes the same prices, number of cases, number of witnesses and time per witness as the prior estimate. It also assumes a 25 per cent disclosure rate, at least 40 per cent of which is not duplicated by a committal or a not guilty plea.)

If assumption (5) were employed, the revised estimate would be £1.85 million or less.

Second Revised Estimate for Statements: £2.5 million

The time estimated as necessary to produce statements seems excessive. At 2 - 2.5 civilian and 1 - 1.5 police witnesses per case the time estimates are 9.7 - 12.3 total hours (excluding solicitor time). Research for the Royal Commission estimates 7.8 hours as the average time needed to produce a full file.

If assumption (5) were employed, the revised estimate would be £1.4 million.

Rate of Requests for Disclosure

The most extensive data on the extent to which defence solicitors will request disclosure comes from Newcastle. There, defence solicitors requested disclosure in about 25 per cent of the either-way cases. These figures were lower during the first two months of the pilot scheme but rose rapidly thereafter, as shown in Table B-1.

The rate of requests for disclosure thus far in the Metropolitan Police pilot scheme is considerably lower at this point than that in Newcastle. During the first four months of the project, disclosure was requested in about 7 per cent of the either-way cases going past first appearance and in only 4 per cent of all either-way cases.

Whilst some knowledgeable observers prior to the pilot schemes expected disclosure to be requested in most cases or every case, it now seems clear that this is not likely. The strongest evidence for this of course is the Newcastle and London experience. Detailed analysis of this experience suggests some of the reasons why this is so:

(i) The first reason is that 25-30 per cent of the either-way defendants are not legally represented and are consequently unlikely to request disclosure very often even if they are allowed to do so.

(ii) A second reason is that there is already a great deal of informal disclosure and whilst defence solicitors are reluctant to rely on this in more serious cases, they are often quite content to rely on it in less serious cases or in cases in which the plea will almost certainly be guilty.

(iii) The third and most important reason is that some defence solicitors have developed articulate and professionally careful reasons for not requesting disclosure in many cases.

Interviews with defence solicitors in Newcastle indicate that defence solicitors generally follow one of two policies with respect to requesting disclosure:

(1) they request disclosure routinely in every case, or

(2) they request only in those cases in which consideration is being given to a guilty plea or an election for Crown Court but no decision has yet been made.

Obviously if all defence solicitors followed the first policy, the rate of requests for disclosure would be much higher. It would be exceedingly hard, however, to say that defence solicitors following the second policy are irresponsible or acting unprofessionally. It may be that there will be a long-term trend toward a greater number of requests but for the forseeable future it seems likely that requests for disclosure are likely to be in the range suggested by the pilot schemes.

Defence solicitors in Newcastle say that the rate of requests was <u>not</u> influenced by the fact that disclosure there was based on a written summary and emphatically deny that the rate of disclosure requested indicates that disclosure is not needed or wanted.

What then is the rate of request suggested by the pilot schemes - 4 per cent or 25 per cent? It is believed that the 25 per cent rate is more likely over a period of several years. As defence solicitors become more accustomed to the procedures and benefits of disclosure, they are more likely to follow the Newcastle pattern than the early London pattern.

TABLE B-1

Monthly Requests for Disclosure

	Number of Requests	Estimated Percentage of Either-Way Cases
November 1982	33	10%
December 1982	35	10%
January 1983	101	20%
February 1983	86	25%
March 1983	77	25%
April 1983	92	25%
May 1983	77	25%
June 1983	90	25%
July 1983	89	25%
August 1983	97	25%
September 1983	88	25%
October 1983	92	25%

NOTE: (1) Whilst the pilot scheme ended on 31 October 1983, requests for cases charged during the scheme will continue to be honoured.

(2) The estimated percentage of either-way cases is calculated on the basis of month of requests rather than month of case and therefore differs from Table 3.

NOTES

1. In Leeds a "mini-file" is prepared, prior to the mode of trial decision. This file always contains a summary. In assault and shoplifting cases in which the arrest is based on the actions of a civilian complainant force policy requires a statement from the complainant. In other cases one or more statements may be included.

   The mini-file is not routinely shown to the defence but will be disclosed on request. Generally such disclosure is by inspection rather than by providing copies.

2. Report of the Interdepartmental Committee, The Distribution of Criminal Business Between the Crown Court and Magistrates' Courts (November 1975), pp. 100-101.

3. Royal Commission on Criminal Procedure, Report (1981), pp. 73-74.

4. Criminal Statistics in England and Wales reports 17 per cent for 1982.

5. Figures on this percentage were discontinued in Criminal Statistics some years ago because of errors in reporting. Data from individual courts and estimates by knowledgeable observers suggest the 10 to 20 per cent figure. The estimate for the Working Party indicated that 20 per cent was the most likely figure.

6. R. Gemmill and R.F. Morgan-Giles, Arrest Charge and Summons (Research Study No. 9, Royal Commission on Criminal Procedure), p.30.

7. The estimate for the Working Party indicated that 10 forces did not now prepare summaries, relying instead on the officer's notebook. Based on the Newcastle experience the time required to produce a summary once the notebook entries are completed is 10-15 minutes per case. (The estimate for the Working Party was 10 minutes.) Projected for 10 forces at £3.50 per case (£2.50 for officer time and £1 for typing) the additional cost would be £86,940. Because the summary is so integral a part of the regular procedure in most forces no attempt has been made to include its production cost in the estimates in this section. These production costs are shown, however, in section G.

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8. See note 6.

9. Based on a current £17,000 annual salary for the Metropolitan Police District this is a realistic 1983 figure. The salary used in the 1980 Working Party estimate was £13 per hour based on a sergeant's pay at that time. No explanation was given as to why the cost was based on a sergeant's time rather than a constable's.

10. Based on data from the estimate for the Working Party. Gemmil and Morgan-Giles, note 2 supra, do not indicate the components of difference between short and full files.

11. Based on discussions with officers these seem like minimum costs. In taking statements on a delayed basis the officer must refamiliarise himself with the case, locate the witness and in many cases travel to meet the witness. Many of these costs are reflected specifically in the estimate for the Working Party.

12. Based on an estimated 3,600 either-way cases.