The Committee on the Administration of Justice (CAJ)
45/47 Donegall Street, Belfast BT1 2FG
Tel: (01232) 232394 Fax: (01232) 246706

CAJ's response to the Northern Ireland Office (NIO) Consultation Paper on Disclosure in Criminal Cases

August 1995

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The Committee on the Administration of Justice, as an organisation which has worked on a large number of miscarriage of justice cases, views with grave concern the proposals outlined by the government in their consultation paper on disclosure. It appears to us that the proposals as they stand, if given legislative expression, would seriously undermine the integrity of the guiding principle of the criminal justice system that someone is innocent until proven guilty. Additionally, the prosecution would effectively be relieved of their burden of having to prove someone's guilt beyond a reasonable doubt. CAJ considers the suggestion that the defence disclose details of their case at an early stage to be both unprecedented and unjustified.

It is important to contextualise the debate around these proposed developments and to remember that what gave rise to them was a series of judicial decisions in England expanding the concept of prosecution disclosure. These decisions concerned a number of cases, including at least one where individuals were wrongly convicted as a result of the failure of the prosecuting authorities to disclose evidence of a nature crucial to the defence. The government, by these proposals, is seeking to reverse the trend of these decisions. We feel this to be a dangerous development, particularly as it appears that only the general framework for the changes will be laid down in primary legislation while the detail will be contained in secondary legislation or codes of practice, thus diluting the constitutional safeguard of parliamentary debate.

The government asserts that one of the main reasons for the current proposals is to remove the inordinate administrative burden which the law as it now stands places on the investigatory and prosecuting authorities. If it is in fact correct that the authorities face such a burden, it is the responsibility of the police and the prosecution rather than the result of some nefarious plan by cunning defence lawyers to secure the acquittal of the guilty. We disagree strongly with the government's proposal that the discretion as to which documents should be disclosed be again left to the police or the prosecution. Their track record in this area is not good and we see no reason to be confident that they will act any differently now than they have done in the past.

CAJ also does not accept the implication in the NIO's consultation paper that, because the Court of Appeal here has not quashed convictions on the basis of non-disclosure, the reality is different to that which prevailed in Britain. While it might often be unhelpful to delve into the specifics of particular cases, we can think of at least two cases where the non-disclosure of crucial evidence by the prosecution was discovered during trial and led eventually to the acquittal of the accused i.e. the Ballymurphy Seven and the trial of fifteen individuals arising out of an attempted escape from Crumlin Road prison.

CAJ therefore rejects the current proposals although we do appreciate there may be a need for rationalisation of the law in this area as it stands. We do not agree however that the contents in this consultation paper represent the correct starting point for any debate on this issue. We believe they ignore the context in which recent legal developments have taken place and, far from addressing the real agenda of concern for the protection of the innocent individual, may have rewarded incompetence and perhaps worse on the part of the prosecuting authorities and the police.

Aside from these general comments CAJ would wish to make the following specific observations on the proposals.

1. The CAJ welcomes the government's proposals to place this area of law on a statutory footing. It acknowledges the need for clear rules and for detailed criteria. It would stress that the prime purpose of new legislation should be the acquittal of the innocent, not the alleviation of administrative burden or a reduction in inconvenient bureaucracy. We think that at present it is only in very rare cases that the time and effort spent on disclosure by the prosecution is disproportionate to the expected gains: while resources are clearly not unlimited in this area we consider the protection of innocent people from unjust convictions as paramount. The examples given in the NIO consultation paper (at para 15) are, we believe, very unrepresentative. We believe in any event that there are other ways of protecting the sources of information (e.g. keeping the name of an informant secret) without restricting access to the information itself.

2. The two main problems identified in the HO and NIO papers are the volume of information which sometimes has to be disclosed and on occasion the sensitive nature of some of it. We find it hard to believe that the first of these problems is anything like as serious in NI as it is in England and Wales and we are wary of approving changes to the NI criminal procedure system merely to keep that system in line with developments in England and Wales. While sensitivity may, at present, be a more serious problem in Northern Ireland we do not think that it has up to now created significant difficulties for the prosecuting authorities and we therefore do not see why change is now required. Rather than alleviating a problem this change seems intended as a means of increasing the rate of conviction per se. If there is evidence of the current duty of disclosure making the task of prosecutors significantly more difficult in Northern Ireland we would like to see it.

3. We believe that the proposals contain one fundamental flaw: under the guise of alleviating administrative burdens on prosecutors they would make changes to the duty of disclosure on defendants. CAJ is not aware of the latter duty being a problem at present and to interfere with the current position is to undermine the basic principles that in our criminal justice system the burden of proof is on the prosecution and that a defendant must be presumed innocent until proven guilty. We regard the current position (which requires prior disclosure only of an alibi defence) as satisfactory.

4. Generally we favour the enactment of a general statutory principle placing a duty of disclosure squarely on the prosecuting authorities (and on the investigating authorities if these are different). Defendants have the right to know the case against them, and unless this is presented as fully as possible they will be at a disadvantage when considering how best to show that the prosecution have not discharged their burden of proof. We would have objections to a statutory principle which allowed the prosecuting authorities to decide what is relevant to the defence or what might undermine the prosecution case. A better position, we contend, is one whereby the prosecution have to disclose everything - or at any rate, as at present, make everything available for inspection by the defence - <u>unless</u> they can present an acceptable case to a judge at a pre-trial hearing as to why certain items should <u>not</u> be disclosed. We do not agree with the suggestion that legislation should specify

categories of material which the prosecution can identify as potentially useful to the defence but not to the prosecution.

5. We see a difficulty with the proposed distinction between primary and secondary prosecution disclosure. Unless the duty of primary disclosure is extensive there is a risk that the defence might find it difficult to supply sufficient particulars of its case to allow the issues in dispute to be identified. Put differently, the prosecution may be tempted to hold back information under its primary duty of disclosure until it knows what shape the defence is going to take, yet this very retention of material may disable the defence from putting forward a good defence case. If the issues in dispute are not sufficiently identified at this stage this will not trigger, in the government's proposed scheme, the prosecution's secondary duty of disclosure. We find it particularly objectionable that the proposed scheme appears to require the defence to do the work of the prosecution by placing an onus on the defence to provide specific particulars of the weaknesses in the prosecution case.

6. The CAJ cannot accept the proposal that a failure to disclose the defence case in advance, or an attempt to run more than one line of argument in defence, could be the subject of comment and of adverse inference at trial. This smacks ominously of the recent changes to the right of silence and would tilt the balance unjustifiably in favour of the prosecution at the trial. We would like to remind the government of the comments of the United Nations Human Rights Committee following the recent hearings under Article 40 of the International Covenant on Civil and Political Rights in Geneva which described the changes to the right to silence as violating Article 14 of the Covenant which guarantees the right to a fair trial. In addition, the awaited judgement of the European Court of Human Rights in the case of Murray v UK will, if it confirms the decision of the Commission, have serious implications for the Criminal Evidence Order and potentially these proposals. We are also opposed to such comments and inferences in principle, but if they are to be permitted they should at the very least be balanced by a corresponding right in the defence to comment on prosecution tactics prior to the trial.

7. We support the idea of pre-trial hearings to determine the extent of each side's duty of disclosure, but at such hearings the court should be required by statute to make paramount the principles that the burden of proof in a criminal trial rests on the prosecution and that all defendants are to be presumed innocent until proven guilty in accordance with the law. We strongly disagree with the proposal that at a court hearing into the resolution of a dispute over disclosure it should be for the defence to justify its request for further prosecution disclosure: to us this is an unacceptable reversal of the current rule and flies in the face of the prevailing judicial view in R v Saunders (1990), R v Ward (1993) and R v Keane (1994).. Moreover we are dissatisfied with the very general nature of the criterion identified in the consultation paper as being the appropriate one to be applied by the court when considering disclosure applications (para 62 of NIO paper): we submit that much more detailed criteria are required, making reference for example to the nature of the material in question, its provenance, its volume, its inherent reliability, etc. If such criteria are not provided there will be a continuing risk of serious miscarriages of justice occurring.

8. The CAJ would also prefer to see the proposed legislative form of the "sensitivity" test (para 68 of NIO paper) set out in more detail. It is not sufficient for the proposal simply to refer to R v Johnson, Davis and Rowe without further illustration of how the procedure laid down by the judiciary is to be translated into statutory form.

9. Finally, if the changes to the law on disclosure are to be put into legislative form we urge the government to use primary legislation for the whole scheme. To use primary legislation only for the general principles, leaving secondary legislation or Codes of Practice to cover the details, is in our view to risk further injustice. The issues involved in disclosure are vital and should therefore be fully debated during the enactment of legislation by the House of Commons. Experience to date, moreover, shows that rules laid down in secondary legislation or Codes of Practice tend not to be backed up with effective sanctions if breached: the CAJ sees it as imperative that if investigating or prosecuting authorities fail to comply with such rules they should be made to pay some penalty; in addition the defendant should not have to suffer the risk of an unsafe conviction.