

CRIMINAL JUSTICE ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 5: Disclosure

178. This Part amends some of the provisions in the Criminal Procedure and Investigations Act 1996 (the 1996 Act) that govern the disclosure of unused prosecution material to the defence and the provision of a defence case statement.

Section 32: Initial duty of disclosure by prosecutor

179. This Section amends section 3 of the 1996 Act and introduces a new objective single test for the disclosure of unused prosecution material to the defence. It replaces the current two tests that apply at the primary and secondary disclosure stages of the present scheme.

180. The new test will require the prosecutor to disclose to the accused:

““...any prosecution material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused, or of assisting the case for the accused.”

Section 33: Defence disclosure

181. This Section amends the defence disclosure requirements in section 5 of the 1996 Act.
182. *Subsection (1)* amends section 5 of the 1996 Act to provide for the cross service of defence statements following an order of the court. The court may make such an order of its own motion or on the application of any party (new *sub-section 5(B)*).
183. *Subsection (2)* inserts a new section 6A in the 1996 Act. The new section prescribes the content of a defence statement. It replaces subsections (6) to (9) of section 5 of the 1996 Act (which are repealed).
184. At present the accused is required to set out in general terms the nature of his defence. The effect of the new section is to require the accused to provide a more detailed defence statement. The present requirements contained in section 5(6)(b) and (c) of the 1996 Act are replicated in the new section 6A(1)(b) and (c) and the alibi notification provisions in section 5(7) and (8) are replicated in the new section 6A(2) and (3). The main changes are that the accused will, in the future, be required to set out the nature of his defence, including any particular defences on which he intends to rely, and indicate any points of law he wishes to take. Details of alibi witnesses must include the witness's date of birth.
185. *Subsection (1)* of the new section 6A defines a defence statement for the purposes of Part 1 of the 1996 Act. The accused will be required to provide a written statement setting out the nature of his defence, including any particular defences on which he intends to rely. The statement must also indicate any facts on which the accused takes issue with the prosecution, setting out in respect of which matter the reason why he takes issue with the prosecution and indicating any point of law he wishes to take, including the

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admissibility of evidence and abuse of process points, and any authority on which he intends to rely for that purpose.

186. *Subsection (2)* of the new section 6A provides that if the statement discloses an alibi, the accused must include particulars of the alibi in the statement. These are to include the name, address and date of birth of any witness the accused believes is able to give evidence in support of the alibi, if the accused knows these details, when the defence statement is given. If the accused does not have this information, the particulars are to include any information in his possession that might assist in identifying or finding any such witness.
187. *Subsection (3)* of the new section 6A defines evidence in support of an alibi for the purpose of section 6A as evidence tending to show that by reason of the presence of the accused at a particular place or in a particular area at a particular time, he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission. This definition reproduces the definition of evidence in support of an alibi given in section 11(8) of the Criminal Justice Act 1967.
188. *Subsection (4)* of the new section 6A gives the Secretary of State power to prescribe in regulations further details that are to be contained in defence statements. Such regulations will be subject to the affirmative resolution procedure.
189. *Subsection (3)* of the Section inserts a new Section 6B in to the 1996 Act which requires the accused to provide an updated defence statement within a period specified in regulations made under section 12 of the 1996 Act. However, if the accused has nothing to add to his earlier defence statement, he may instead give a written statement to that effect.
190. Updated defence case statements must comply with the requirements applicable to defence statements.
191. *Subsections (5) and (6)* of the new section 6B provide for the cross service of updated statements following an order of the court (made either of its own motion or on application by any party). This mirrors new sub section (5B) of section 5 of the 1996 Act (inserted by Section 28(1)) that provides for the cross service of the initial statement.

Section 34: Notification of intention to call defence witnesses

192. This Section inserts a new section 6C in the 1996 Act which imposes a new requirement on the accused to serve, before the trial, a notice giving details of any witnesses he intends to call to give evidence at his trial. Details of the witnesses' name, address and date of birth must be given to the court and the prosecutor within a time limit specified in regulations made under section 12 of the 1996 Act. If the address is not known, the accused must provide any information that might assist in identifying or finding the witness. The Section does not require the accused to provide advance notice that he personally intends, or does not intend, to give evidence at the trial.
193. *Subsection (2)* of the new section 6C provides that if details of any alibi witnesses have already been provided as part of the defence statement in accordance with new section 6A(2), further details do not have to given under this provision.
194. *Subsection (4)* of the new section 6C requires the accused to give an amended notice if he subsequently decide to call a witness who is not in the notice, decides not to call someone who is on the list or discovers any information on the whereabouts of the witness.

Section 35: Notification of names of experts instructed by defendant

195. This Section inserts a new section 6D into the 1996 Act, which imposes a new requirement on the accused to serve, before the trial, a notice giving details of the name

and address of any expert witness consulted. A notice will be required in respect of each expert consulted.

196. *Subsection (2)* of the new section 6D provides that if details of the expert have already been provided under new section 6C (notification of intention to call defence witnesses), a notice is not required under this section.

Section 36: Further provisions about defence disclosure

197. This Section inserts a new section 6E into the 1996 Act.
198. *Subsection (1)* of new section 6E provides that a defence statement served under sections 5,6 or 6B of the 1996 Act on behalf of an accused, by his solicitor, is deemed to have been given on the authority of the accused, unless the contrary is proved.
199. *Subsections (2) and (3)* of the new section 6E provides that where it appears to the judge at a pre trial hearing (as defined in Part 4 of the 1996 Act) that the accused has not fully complied with the requirements set out in sections 5 (defence statement), 6B (updated defence statement) or 6C (witness list), the judge must warn him that there is the possibility of comment being made or inferences being drawn.
200. *Subsections (4), (5) and (6)* of section 6E apply where there is a trial before judge and jury. They enable the judge, either of his own motion or on the application of any party, to give to the jury a copy of the defence statement and, if he does so, to direct that it be edited to exclude any inadmissible material. The defence statement that is given to the jury is the updated defence statement where this has been provided. Where no updated defence statement has been given it is the initial defence statement.

Section 37: Continuing duty of disclosure by prosecutor

201. This Section inserts a new section 7A in the 1996 Act. The new section 7A replaces the existing sections 7 and 9 of the 1996 Act (which are repealed). The new section 7A imposes a continuing duty on prosecutors to disclose unused material.
202. *Subsection (1)* of the new section 7A provides that the section applies at all times after the prosecutor has provided initial prosecution disclosure under section 3, or has purported to do so. This duty continues until the accused is acquitted, convicted or the prosecutor decides not to continue with the case.
203. *Subsection (2)* of the new section 7A requires the prosecutor to keep under review the question of whether there is any material that meets the new disclosure test in set out in section 3 (material that might reasonably be considered capable of undermining the case for the prosecution or of assisting the case for the accused and has not been disclosed to the accused).
204. *Subsection (3)* of the new section 7A provides that if there is any such material the prosecutor must disclose it to the accused as soon as is reasonably practicable or within any time limit specified in regulations made under section 12 of the 1996 Act.
205. *Subsection (4)* of the new section 7A provides that when complying with the requirement to review the unused prosecution material the prosecutor must take account of the state of affairs as it stands at the time, including the prosecution case.
206. *Subsection (5)* of the new section 7A provides that where the prosecutor receives a defence statement served under sections 5, 6 or 6B and as a result of that statement is required to make further disclosure in accordance with section 7A, he must do so within the relevant period specified in regulations made under section 12 of the 1996 Act or give a written statement that that no disclosure is required.
207. *Subsection (6)* of the new section 7A defines prosecution material for the purposes of the section as material which is in the prosecutor's possession, or which he has been

allowed to inspect in pursuance with a Code of Practice issued under Part 2 of the 1996 Act.

208. *Subsection (7)* of the new section 7A provides that the prosecutor should disclose material under this section as he does so when carrying out initial prosecution disclosure in accordance with section 3 of the 1996 Act.
209. *Subsection (8)* of the new section 7A provides that material must not be disclosed to the accused under this section if the court, on application by the prosecutor concludes that it is not in the public interest to disclose it, and has ordered accordingly.
210. *Subsection (9)* of the new section 7A provides that material must not be disclosed to the accused under this section if disclosure is prohibited under section 17 of the Regulation of Investigatory Powers Act 2000.

Section 38: Application by defence for disclosure

211. This Section replaces subsections (1) and (2) of section 8 the 1996 Act. Section 8 enables the accused to apply to the court for further disclosure of unused prosecution material if certain conditions are met.
212. *New subsection (1)* of section 8 provides that the section applies when the defence has given a defence statement under sections 5, 6 or 6 B and the prosecutor has complied with his continuing duty to disclose or purported to comply with it or has failed to comply with it.
213. *New subsection (2)* of section 8 enables the accused to apply to the court for an order requiring the prosecutor to disclose material, to the accused, if the accused has reasonable cause to believe that there is prosecution material that should have been, but has not been, disclosed to the accused pursuant to the prosecutor's continuing duty to disclose.

Section 39: Faults in defence disclosure

214. This Section substitutes a new section 11 for existing section 11 of the 1996 Act. The new section 11 extends the existing list of defence disclosure failures and removes the leave requirement for making comment in respect of some of these.
215. New section 11 provides that a court or jury may draw inferences from certain faults in relation to disclosure by the accused in deciding whether he is guilty.
216. *Subsection (1)* of section 11 provides that this section applies in three sets of circumstances, as set out in subsections (2), (3) and (4).
217. *Subsection (6)* provides that in the case of a failure to mention a point of law in a defence statement, comment by another party may only be made with the leave of court.
218. *Subsection (7)* provides that in the case of failures in relation to witness lists, comment by another party may only be made with the leave of the court.
219. *Subsection (10)* provides that a person cannot be convicted solely on an inference under this section.

Section 40: Code of practice for police interviews of witnesses notified by accused

220. *Section 40* should be read in conjunction with *section 34*. It inserts a new section 21A into the 1996 Act. New section 21A provides for a code of practice, which will apply where the police, or non-police investigators, interview a person whose details have been disclosed under new section 6A(2) or 6C of the 1996 Act.
221. *Subsection (1)* of new section 21A requires the code to be prepared by the Secretary of State.

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222. *Subsection (2)* specifies a number of matters on which the code must provide guidance, for example, the attendance of the interviewee's solicitor at such an interview. The list is not exclusive.
223. *Subsection (3)* requires police officers and non-police investigators conducting such interviews to have regard to the code of practice.
224. *Subsection (4)* requires the Secretary of State to consult the persons specified in the subsection when the code is being prepared. The persons to be consulted vary, depending on whether the code is to apply to England and Wales or Northern Ireland. The lists are not exclusive, in that the Secretary of State may consult anybody else, if he thinks fit.
225. *Subsection (5)* provides for the code to be brought into operation by the Secretary of State by order.
226. *Subsection (6)* enables the Secretary of State to revise the code from time to time and applies the same consultation requirement, and provision for it to enter into operation by order, to the revised as to the initial code.
227. *Subsections (7) to (10)* set out the Parliamentary procedures that will apply when an order is made to bring a code or revised code into operation. Under subsection (10), any consultation requirements must have been discharged before an order is made.
228. *Subsection (11)* makes it clear that a failure to have regard to the code cannot, in itself, render the person responsible for the failure liable to criminal or civil proceedings.
229. *Subsection (12)* makes the code admissible in evidence in all criminal and civil proceedings and *subsection (13)* requires all courts to take the code, or a failure to have regard to it, into account where the code or the failure appears to be relevant to a questions before them in any criminal or civil proceedings.