CRIMINAL LAW SEMINAR

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Disclosure – A Practical Guide – **Jason Beal**

Seeking Indications as to Sentence – **Edward Bailey**

Financial Reporting Orders – **Victoria Hoyle**

Sentencing Update – **Sally Daulton**

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Disclosure
A Practical Guide

Jason Beal

DISCLOSURE
A Practical Guide

The current position in relation to the disclosure obligations upon the Prosecution and the Defence in Crown Court proceedings is a seething and, at times, contradictory meeting of primary legislation, secondary legislation, procedure rules, codes of practice and local practice directions.

1. Initial Disclosure

Who ?

The Prosecution.

What ?

Any 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[1].

The impression can often arise, whether true or not, that the quality of the disclosure given to the accused is dependent entirely upon the quality of the disclosure given to the prosecutor. The halcyon days of independent "investigating officers" and "disclosure officers" seems to have vanished.

When ?

There is no prescribed time limit either within the Act or under the Criminal Procedure Rules. By virtue of section 3 (8) and 13 of the Act, the Prosecution simply has to comply with its duty "as soon as is reasonably practicable" after the accused is charged with an offence for which he is sent for trial.[2]

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[1] CPIA (1996) section 3 (a)
[2] CPIA (1996) section 1 (2) (cc)

vi) any alibi, including details of alibi witnesses (names, addresses, dates of birth or as many of the details as are known or, if these are not known, any information which might be of material assistance in identifying or finding such a witness)

vii) **whether** he intends to call any witness at trial (and names, addresses, dates of birth or as many of the details as are known or, if these are not known, any information which might be of material assistance in identifying or finding such a witness).

Note: If it is not intended to call any defence witnesses, there is a requirement to include this in the Defence Statement.

There is no statutory requirement upon the Defence to "request" items of disclosure of unused material.

Recent case law :- *In re Joseph Hill and Co (Wasted Costs Order)* [2013] 2 Cr.App.R 20. Applies to alibi witness ; defence witnesses generally not considered.

When ?

There are time limits for the Defence. The time limit starts to run from the date when the prosecutor complies or purports to comply with the initial disclosure under section 3.

The Defence then have 28 days to comply with the requirements under section 6A and 6C.[4]

There is a power to extend these time limits, but :-

i) an application has to be made before the expiry of the time limit,

ii) the application has to set out the grounds upon which it is made,

iii) the application has to set out the length of the extension required, and

iv) the court has to be satisfied that it would be unreasonable for the accused to give a defence statement or notification of witness requirements within the relevant period.

[4] CPIA (Defence Disclosure Time Limits) Regulations 2011, S.I 2011 No 209

When ?

This only applies :-

i) where the accused has given a Defence Statement, and

ii) the prosecutor has complied with further disclosure, or has purported to comply with further disclosure or has failed to comply with further disclosure.

How ?

There are rules relating to these applications. Rule 22.5 of the *Criminal Procedure Rules* 2012 set out the requirements. The application must :-

i) describe the material,

ii) explain why there is reasonable cause to believe that the prosecutor has the material and why it should be disclosed, and

iii) explain why a hearing is needed

The Court can determine the application in public or in private or without a hearing. The Court cannot require the prosecution to make disclosure unless it has had 14 days in order to make representations (see Appendix for draft application).

Criminal Procedure Rules (Crim PR)

The purpose of setting out the law is to provide the framework and timescale within which disclosure should take place. There is nothing to stop the Court from changing the time-limits. The Crim PR allow the Court extensive and wide-ranging powers to abrogate, change, and extend time-limits in order to comply with the over-riding objective.

The over-riding objective, of course, is to deal with cases justly. Dealing with cases "efficiently and expeditiously" is just one aspect of dealing with cases justly. The scramble to get things done quickly should not be done at the expense of things being done fairly ; nor should the insistence on proper compliance with disclosure obligations be met with routine sneering about "fishing" expeditions.

IN THE CROWN COURT AT PLYMOUTH Case No T2013.

BETWEEN

REGINA

-v-

JOHN SMITH

APPLICATION FOR DISCLOSURE UNDER SECTION 8 OF THE CRIMINAL PROCEDURE AND INVESTIGATIONS ACT 1996

Date of Defence Statement	Date of Further Disclosure	Material sought	Reason that material should be disclosed
01.06.13	15.06.13	1. Circumstances of the previous convictions of the complainant	1. The issue in the case is self-defence ; the Defendant says that the complainant attacked him with a knife. The Prosecution have disclosed the fact that the complainant has a previous conviction for possessing a bladed article – the facts behind this conviction will form the basis of a non-defendant's bad character application
		2. Medical notes relating to the complainant's treatment at hospital	2. The statement from Dr Jones (page 12) indicates that the complainant gave a detailed account to her of the circumstances of the offence. This was the first account given by the complainant before he saw the police. The notes should be considered for the presence of previous inconsistent statements.
		3. Laboratory notes from the Prosecution	3. Examination by the forensic scientist instructed by the Defence revealed that further examinations

Indications as to Sentence

Edward Bailey

INDICATIONS AS TO SENTENCE

A Historical Background

Guidelines as to the extent to which there could be discussions between judge and counsel about sentence prior to plea were formerly to be found in the case of *R v Turner (1970)2 A.B. 321*. A statement that on a plea of guilty such a sentence would be imposed but that if convicted after trial a severer one would follow should never be made, except that it was permissible for a judge to say that whatever the plea the sentence would or would not attract custody. A conviction was liable to be quashed where a plea of guilty had followed an indication of a particular form of sentence, but a more severe form was in the event imposed, as in *R v Grice (1977) 66 Cr. App.R. 167*; or, more generally, where there had been undue pressure on the defendant to plead guilty, as in *R v Pitman 1991, All E.R. 468*, where the absence of the defendant during discussions held in the judge's chambers meant he had to learn second-hand what the judge had said and was unable to correct anything said on his behalf by his counsel.

B R v Goodyear 2005 2 Cr App R 20

Principles

1) Any advance indication of sentence should normally be confined to the maximum sentence if a plea were tendered at the stage at which the indication was sought.

2) Such an indication should only be given if sought by the defendant, but a judge was entitled to remind the defence advocate of the defendant's entitlement to seek such an indication.

3) The judge has a discretion to refuse to give an indication or to reserve his position.

4) The indication should either be sought on a full facts basis; or on a written basis of plea, agreed by the prosecution, without which the judge should

9) **The unrepresented defendant**

The defendant in person is entitled to ask for an indication, but for the judge or prosecutor to inform him of that right might appear to be undue pressure.

10) **Procedure**

i) Indications should normally be sought at the plea and case management hearing, but can be made later, even during the trial itself.

ii) In complex cases it is unlikely that the judge will be able to give an indication unless the issues between the parties have been addressed and resolved; in such cases at least 7 days' notice should be given of an intention to seek an indication, and failure to do so resulting in an adjournment could lead to a reduced discount for any eventual plea.

iii) The hearing will take place in open court.

iv) Any reference to a sentence request is inadmissible in a subsequent trial; and reporting restrictions should normally be imposed, but should be lifted once a plea is entered or the defendant found guilty.

v) The judge must only commit himself to the maximum sentence that he would impose if the defendant were to plead guilty there and then. The judge should not announce any notional post-trial sentence: if he does, this cannot bind him or any other judge when sentencing after trial – at the end of the trial, the judge's assessment of the seriousness of the offence may be significantly different, e.g. the evidence against the defendant has painted a worse picture of the criminality involved *R v Patel (2009) 2 Cr. App. R.(s) 67*.

vi) the judge, having given an indication as to which bracket of a definitive sentencing guideline a case fell into, will be bound by it *R v Oreole (2012) 1 Cr. App .R(s) 41*

11) **Indications in relation to dangerous offenders**

Where a defendant has been charged with a "specified offence" and where the risk assessment under s.229 remains to be made, any indication must

C **Indications sought in the Magistrates Court**

The court in Goodyear stated that, pending the settling in of these arrangements, they should be confined to the Crown Court. But it is now possible for the defence advocate to ask magistrates at the plea before venue and allocation stage whether or not a custodial sentence would be imposed if the defendant consented to summary trial in an either-way offence – section 20 (3) MCA 1980. The procedure is as follows:- where a not guilty pleas is made, by an adult defendant who is not facing any related offences and who is not jointly charged; and where the magistrates having considered representations from both the prosecution and defence, and having had sight of the antecedents, and having considered whether their sentencing powers are adequate, and having had regard to any allocation guidelines, decide upon the suitability of summary trial, then, before the defendant consents to be tried summarily or elects trial on indictment he can at this point request an indication of whether a custodial or non-custodial sentence would be more likely if he were to be tried summarily and plead guilty. The court is not required to give such an indication and there is no guidance as to the basis on which it should make such a decision. If the magistrates do give an indication, the defendant is then asked whether he wishes to reconsider his earlier indication, or lack of it, as to plea. If he then indicates a guilty plea he will be treated as having been tried summarily and pleaded guilty. Under the new section 20A of the MCA 1980, the magistrates are then limited as to how they may deal with him because they may not impose a custodial sentence unless one was indicated.

If a defendant does not change his plea to guilty after an indication, that indication will not be binding on any court and a sentence may not be challenged by appeal to any higher court on the ground that it was inconsistent with the indication of sentence.

If either the court does not give an indication, or the defendant does not indicate that he wishes to change his plea after an indication, or does not indicate that he would then plead guilty, the clerk will then ask him if he consents to summary trial or wishes to be tried on indictment.

Finally where an indication is sought, given, and before the time for acceptance is over, in a case where there is a possibility that the defendant meets the criteria for an extended sentence under s.3A of the PCC(S)A 2000, the defendant should be

Financial Reporting Orders

Victoria Hoyle

FINANCIAL REPORTING ORDERS

1. Section 76 (1) and (2) of the Serious Organised Crime and Police Act 2005 provide for a financial reporting order to be made when a court is considering or otherwise dealing with a person convicted of an offence specified in subsection (3), where it is satisfied that the risk of a person committing another such offence is sufficiently high to justify making such an order.

Serious Organised Crime and Police Act 2005, ss76-81

s76 – Financial reporting orders: making

(1) A court sentencing or otherwise dealing with a person convicted of an offence mentioned in subsection (3) may also make a financial reporting order in respect of him.

(2) But it may only do so if it is satisfied that the risk of the person's committing another offence mentioned in subsection (3) is sufficiently high to justify the making of a financial reporting order.

(3) The offences are –

(aa) an offence under either of the following provisions of the Fraud Act 2006 –

(i) Section 1 (fraud)

(ii) Section 11 (obtaining services dishonestly)

(ab) a common law offence of conspiracy to defraud

(ac) an offence under section 17 of the Theft Act 1968 (false accounting)

(c) any offence specified in Schedule 2 to the Proceeds of Crime Act 2002 ("lifestyle offences"),

(da) an offence under any of the following provisions of the Bribery Act 2010;

- section 1 (offences of bribing another person);
- section 2 (offences relating to being bribed);
- section 6 (bribery of foreign public officials);

(g) an offence under any of the following provisions of the Criminal Justice Act 1988 –

- section 93A(assisting another to retain the benefit of criminal conduct)
- section 93B (acquisition, possession of use of proceeds of criminal conduct)
- section 93C (concealing or transferring proceeds of criminal conduct),

(2) He must make a report, in respect of—

(a) the period of a specified length beginning with the date on which the order comes into force, and

(b) subsequent periods of specified lengths, each period beginning immediately after the end of the previous one.

(3) He must set out in each report, in the specified manner, such particulars of his financial affairs relating to the period in question as may be specified.

(4) He must include any specified documents with each report.

(5) He must make each report within the specified number of days after the end of the period in question.

(6) He must make each report to the specified person.

(7) Rules of court may provide for the maximum length of the periods which may be specified under subsection (2).

(8) In this section, *"specified"* means specified by the court in the order.

(9) *[Scotland.]*

(10) A person who without reasonable excuse includes false or misleading information in a report, or otherwise fails to comply with any requirement of this section, is guilty of an offence and is liable on summary conviction to—

(a) imprisonment for a term not exceeding—

(i) in England and Wales, 51 weeks,

(ii) in Scotland, 12 months,

(iii) in Northern Ireland, 6 months, or

(b) a person to whom the specified person has disclosed a report, for the purpose of contributing to doing either of the things mentioned in subsection (4).

(4) The things mentioned in subsections (2) and (3) are—

(a) checking the accuracy of the report or of any other report made pursuant to the same order,

(b) discovering the true position.

(5) The specified person may also disclose a report for the purposes of—

(a) the prevention, detection, investigation or prosecution of criminal offences, whether in the United Kingdom or elsewhere,

(b) the prevention, detection or investigation of conduct for which penalties other than criminal penalties are provided under the law of any part of the United Kingdom or of any country or territory outside the United Kingdom.

(6) A disclosure under this section does not breach—

(a) any obligation of confidence owed by the person making the disclosure, or

(b) any other restriction on the disclosure of information (however imposed).

(7) But nothing in this section authorises a disclosure, in contravention of any provisions of the Data Protection Act 1998, of personal data which are not exempt from those provisions.

(8) In this section, references to a report include any of its contents, any document included with the report, or any of the contents of such a document.

FRO's: The Background

2. HM Treasury, in the paper "The financial challenge to crime and terrorism" at paragraph 2.7 indicates: "Financial Reporting Orders were introduced in the Serious Organised Crime and Police Act 2005 to create a new financial tool for the lifetime management of

Judges asked to make such orders should give careful consideration as to whether it would achieve anything where there are alternative powers available to financial investigators which would have much the same effect.

9. Hughes L.J, at paragraph 13 said "*We should say that whilst this form of order is newly created it ought not to be thought that it is routinely to be made without proper thought. We do not seek to set out any general rules for when it will be appropriate or not. This is the not the right place in which to do that. No doubt the paradigm case for such an order is the defendant with a history of unsatisfactory business or financial dealing who at some stage at least is likely to be at large and engaged in business, commercial or financial activity which would otherwise be unsupervised or unmonitored. But it is perfectly clear that the section embraces also the appellant who is going be a prisoner and, at least in the case of the very exceptional facts of the prisoner, we have no doubt that an order can be appropriate".*

10. In R v Bell and Burgess [2012] 2 Cr.App.R.(S) 5 CA, it was stated that, where an order under section 76 is made, it would assist all involved if the judgement were (i) to include a brief analysis of how the risk of further relevant offending had been assessed, and (ii) to identify the reasonably expected advantages of the order for purposes of crime detection and prevention, in the light of the assessed risk of re-offending and the burden of the order.

Financial Reporting Order and Serious Crime Prevention Orders

11. The provisions for FRO's overlap to a considerable extent with the long-winded provisions of the Serious Crime Act 2007 which empowers courts to make serious crime prevention orders. A serious crime prevention order may be made on application by the DPP, the Director of Revenue & Customs Prosecutions or the Director of the Serious Fraud Office, by the Crown Court in respect of a person who was been convicted of any of the offences listed in Sch.1 to the Act, or any other offence which "in the particular circumstances of the case, the court considers to be sufficiently serious to be treated for the purposes of the application or matter as if it were so specified". The list of offences in Sch.1 to the 2007 Act is not the same as in the list in s76(3) of the 2005 Act but there are many offences common to both lists; the lists of offences in the 2007 Act includes the useful feature of elasticity which the list in s76(3) of the 2005 Act lacks. A serious crime prevention order may include requirements to provide information about a person's

Sentencing Update

"The Trimmings"

Sally Daulton

Sentencing Update
"The Trimmings"

Victim surcharge

Summary of changes

A court must order the Victim Surcharge when it deals with an offender in respect of an offence committed on or after 1 October 2012 as set out in the following tables.

Offenders under 18 years at the time the offence was committed	**Victim Surcharge**
A conditional discharge	£10
A fine	£15
Youth Rehabilitation Order	£15
Referral Order	£15
Adult Community Order	£15
A suspended sentence of imprisonment	£20
A custodial sentence (all lengths)*	£20

Offenders 18 years or over at the time the offence was committed	**Victim Surcharge**
A conditional discharge	£15
A fine	10% of the fine value with a £20 minimum and a £120 maximum *(Surcharge should be rounded up or down to the nearest pound)*
A community sentence	£60
An immediate custodial sentence*	6 months and below – £80 Over 6 months and up to and including 2 years – £100 Over 2 years – £120 (Only in Crown Court)
A suspended sentence of imprisonment	6 months and below – £80 Over 6 months and up to and including 1 year – £100

Time spent on remand

Remand in custody

CJA 2003 s. 240 abolished; s.240ZA substituted by LASPO 2012 s.108

When passing a determinate custodial sentence (whether or not extended) the court no longer certifies the number of days spent on remand in custody or makes any direction regarding whether or not those days will count towards the sentence. By s.240ZA CJA 2003 time spent on remand in custody will, subject to certain qualifications, count automatically.

Note that a suspended sentence (a) is to be treated as a sentence of imprisonment when it takes effect and (b) is to be treated as being imposed by the order under which it takes effect [s.240ZA(7) CJA]. Thus time spent on remand in custody before the sentence was imposed will count when the sentence takes effect.

It is still necessary for the court to make a reduction for the number of days spent on remand in custody when setting a minimum term to be served on an indeterminate sentence (Life/IPP/DPP if conviction before 3rd December 2012; Life if conviction on or after 3rd December 2012).

Remand on qualifying electronically monitored curfew

CJA 2003 s.240A as amended by LASPO 2012 s.109

When passing a determinate custodial sentence (whether or not extended) the court must certify the number of days spent on remand under a curfew with relevant conditions i.e:
(a) a curfew for 9 hours or more and
(b) which is electronically monitored
and either direct that a proportion of those days will count towards the sentence or give reasons why it would be unjust to give such credit. The occasions on which the court will not credit time on remand will be very rare.

The proportion of those days is to be calculated by reference to the 5 step test prescribed by s.240A(3) CJA [as substituted by s.109(3) LASPO]. It is anticipated that this calculation will be done by the advocates.

Community order requirements

s.177 CJA 2003 as amended by ss.70 – 75 LASPO 2012

Unpaid work requirement

40 < 300 hours to be completed within 12 months

Activity requirement

Up to 60 days; must be consultation with the Probation Service

Programme requirement

must specify the number of days on which the defendant must participate

Prohibited activity requirement

must be consultation with the Probation Service

Curfew requirement

2 < 16 hours in any 24 hours; maximum term 12 months; must consider those likely to be affected; must be electronically monitored unless a person whose cooperation is necessary does not consent or it is otherwise inappropriate
(increased from maximum 12 hours and 6 months, by LASPO)

Exclusion requirement

from a specified place/places; maximum period 2 years: may be continuous or only during specified periods; must be electronically monitored unless inappropriate

Residence requirement

to reside at a place specified or at another place directed by the supervising officer

(initial pilot in Croydon and Sutton)
(introduced by LASPO)

Supervision requirement

Attendance centre requirement

only available for offenders under 25; 12 < 36 hours

Electronic monitoring requirement

mandatory, unless inappropriate, for curfew and exclusion;
discretionary for unpaid work, activity, programme, prohibited activity, residence, foreign travel prohibition, mental health treatment, drug rehabilitation, alcohol treatment, supervision, attendance centre

Exclusion requirement

from a specified place or area; maximum period 3 months: must be electronically monitored unless inappropriate or impractical

Residence requirement

to reside with a specified individual; if 16 or over, to reside at a place specified or at a place approved by the supervising officer

Local authority residence requirement

maximum period 6 months; not to extend beyond 18th birthday; must consult local authority and parent/guardian

Mental health treatment requirement

- may be residential/non-residential
- must be by/under the direction of a registered medical practitioner or chartered psychologist
- the court must be satisfied:

  (a) that the mental condition of the offender is such as requires and may be susceptible to treatment but it not such as to warrant the making of a hospital or guardianship order;

  (b) that arrangements have been made;

  (c) that the offender has expressed willingness to comply.

*(LASPO removes the requirement for the court to be satisfied as to the offender's mental condition **on the evidence of a registered medical practitioner**)*

Drug treatment requirement

residential or non-residential; must be recommended; must have offender's consent

Drug testing requirement

only available within a drug treatment requirement; must have offender's consent

Suspended sentence orders

CJA s. 189 – 193 LASPO s.68

NOTE - this section relates to all sentences passed on or after 3rd December 2012 in respect of offences committed on or after 4th April 2005: s.68 LASPO. For offences committed before 4th April 2005, pre-CJA provisions continue to apply.

The power to order that a custodial sentence be suspended applies to sentences of imprisonment of not less than 14 days or more than 2 years and to sentences of detention in a Young Offender Institution of not less than 21 days or more than 2 years. Where consecutive suspended sentences are passed the aggregate sentence must not exceed 2 years.

It is no longer mandatory to impose any requirement on a suspended sentence.

Sally Daulton