BUILDING ON THE DECADE OF DISCLOSURE IN CRIMINAL PROCEDURE

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To my parents, Arnold and Bertha

PREFACE

This work has three aims. Firstly, to provide an examination of the history of the disclosure of information in advance of trial in criminal proceedings in England and Wales. This is done with reference to first principles, statutory and case law, and formal and informal practice norms. This examination will set the stage for the discussion of the law and practice of disclosure in England and Wales now in found in Criminal Procedure and Investigations Act 1996, its Code of Practice, and the expanding body of relevant case law, and the Attorney General's Guidelines on disclosure (2000).

Secondly, to provide a detailed discussion of the current law and practice of disclosure in England and Wales by closely examining the case law, statutory provisions and guidelines. The analysis will take into account the evidence of the manner in which the rules are being applied in practice by reference to the studies completed by the legal profession, the CPS Inspectorate and the independent researchers for the Home Office, published in 1999, 2000 and 2001 respectively. The CPIA is not functioning as intended. Emphasis is placed on the applicable remedies for failure to comply with the rules, and the procedure for enforcement. The analysis is supplemented by making contrast to the pre-CPIA position, and by contrast to the position in Canada. The Canadian criminal justice system continues to operate a disclosure regime based on rules that are almost identical to those that were in force in England and Wales before the CPIA.

Finally, to discuss the way forward. The Government has indicated its provisional views in the Command Paper, *The Way Ahead*. Various commentators have made suggestions as to how the disclosure regime might be reformed. Their ideas are discussed, and original ideas are presented. It is hoped that the discussion will assist in formulating the necessary reforms to the disclosure regime.

John Arnold Epp
Grand Cayman
July 2001

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TABLE OF ABBREVIATIONS

ACPO	Association of Chief Police Officers
AJA	Access to Justice Act 1999
BAFS	British Academy of Forensic Scientists
CCRC	Criminal Cases Review Commission
CDA	Crime and Disorder Act 1998
CDS	Criminal Defence Service
Charter	Canadian Charter of Rights and Freedoms 1982
CJA	Criminal Justice Act
CJS	Criminal Justice System
CJU	Criminal Justice Unit
Co-BAFS	Study done by the legal profession in conjunction with the BAFS
CPIA	Criminal Procedure and Investigations Act 1996
CPS	Crown Prosecution Service
CRIMPO	Criminal Procedure and Public Order Act 1994
DNA	Deoxyribonucleic acid
DPP	Director of Public Prosecutions
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ECtHR Com	European Court of Human Rights Commission
FSS	Forensic Science Service
HO	Home Office
HRA	Human Rights Act 1998
ICT	Information Communication Technology
LCCSA	London Criminal Courts Solicitor's Association
LCD	Lord Chancellor's Department
LSC	Legal Services Commission
MCA	Magistrates' Courts Act
PACE	Police and Criminal Evidence Act 1984
PDH	Plea and Directions Hearing

PDO	Public Defenders Office
PII	Public Interest Immunity
RCCP	Royal Commission on Criminal Procedure 1981 (Philips)
RCCJ	Royal Commission on Criminal Justice 1993 (Runciman)
SCC	Supreme Court of Canada
SFO	Serious Fraud Office
VPS	Victim Personal Statements

INTRODUCTION

1.1 THE DECADE OF DISCLOSURE

The law of England and Wales pertaining to the obligation on the prosecution to provide information to the defence before trial evolved at a significant pace in the decade of the 1990s. The changes made were the culmination of a long period of study and consideration[1] and a response to the miscarriages of justice[2] in the now infamous cases of the Guildford Four,[3] Birmingham Six,[4] Maguire Seven,[5] Judith Ward[6] and the M25 Three.[7] The changes led to a re-examination of the rules governing advance notice to the defence of the evidence to be used by the prosecution at trial and the disclosure to the defence of information or evidence that might be relevant to the case, but which was not to be used at trial. The Court of Appeal and the House of Lords stated that fair disclosure to the defence in the pre-trial stage was an inseparable part of the right of the accused to a fair trial.[8] Simply stated, the key features of the development of the common law of disclosure in the last decade were the decision of the appellate courts to declare their power of review of prosecution disclosure decisions[9] and the declaration of the breadth of the information that had to be disclosed by the prosecutor.[10] Ironically, just as practitioners and the police came to understand the changes to the common law,[11] and appropriate adjustments had been made to the National Operations Manual of the Crown Prosecution Service (CPS),[12] the Criminal Procedure and Investigations Act (CPIA) 1996 was enacted.

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1 Law Society, 1966; JUSTICE, 1966; Criminal Bar Association; 1973; Philips Commission, 1981a; *Runciman Report*, 1993.

2 The key facts of these cases are provided in Chapter 2.

3 *Richardson, Conlon, Armstrong and Hill* (1989) *The Times*, 20 October, CA.

4 *McIlkenny and Others* (1991) 93 Cr App R 287 CA (decided March 1991).

5 *Maguire and Others* (1992) 94 Cr App R 133 CA (decided June 1991).

6 *Ward* (1993) 96 Cr App R 1 CA (decided June 1992).

7 *Davis, Johnson and Rowe* [2001] 1 Cr App R 115 CA.

8 *Brown (Winston)* [1998] 1 Cr App R 66 HL.

9 *Ward* (1993) 96 Cr App R 1 CA.

10 *Ward* (1993) 96 Cr App R 1 CA as modified in *Keane* (1994) 99 Cr App R 1 CA; *Stinchcombe* [1991] 3 SCR 326.

11 Niblett, 1997, p xiii.

12 The manual's guidelines were adjusted in 1994 and they received favourable comment from Simon Brown LJ in *Bromley Justices ex p Smith and Wilkins* [1995] 2 Cr App R 285 DC, pp 289–90.

The CPIA 1996 set the law of disclosure of unused material on a substantially different course by disengaging the common law rules, amending relevant legislation and introducing a reciprocal information exchange regime.[13] The regime applies once the accused has been committed, or sent, to Crown Court for trial on indictment.[14] It also allows the accused before a magistrates' court to participate voluntarily.[15] It assumes that disclosure of the evidence to be used by the prosecution at trial on indictment has been provided to the accused. The CPIA 1996 reduces the breadth of the prosecution disclosure obligation and it attempts to limit the court's supervisory powers over prosecution discretion in disclosure.[16] The main features of the legislation include a scheme of initial limited prosecution disclosure consisting of the balance of the prosecution evidence not provided earlier, if any, and unused material that, in the opinion of the prosecutor, might undermine the case. If the defence seeks more extensive disclosure of unused materials it is required to provide a comprehensive defence statement before requesting 'secondary' disclosure. Secondary disclosure is limited to an examination and disclosure of unused material that might assist in the stated defence. The defence statement is defined as a written statement setting out the nature of the defence and indicating the matters in issue along with the reason why issue is taken on each matter.[17]

The case of *DPP ex p Lee*[18] examined the relationship between the common law rules and the CPIA 1996. The court rejected the argument that early disclosure of the case for the prosecution, and some unused materials, rested fully within the discretion of the CPS. It confirmed the availability of judicial review in respect of decisions in relation to the time of disclosure and provided comment on the scope of what must be given in early disclosure.

Ultimately, the Attorney General provided guidance on the best practices to be followed in disclosure of 'used' and 'unused' information.[19] The detailed examination of the historical and current position in England and Wales found in this book will offer support to the conclusion that the last decade of the 20th century was *the* decade of disclosure in England and Wales.

A discussion of the current law reveals many important issues. It will be demonstrated that pre-trial disclosure by the prosecution is important for many reasons, two of which can be stated now. First, the police gather and hold most,

13 Leng and Taylor, 1996, p 1.
14 *DPP ex p Lee* [1999] 2 Cr App R 304 DC.
15 CPIA 1996, s 6.
16 The act is supplemented by a Code of Practice, SI 1997/1033.
17 CPIA 1996, s 5(6), *John Tibbs* [2000] 2 Cr App R 309 CA. Previously, the accused was obligated to provide evidence of alibi, Criminal Justice Act (CJA) 1967, s 11. Special provisions applied to serious and complex fraud prosecutions; CJA 1988.
18 *DPP ex p Lee* [1999] 2 Cr App R 304 DC.
19 Attorney General, 2000a.

if not all, of the information relevant to criminal proceedings and, second, the accused almost never has the resources to match those of the State. It will be argued that the current provisions relating to disclosure by the prosecution are open to criticism on the basis that the provisions do not comply with the right to fair disclosure which is an important element of a fair trial. The provisions in question leave open the possibility that information that may lead to inquiries which might assist the defence may never be revealed. For example, in the first phase of prosecution disclosure of unused evidence the pool of information from which disclosure is to be given is defined narrowly, as is the breadth of the test that is to be applied in making disclosure. Further, the test to be applied relies on the opinion of the prosecutor without provision for judicial supervision. An examination of the manner in which the current law of disclosure is applied by the police and prosecution will reveal other concerns. The evidence gathered by the Home Office, the CPS Inspectorate[20] and the legal profession, in conjunction with the British Academy of Forensic Sciences[21] (co-BAFS) reveal that investigators of crime can and do undermine the rules of disclosure by failing to inform the prosecutor of all relevant information. This leaves the prosecutor unable adequately to inform the defence. Also, some prosecutors are failing properly to honour their professional and statutory duty to provide fair disclosure to the defence. The evidence discussed in this work suggests that the deviation from appropriate standards has had, and will continue to have, a negative impact on the right to a fair trial. Unfortunate results occur when the prosecution process is undermined by the unethical conduct of the participants. Lord Justice Rose provided the important reminder that '…no one associated with the criminal justice system can afford to be complacent'. Injustices like the wrongful conviction and consequent ruination of lives '… can only be avoided if all concerned in the investigation of crime, and the preparation and presentation of criminal prosecutions, observe the very highest standards of integrity, conscientiousness and professional skill'.[22]

20 CPS Inspectorate, 2000.

21 Ede, 1999.

22 *Mahmoud Hussein Mattan* (1998) *The Times*, 5 March, CA.Mattan, an innocent man, was executed in Cardiff in 1952.

1.2 BUILDING ON THE DECADE OF DISCLOSURE

1.2.1 Introduction to building

While a discussion of the history of disclosure is informative, and will be undertaken in this work, the issue that is in urgent need of discussion is the way forward. It has been stated by Malcolm Fowler, chairman of the Law Society's criminal law committee that the CPIA 1996 is in need of 'root and branch reform'.[23] Lord Williams of Mostyn, while Attorney General, acknowledged that the disclosure regime was in need of further study and stated that the topic would be revisited upon the receipt of the report of the independent researchers appointed by the Home Office,[24] a commitment repeated by the Government in February 2001.[25] That report is now in the Home Office and is to be released in due course.[26]

The issue of reform, or building on the decade of disclosure, is one of the central themes of this work. It will be argued that the combination of the statute and common law of the early 1990s provided a sound basis on which to operate a disclosure regime and that many of the provisions found in the CPIA 1996 cannot withstand scrutiny in the light of first principles. Some of the evidence in support of these conclusions is found in making comparison to the situation in Canada which continues to operate a disclosure regime based on rules that are very similar to the rules found in England and Wales before the CPIA 1996. However, it is not the thesis of this book that justice would be better served by returning to the previous regime. Rather, it is suggested, the way forward is to take the best from the past, the best from the CPIA 1996, and to improve on the mix by addressing concerns that have been identified at or since the inception of the Act. For example, it will be argued that the pool of information to which the disclosure obligation applies, now defined restrictively in the CPIA 1996 as 'prosecution material', should be expanded to the broad position found in the common law as stated in *Keane*.[27] The code of practice issued pursuant to the CPIA 1996, governing investigation, retention and disclosure of material, has proven to be an important innovation and should be retained subject to one improvement. It is submitted that the code and the CPIA 1996 should be amended to provide to the court a power, exercisable on its own motion, or on the application of the defence, to enforce the provisions of the code. It must be

23 Times staff, 2000.
24 Attorney General, 2000a, 'Commentary', p 1.
25 Home Office, 2001, para 3.42.
26 Plotnikoff and Woolfson, 2001. Lord Williams has since been promoted to the position of Leader of the House of Lords. Lord Goldsmith QC is now the Attorney General.
27 (1994) 99Cr App R 1 CA.

formulated in a manner that enables the court to act in an efficient manner and at a pre-trial stage, in enforcing the code. It is also submitted that reforms must be adopted to encourage the police to comply with the CPIA 1996. This may include the provision for an early review power in the court and must include reform to the police mindset, or 'culture', and training and management methods.

The discussion in this book is presented at what may be a most opportune time. Not only have there been a growing number of calls for reform of the CPIA 1996, and the report of the independent researchers is now in hand, the Government has announced its plans for criminal justice in England and Wales. In keeping with past policies, 'law and order' and efficiency are the central themes. In consequence, the police and the CPS feature prominently in the plan. Additionally, the Public Defenders Office has just commenced operation and, along with the contracting of defence services, marks a sea change in the delivery model of criminal legal aid. Also worthy of mention is the Criminal Court Review, undertaken by a committee chaired by Lord Justice Auld, which informs the debate on some issues relevant to this work.

1.2.2 Current research

The independent research of Plotnikoff and Woolfson contained in *A Fair Balance? Evaluation of the Operation of Disclosure Law* may contribute further to the growing body of evidence suggesting that the disclosure regime for 'unused' material currently in use in England and Wales would benefit from reform. While their report has not as yet been released, it is expected that a majority of the respondents to their study may have expressed dissatisfaction with the way that the CPIA 1996 is operating. It is widely anticipated that many of the findings reported to the Home Office confirm the results of the co-BAFS study and the CPS Inspectorate. One can hope that Plotnikoff and Woolfson have joined with the CPS Inspectorate in calling for the completion of a consultation exercise throughout the Criminal Justice System (CJS) with the aim of developing a working consensus on the principles underpinning the disclosure regime. The results of the published studies will be considered throughout this work.

1.2.3 CJS

The CJS in England and Wales is a voluntary amalgamation of the representatives of government departments, agencies and services that are responsible for crime related issues. Participants include the Home Office, which is responsible for police, Prison and Probation Services and their respective inspectorates, and support for victims. It also includes the Lord Chancellor's Department, which is responsible for the Crown Court and the Court of Appeal,

the magistrates' courts and their Inspectorate and publicly funded criminal defence services. The third member of the CJS is the Law Officers' Department, which is responsible for the CPS and its Inspectorate and the Serious Fraud Office and, perhaps in the near future, the prosecutions for Customs and Excise. Finally, the judiciary and magistracy are included, while on many issues the input of other bodies is received, for example, local authorities and community organisations such as Victim Support.

The aims of the CJS are to 'reduce crime and the fear of crime; and to dispense justice fairly and efficiently and to promote confidence in the rule of law'.[28] The objectives of the CJS, the strategy designed and the funding allocated to meet the aims and objectives are presented annually in the CJS business plan.

1.3 THE BUSINESS PLAN OF THE CJS

1.3.1 Introduction

In the business plan for 2001–02, emphasis is placed on the need for a modern, efficient and effective criminal justice system wherein the departments, agencies and services that comprise the CJS attempt better to co-ordinate their related activities. It is stated that 'making the CJS more efficient so as to reduce delay continues to be a major priority, especially in dealing with persistent young offenders'.[29] In aid of this emphasis and the broader aims of the CJS, the business plan indicates that there will be a significant increase in funding for police, courts and the CPS.[30] For example, the allocated spending total for the year 2001–02 will be £13.97 bn, of which the police will receive £8.61 bn, the courts £6.3 bn and the CPS and the Serious Fraud Office £0.43 bn.[31] Similarly, more funds are to be made available for programmes for crime reduction and victim support. Finally, a large investment is to be made in 'new information communication technology (ICT) to streamline case management and contribute to reductions in the time taken for dealing with cases'.[32] The Home Secretary stated that: 'As a whole, the criminal justice system will receive the biggest injection of new resources in 20 years'[33] By way of contrast, it is instructive to note that the Criminal Defence Service (CDS), which provides criminal defence

28 CJS, 2001, p 6.
29 Ibid, p 4.
30 *Ibid*, pp 7–8.
31 An additional £30 m was designated for the CPS from an unallocated CJS fund (*ibid*, p 9). The allocated spending total for the year 2000–01 was £12.98 bn, of which the police received £7.7 bn, the courts £6.0 bn and the CPS and the Serious Fraud Office £0.3
32 CJS, 2001, p 8.
33 Straw, 2001, col 585.

services to legally aided persons through public defenders and contracted solicitors, has been allocated £0.98 bn.[34] Almost 99% of criminal defendants are legally aided.[35] In the adversarial system, which is the system used in England and Wales, the lawyer for the defence has the responsibility of assisting the accused. One of the important parts of that responsibility is to provide a check against the abuse of power by the prosecution. It may be necessary, for example, where the accused's right to a fair trial is threatened, to seek the assistance of the court.

1.3.2 Objectives of the CJS

The Government has set the following objectives for the Criminal Justice System:

> Aim A—To reduce crime and the fear of crime
>
> (1) to reduce the level of actual crime and disorder;
> (2) to reduce the adverse impact of crime and disorder on people's lives;
> (3) to reduce the economic costs of crime.
>
> Aim B—to dispense justice fairly and efficiently and to promote confidence in the rule of law
>
> (4) to ensure just processes and just and effective outcomes;
> (5) to deal with cases throughout the criminal justice process with appropriate speed;
> (6) to meet the needs of victims, witnesses and jurors within the system;
> (7) to respect the rights of defendants and to treat them fairly;
> (8) to promote confidence in the criminal justice system.[36]

It is instructive to note that the objective (7), 'to respect the rights of defendants and to treat them fairly', is to be measured by the following target. The target is, 'to improve the standard by which the Criminal Justice System meets the rights of defendants by achieving by 2004 10096 of [the] targets in a basket of measures'.[37] The basket of measures to be improved upon include 'the number of substantiated complaints under the Police Act 1996…; the incident and nature of successful challenges under Arts 5 and 6 of the Human Rights Act (HRA) 1998 in respect of criminal cases; ensure that a percentage of people in police stations requesting the service of a duty solicitor receive the service within a specific time; the number of prisons which…have sufficient staff to ensure that

34 Underfunding of defence services in non-complex cases has been an issue since the early 1990s. A significant portion of the allotment for 2001–02 will be used to establish Public Defender Offices (PDO).
35 JUSTICE, 1987, para 3.
36 CJS, 2001, p 10.
37 *Ibid*, p 11.

all prisoners receive information about legal aid on reception and know who can assist them with legal aid applications'.[38] It might be suggested that these measures are rather modest. It is also instructive to state the targets associated with objective (8), 'to promote confidence in the CJS'. The targets are 'to improve by 2004 the level of public confidence in the Criminal Justice System, including that of ethnic minority communities; to increase the number and proportion of recorded crimes for which an offender is brought to justice'.[39] A target has been set for the year 2004 of an increase by 100,000 of the number of crimes ending in an offender being brought to justice.[40]

1.4 THE COMMAND PAPER— *CRIMINAL JUSTICE: THE WAY AHEAD*

1.4.1 Overview

In addition to the annual business plan for the CJS, the Government has released a Command Paper, which addresses topics in criminal justice and provides in greater detail its vision for the way forward. In the Command Paper, *Criminal Justice: The Way Ahead,* the Government continues to place emphasis on youth justice, serious and organised crime, sentencing and efficiency. It commits again 'to tackle crime and the causes of crime, and to build a fair, effective and swift criminal justice system, which commands the full support and confidence of victims and the public'.[41] The then Home Secretary, Mr Jack Straw, in introducing the paper to Parliament, stated the view that 'the system has not been as successful as it should have been in catching, prosecuting and punishing criminals', and, therefore, deemed that further reform was necessary.[42] The measures proposed in the paper are the final parts of the Government's earlier 'law and order' initiatives. The initiatives included harsher sentences for those persons convicted of crime,[43] the creation of a National Crime Squad,[44] the extension of power to take non-intimate body samples without consent,[45] the expansion of legalised intrusive surveillance[46] and the creation of a deoxyribonucleic acid (DNA) data bank.[47] To this list may

38 CJS, 2001, p 12.
39 *Ibid*, p 11..
40 Home Office, 2001, para 1.34.
41 Straw, 2001, col 583.
42 *Ibid*, col 584.
43 Crime (Sentences) Act 1997.
44 Police Act 1997.
45 Criminal Evidence (Amendment) Act 1997.

be added the provisions of the Crime and Disorder Act (CDA) 1998 and the Youth Justice and Criminal Evidence Act 1999. The foregoing measures, it will be recalled, followed closely on the former Government's law and order agenda, including Criminal Justice and Public Order Act (CRIMPO) 1994 and the CPIA 1996.

The need to be tough on crime is not in dispute. It is submitted, however, that one important issue was not accorded due regard in the announced proposals. The proposals fail to emphasise the fundamental principle that it is of the utmost importance that those persons wrongly accused of crime are not convicted. This is not to say that the Government does not acknowledge that convicting the innocent is wrong; in fact, it does, but it is a question of emphasis.[48] For example, the paper states: 'Nothing does more to damage people's confidence in the CJS than a perception that criminals are getting away with their crimes.'[49] The emphasis on conviction over fair trials and safeguarding due process is further betrayed by the statement that: 'Defendants need to have the confidence that they will be acquitted, if innocent.'[50] One would hope that defendants would be acquitted if not proven guilty, on the basis of the presumption of innocence, for the presumption of innocence is one of the best safeguards for the innocent.[51] Finally, the Government has presented a plan 'to modernise and redesign the CJS around the fight against crime',[52] as opposed to, for example, a renewed emphasis on the right to a fair trial. If the cause of acquitting the innocent truly was seen as of great importance the protections of due process and f air trials would have been accorded more respect and protection in the plan. It is submitted that the conviction of the innocent does more to damage people's confidence in the CJS. Evidence in support of this statement is found in the period of the early 1990s, which led to the appointment of the Royal Commission on Criminal Justice chaired by Viscount Runciman. More will be said regarding the basic tenets of criminal justice, and the role of disclosure, below.

46 Regulation of Investigatory Powers Act 2000.
47 Criminal Justice and Police Act 2001.
48 Home Office, 2001, paras 3.7 and 3.60.
49 *Ibid*, para 17.
50 *Ibid*, para 3.77.
51 ECHR, Art 6.2.
52 Home Office, 2001, para 3.1.

1.4.2 Details of *The Way Ahead* for the CJS

It is instructive to take notice of the details of the proposal 'to modernise and redesign the CJS around the fight against crime'.[53] These details will provide the basis for many topics of discussion in the context of the right to fair disclosure as a part of the right to a fair trial and other fair trial issues. The discussion of the details of the plan for the CJS will be presented under the headings of the CPS, the laws and rules of evidence, the organisation of the courts and the trial process, modernising the courts, Victim Impact Statements and the police. It is acknowledged that 'police performance is crucial to the performance' of the CJS as a whole.[54]

1.4.2.1 The CJS and the CPS

The CPS 'will play a key part in delivering the Government's commitment to improving radically the likelihood of offenders being brought to justice'.[55] With regard to the CPS:[56]

> The Government is taking action to deliver five key improvements:
>
> - a better resourced, better performing CPS, more effective in prosecuting crime and preparing good quality cases for court;
> - closer and earlier co-operation between CPS and police and between CPS and courts to reduce duplication of effort and delays;
> - a greater sense of public accountability through closer involvement with local CJS partners and communities;
> - moves towards simple, fair rules of criminal procedure and new rights of appeal to ensure just outcomes; and
> - an enhanced role for the CPS in explaining difficult or controversial prosecution decisions.

The details of the plan that are of particular relevance for current purposes include increased resources. Funding for the CPS has been increased by 2396 in 2001–02 so as to allow it 'to recruit scores of extra prosecutors, remedying the underfunding that has bedevilled the service ever since it was established'[57] The lack of proper funding was a problem identified earlier by many commentators and confirmed by Sir Ian Glidewell in his review of the CPS.[58] Also, limited funding for the CPS featured prominently in the debate leading up to the CPIA 1996.

53 Home Office, 2001, para 3.1.
54 *Ibid*, para 3.130.
55 *Ibid*, para 32.
56 *Ibid*, para 3.13.
57 Straw, 2001, col 585.
58 *Glidewell Report*, 1998.

It is projected that the increased funding should provide a framework for more effective prosecution, and reduce the stress caused by unmanageable workloads.[59] Senior prosecutors will be made available, as a result of reassignment from management duties and by retention arising from better emoluments, to prosecute the serious and difficult cases. More lawyers will be available to handle a wider range of cases by releasing them from direct responsibility for minor cases. This will be achieved by expanding the remit and number of non-legally qualified CPS staff (designated caseworkers) handling prosecutions.[60] Increased salaries will allow the CPS to attract new high calibre staff.[61] It is projected that the CPS will be able to improve its delivery of timely and efficiently prepared prosecution case bundles (disclosure of the case upon which the Crown intends to rely in cases on indictment) to the defence.[62] Further, it should be able more accurately to review or screen cases at an early date so as to reduce the number of cases dismissed by the court[63] and implement some of the recommendations in the CPS Inspectorate report to improve disclosure.[64]

With respect to closer co-operation between the CPS and the police, the number of Criminal Justice Units (CJU), which are made up of police and prosecution representatives and who are responsible for processing cases through the preliminary screening stage, is to be trebled to 77 by 2002. However, they are to be located in police offices[65] and not in CPS offices, as the Glidewell Report had strongly recommended.[66] The increase will result in having at least one CJU in each of the 42 CJS areas in England and Wales. The CPS will also be exploring ways to encourage a nationally consistent approach to the provision of earlier and better pre-charge assistance to the police.[67] This will build upon the success

59 Gibs and Watson, 2000, reported that a CPS 'staff poll found that one in four was "highly stressed", finding that the first Division Association, which represents most lawyers in the service, said put it on the "brink of crisis"'. See, also, CPS, 2000b.

60 Home Office, 2001, para 3.14. The CDA 1998, s 53, amending the Prosecution of Offences Act 1985, s 7A, made provision for lay prosecutors to prosecute files in magistrates' court when a plea has been indicated.

61 Home Office, 2001, para 3.22.

62 *Ibid*, para 3.15.

63 *Ibid*, para 3.15, n 95 provides the targets.

64 CPS Service Delivery Agreement, CJS, 2001, Annex B, p 25, Target 2.

65 Home Office, 2001, para 3.18. Early results from the piloted *CJU* show 'that they eliminated unnecessary work through improved notification of case results to victims and witnesses; freed up staff to take on additional functions and established a single contact point for the public on the prosecution of magistrates' court cases' (ACPO and CPS, 2001).

66 *Glidewell Report*, 1998, p 128 (to avoid police exerting undue influence over prosecutors); Rutherford, 2001, p 393.

67 Home Office, 2001, para 3.16

of earlier co-operative measures, including the *Manual of Guidance for the Preparation, Processing and Submission of Files*.[68]

In support of the plan to make improvements with local CJS partners, local area Chief Crown Prosecutors are expected to have 'a strengthened local role and give a more visible lead to the vigorous and fair prosecution of offenders'.[69] Also, the composition of the CPS staff is expected to reflect the diverse communities in which they are located.[70]

1.4.2.2 The CJS and the laws and rules of evidence

The Government stated that it considers as necessary a full and careful review of the laws and rules of evidence and the organisation of the courts and the trial process. While it was determined that it would wait on the recommendations of the Auld Committee and wider consultation before taking any final decisions in this regard,[71] it is clear from *The Way Ahead* that many reform proposals were favoured already by the Government. Of particular relevance to the discussion in this work are seven proposed reforms to the laws and rules of evidence, which are discussed here, and five proposed reforms to the organisation of the courts and the trial process, which are discussed below.

First, pre-trial disclosure by the prosecution and defence is raised in the Command Paper. The Government believes that the judiciary could make Plea and Direction Hearings (PDH)[72] more effective, presumably by requiring judges to be more proactive in encouraging the parties to narrow the issues before trial.[73] Other issues for consideration could include:

- disclosure in advance of a list of intended defence witnesses…(as applies already in Scotland);
- disclosure of any report prepared by an expert witness, so as to discourage the defence from 'shopping around' for a sympathetic opinion;
- the procedures for disclosing unused prosecution material to the defence, in the light of forthcoming findings of research commissioned by the Home Office.[74]

Secondly, the scope for greater use of written material could be considered: 'Witnesses and jurors could be allowed greater access to written statements, interview transcripts and explanatory materials'[75] Thirdly, the Government

68 For the current edition, see Home Office, 2000a.
69 Home Office, 2001, para 3.23.
70 *Ibid*, para 3.25.
71 Straw, 2001, col 585; Home Office, 2001, para 3.29.
72 Practice Direction [1995] 1WLR 1318.
73 Home Office, 2001, para 3.42,
74 *Ibid*, para 3.42. The reference pertains to Plotnikoff and Woolfson, 2001.
75 Home Office, 2001, para 3.44.

believes that better use could be made of expert witnesses. It is of the view that greater emphasis could be placed on pre-trial agreement between experts to clarify the points at issue, and that provision could be made for receipt of expert testimony from overseas.[76] These suggestions raise some interesting disclosure issues both in terms of the disclosure of draft witness statements and whether experts should be considered part of the prosecution for the purposes of disclosure. Fourthly, it is suggested that the operation of s 78 of the Police and Criminal Evidence Act (PACE) 1984 should be reviewed.[77] Fifthly, consideration might be given to allowing evidence of previous convictions of the accused in more situations.[78] These points raise the other disclosure issues such as the need to ensure that the previous convictions were not wrong and that any advice given about entering a guilty plea is, or was, based on a proper examination of the case for the Crown. Sixthly, it is suggested by the Government that the prosecution's right of appeal might be expanded to allow appeals of judge directed or ordered acquittals, or rulings on evidential matters.[79] Such appeals are allowed in Canada and the use of the right of appeal has allowed the Supreme Court to provide clear guidance on the use of stays in the context of non-disclosure.[80] Finally, the proposal to vary the so called 'double jeopardy' rule to allow a second prosecution after an acquittal where fresh and viable evidence is found, which was a recommendation of the *Stephen Lawrence Inquiry Report*,[81] may be considered.[82] One may wonder how the lapse of time would affect the witnesses and/or increase the case for very wide prosecution disclosure.

1.4.2.3 The CJS and the organisation of the courts and the trial process

The organisation of the courts and the trial process, it is said by the Government, could be improved in a number of ways over and beyond the steps it has already taken. The steps taken by the Government, which it says support its claim of improvement in the system, include the Mode of Trial Bill (No 2) to 'give the courts, rather than the defendant, the power to decide whether a triable either

76 Home Office, 2001, para 3.46.

77 PACE 1984, s 78, gives the court discretion to exclude evidence which has been improperly obtained, if admitting such evidence would have an adverse effect on the fairness of the proceedings.

78 See the negative comment of Serious Fraud Office Director Rosalind Wrieht in Gibb, 2001a. Lloyd-Bostock, 2000, p 734, found that revealing a previous criminal conviction of the defendant 'evoked stereotypes of typical criminality, and that caution over revealing a defendant's criminal record is well justified'. Any changes to the law must be accompanied by clear guidance on the relevance of those previous convictions.

79 Home Office, 2001, para 353.

80 *O'Connor* [1995] 4 SCR 411.

81 *Macpherson Report*, 1999, rec 38.

82 Home Office, 2001, para 355.

way case would be heard in the Crown Court'.[83] The Government also intends to continue to 'enhance the professionalism' of defence lawyers 'brought about by the Criminal Defence Service' and its contribution 'to the end to time wasting and poor preparation'.[84] Within a day of this plan being released, the Home Secretary, Mr Jack Straw, began to press this point. He is quoted as stating that defence lawyers were 'ignoring their social responsibilities to protect their "niche market with the local criminal fraternity"'.[85] The Government also has set aside reserves to fund 'an extra 7,000 Crown Court sitting days in 2001–02 and work in the magistrates' courts on initiatives to speed up youth justice and prosecute more defendants'.[86]

In terms of new developments, the Government is willing to consider at least five proposals relevant to the discussion in this work. First, returning to the topic of extended hours, the Government will consider expanding the number of hours that the Crown Court is in session, and will begin some pilot projects in areas that are considered 'crime hotspots'. Extended sitting hours for magistrates' courts in non-high crime areas will be piloted in 2001. It is acknowledged that such initiatives would greatly affect all members of the CJS[87] and, while not stated, defence lawyers. Secondly, the Government will consider unifying the magistrates' courts and Crown Court so as to provide a common jurisdiction, procedures, processes and administration. It is thought that this will reduce the complexity of the criminal justice system and increase speed and efficiency.[88] Thirdly, the Government might consider a suggestion received by the Auld Committee that an intermediate tier of courts, where a District Judge would sit with two lay magistrates, be created.[89] These reforms may answer the question regarding which court properly is to be approached for pre-trial relief on disclosure issues. Fourthly, the Government will consider suggestions to further reduce delays in the resolution of cases. For example, it will consider extending to a wider group of accused persons, such as those charged for summary offences, procedures akin to Early First Hearings and the use of designated case workers to present more cases in court.[90] Early disclosure may be necessary to serve as a safeguard against incorrect decisions made by case workers. Finally, the Government intends to encourage the CDS and public defenders to 'play its part in responding to any recommendations from Sir

83 Home Office, 2001, para 3.64.
84 *Ibid*, para 3.76.
85 Gibb and Ford 2001a.
86 Home Office, 2001, para 3.65.
87 *Ibid*, para 3.83. See the earlier comment on this issue made by Lord Ackner, 1999, p 1816.
88 Home Office, 2001, para 3.68. The Auld Committee's recommendations will be one of eight viewpoints considered (*ibid*, para 3.69).
89 *Ibid*, para 3.73.
90 Home Office, 2001, para 3.75.

Robin Auld on pre-trial case management'.[91] This may be a reference to the interim proposals of the Auld Committee wherein it is suggested that there should be an 'improvement of mutual advance disclosure by the prosecution and defence so as to achieve early identification of the issues and shorter trials'.[92]

1.4.2.4 The CJS and the modernising of the courts

In the meantime, the Government plans to press ahead with a programme to modernise the Crown Court, magistrates' courts and the CJS through the use of ICT. Of particular interest is the plan to develop fully communication by email, and to work towards the development of a single CJS electronic case file.[93] It will be argued below, on the basis of experience in Ontario, that ICT will assist in the efficient and economical provision of disclosure.

1.4.2.5 The CJS and victim personal statements

Another reform that appears likely to be promoted strongly is the use of victim impact statements in sentencing. The statements, styled 'Victim Personal Statements', will allow victims, including bereaved relatives in homicide cases, to give a statement in their own words saying how the crime has affected their lives. This change is to be introduced by October 2001.[94] It is proposed that the statement could be used by the CPS in bail applications, charge screening (to inform decisions about the suitability of the charge or the credibility of the proposed evidence) and to rebut exaggerated claims in mitigation by the defence. The statement might also inform the Parole Board.[95] It is submitted that many disclosure issues may arise from the use of victim personal statements.

1.4.2.6 The CJS and police performance

The police are the gatekeepers of the CJS. While they do have other important roles, including crime prevention and maintaining in the public a sense of confidence in a safe society, the actions of the CPS and courts can only be triggered once the police have identified a suspect and gathered evidence.[96] In all of their duties, the manner in which police officers are organised, managed

91 Home Office, 2001, para 3.78.
92 *Auld Progress Report*, 2000.
93 Home Office, 2001, pp 67–68.
94 *Ibid*, para 3.114.
95 *Ibid*, para 3.115.
96 *Ibid*, *para* 3.130.

and led can have a significant impact on their effectiveness.[97] The Government intends to aid the police in the fight against crime and the process of maintaining confidence by a series of measures. It is submitted that many of these measures will assist in supporting another important goal, the goal of a fair trial. The goal of a fair trial is supported when police officers are led and managed to complete properly their duties in relation to investigation, recording of information and disclosure. The question remains as to whether these initiatives can reform the police mindset.

The measures announced include an increase in funding of 2196 over three years to provide for a modern operational communication system, an expanded DNA database, development of better strategic intelligence and training and to increase the number of police officers to a record level.[98] The communication system will be improved through placing into service a new secure digital radio system allowing the supply of data direct to and from officers on the beat.[99] The entire active criminal population will be on the DNA database by April 2004.[100] A national intelligence information exchange will be finalised. 'Within a few years, officers should be able to have mobile, online access to databases to allow them to report and obtain the intelligence they need, where and when they need it.'[101] Some of these developments will reopen issues of disclosure and withholding information in the public interest. The number and quality of crime detectives, and the co-ordination of technical support are to be increased.[102] Plans are being designed to encourage the appropriate balance between specialisation and effectiveness in investigation and specialisation and the problems of creating a specialist squad. Recent events[103] demonstrate again[104] that specialist squads can breed 'a closed culture with risks of ethical failings or even corruption'.[105] Improvements are also to be made in efforts to recruit people with specialist skills, for example, computing, and in leadership and the management of senior careers in the police service.[106] Finally, the Police Complaints Authority is to be replaced by the Independent Police Complaints Commission by April 2003.[107]

97 Home Office, 2001, para 3.133.
98 *Ibid*, para 3.134.
99 *Ibid*, para 3.134.
100 *Ibid*, para 334.
101 *Ibid*, para 3.201.
102 *Ibid*, para 3.138.
103 *Guney* [1998] 2 Cr App R 242 CA; Dein, 2000.
104 Kaye, 1991.
105 Home Office, 2001, para 3.139.
106 *Ibid*, para 3.141.
107 *Ibid*, para 3.163. Final details will be informed by the results of the consultation paper, Home Office, 2000b.

1.4.3 Achieving the target

For the past three years the conviction rate has remained approximately constant. However, the Government has set as a target for the CJS a significant increase in the number (100,000) of 'offenders brought to justice'.[108] The target represents an increase of approximately 9–1096 in the number of cases concluded by the year 2004. For the purpose of comparison with past years, it is helpful to attempt to state an annual target. The target appears to approximate an increase in the rate of 'offenders brought to justice' of at least 396 per year for the next three years.[109]

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108 The term 'brought to justice' is defined to include cases otherwise 'dealt with', cautions and TICs (other offences 'taken into consideration'), Home Office, 2001, para 1.34, n 25. Only adult offenders can be 'cautioned' as a result of new scheme of warnings for youth in the CDA 1998.

109 The calculation is approximate because, while the number of cautions are recorded on the Police National Database, accurate statistics regarding TICs are elusive. The stated percentage was calculated by first determining the total number of cases per year that resulted in conviction in magistrates' courts, and conviction or bindover in Crown Court. For the period 1997–98, the statistics provided by the CPS indicate that in magistrates' courts (CPS, 1998, p 39, Chart 4) the total number of cases that ended in a result (ie, guilty plea, proofs in absence, conviction after trial, and dismissals) was 972,160. Deduct from the total the number of dismissals for that period, 18,400, and the number of convictions was 953,760. This is a useful statistic. In Crown Court, the completed cases (ie, trials including guilty pleas, cases not proceeded with, bindover, other disposals including bench warrants) statistics for 1997–98 was approximately 105,000 cases. Deduct from the total the number of cases not proceeded with and cases disposed of otherwise, that subtotal being 9,200 (made up of 8, 000 not proceeded with and 1,200 of other disposals). The result is the total number of cases ending in conviction or bindover, being 95,800 (*ibid*, p 41, Chart 8, Completed Cases; since a bindover is a just result, then it is necessary to keep that statistic in the totals). This is another useful statistic for the purpose or comparison. A total for magistrates' and Crown Court is required. In 1997–98, the number of cases that were disposed of by conviction (guilty plea or after trial) or bindover (1,500 cases) in either court was 1,049,560. An increase by 100,000 over a three year period is approximately 1096. Then cautions must be factored in.
This calculation can be applied to the period 1999–2000 and the result is very similar. In the period 1999–2000, the statistics provided by the CPS indicate that in magistrates' courts (CPS, 2000a, Chart 4) the total number of cases that ended in a result (ie, guilty plea, proofs in absence, conviction after trial and dismissals) was 1,002,916. Deduct from the total the number of dismissals for that period, 16,780, and the number of convictions was 986,136. This is a useful statistic. In Crown Court, the completed cases (ie, trials including guilty pleas, cases not proceeded with, bindover, other disposals including bench warrants) statistics for 1999–2000 was approximately 86,000 cases. Deduct from the total the number of cases not proceeded with and cases disposed of otherwise, that subtotal being 11,000 (made up of 9,600 not proceeded with and 1,400 of other disposals). The result is the total number of cases ending in conviction or bindover, being 75,800. (*ibid*, Chart 8, Completed Cases; since a bindover is a just result, then it is necessary to keep that statistic in the totals). This is another useful statistic for the purpose of comparison. A total for magistrates' and Crown Court is required. In 1999–2000, the number of cases that were disposed of by conviction (guilty plea or after trial) or bindover (1,500 cases) in either court was 1,061,936. Again, an increase by 100,000 is dose to a 1096 increase over a three year period.

Reaching the target will be a significant challenge. To do so, police must detect and investigate more crimes and charge more suspects, in a number that will take account of all the contingencies of the criminal justice process. All of the administrative tasks, including disclosure schedules for the prosecution (when a plea of not guilty is given) and victim personal statements, must be completed for those additional files. The prosecution will be required to complete the preliminary stages of charge screening, disclosure and resolution discussions in more files. Thereafter, assuming that the traditional rates of conviction by guilty plea and convictions after trial remain the same, the CPS must successfully complete many additional trials. The rate of guilty pleas, which traditionally is the basis of the greatest majority of the one million-odd convictions per year, is unlikely to change.[110] Certainly there is no incentive offered by the Government to stimulate an increase in the proportion of guilty pleas.[111]

Assuming that more trials will need to be completed to meet the target, it is submitted that it is also appropriate to factor in the acquittal rate. For example, in 1999–2000, approximately 1196 of Crown Court trials ended in acquittal[112] and 1696 of magistrates' court trials ended in acquittal.[113] In consequence, the target may be more difficult to reach than first realised. The CPS will have to complete many improvements in a short time. It is likely that funding will be an issue in the year ahead. While the Government has announced a large injection of capital into the CPS, a large portion of the new resources committed to the CPS will be needed to introduce new programmes, such as direct communications to victims by the CPS[114] and to compensate past shortfalls in salary and other benefits.[115]

One possible by-product of the need to complete more trials that result in conviction is the creation on the prosecution of a pressure to be more interested in a conviction than a just result. Therefore, special care will need to be taken to

110 Crown Court conviction by guilty pleas, CPS, 1998, Chart 9, 7696; CPS, 2000a, Chart 9, 7396; magistrates' courts conviction by guilty pleas, CPS 1998, Chart 4, 8196; CPS, 2000a, Chart 4, 8296.

111 The reasons why defendant's plead guilty are varied (Zander, 1992, p 280; Baldwin and McConville, 1977, p 61).

112 CPS 2000a, Chart 9. For the year ending March 2000, of the 27% of cases that actually went to trial on the basis of a not guilty plea in Crown Court (6% in the magistrates' court) 4396 resulted in acquittal (2896 in the magistrates' court) (*ibid*, Chart 9 and Chart 4). Research shows that this result is a significant increase in the number of contested cases now ending in acquittals by juries: As well as distrusting police evidence, juries are tending to disregard legal advice offered by the judge and returning "perverse" verdicts based on their own views.' (Robbins, 2001).

113 CPS 2000a, Chart 4.

114 Of the additional money, £30 m was designated for the CPS from an unallocated CJS fund, £3 m is earmarked for direct communications to victims: CJS, 2001, p 9.

115 Gibb, 2001b.

avoid situations wherein members of the prosecution fail to exercise discretion in an appropriate manner.[116] Transparency in the decision making process may assist in reducing the temptation to make unethical decisions in the pre-trial or trial stages.

1.5 A SECOND AGENDA

In addition to the formal agenda announced by the Government, it is apparent that the Foreign Secretary, Mr Jack Straw, might have an unwritten agenda concerning the criminal justice system which may or may not be shared by the Government. From recent speeches while former Home Secretary, it is clear that Mr Straw intends to attempt to reduce popular support for the legal profession and particularly defence lawyers.[117] He has portrayed criminal law firms as having 'cosied up to crooks' and, according to Malcolm Fowler, chairman of the Law Society's criminal law committee, he has challenged the validity of defence tactics mat clearly fall squarely within the bounds of the adversarial system.[118]

It is submitted that rhetoric of this kind does nothing to support the general enhancement of criminal justice or the CJS, or, specifically, the quality of defence services.[119] It will be recalled that the Access to Justice Act 1999 included provisions which, it was said, were designed to facilitate measures to improve the quality of defence services provided by the legal aid scheme. Reference to quality defence services was placed as a mainstay of the campaign for value for money in legal services.[120] However, the comments by the former Home Secretary might be understood to mean that, rather than hoping to encourage the commitment of defence lawyers to adversarial principles, he may want to discourage it.[121] He may wish defence lawyers to play the role of a conduit through which the norms and expectations of the prosecution and the courts are transferred to the defendant. It was only a few years ago that McConville *et al* exposed a certain segment of the profession that was willingly or unwittingly

116 Rutherford, 2001, p 392, commented: 'There are two inter-connected aspects to the Government's criminal justice quandary: a high yield promise carrying imminent danger to constitutional protections.'

117 Gibb and Ford, 2001a. The re-elected Labour Government is continuing its assault on the legal profession (Gibb, 2001c).

118 Gibb and Ford, 2001b.

119 Morton, 2001, p 325.

120 Legal Aid Board, 1999.

121 Roy Amlot QC, Chairman of the Bar Council, responded to Jack Straw's comments. Amlot is quoted as saying: 'The Home Secretary's attack on lawyers betrays a dangerous and reactionary attitude toward the criminal justice system.' (Gibb and Ford, 2001a).

fulfilling that role.[122] However, that concern was one of several concerns which was used to found the call for an improvement in the quality of defence services.

In the discussion to follow, the issues surrounding public defenders, contracted defence lawyers and disclosure with a view to a fair trial will be discussed. Some of these issues have been raised above; other issues include low remuneration and increased administrative demands. It is submitted that the impact of the changes to the circumstances in which criminal defence practitioners function provides support for the argument that efficiency and fairness in the CJS would be enhanced by early and broad prosecution disclosure.

1.6 CRIMINAL COURTS REVIEW 2000–01

1.6.1 The appointment

In December 1999, the Lord Chancellor appointed Lord Justice Auld to chair a committee to report on the working of the criminal courts. The committee will report in September 2001.[123] The terms of reference required an in-depth review and allowed recommendations that looked beyond all rules, structures and traditional modes of operation. The reference could have been seen as an invitation to recast the criminal court system in the light of a modern interpretation of first principles.[124] Unfortunately, in spite of the broad assignment, the Auld Committee was not given an adequate research budget or sufficient time within which to report.[125] The work of the committee, and the importance of its report, was further diminished by the decision of the Government to announce its plans for the future of the CJS in February 2001, a few months before the Auld Committee was ready to release its report.[126] The Government has stated in the Command Paper *The Way Ahead* that it hopes to consult widely and prepare a detailed response to the report through a White Paper before the end of 2001.[127] While the Government stated in the Command

122 McConville *et al*, 1994.

123 http://www.criminal-courts-review.org.uk.

124 The terms of reference are: 'A review into the practices and procedures of, and the rules of evidence applied by criminal courts at every level, with a view to ensuring that they deliver justice fairly, streamlining all their processes, increasing their efficiency and strengthening the effectiveness of their relationships with others across the whole of the criminal justice system, and having regard to the interests of all parties including victims and with thereby promoting public confidence in the rule of law.'

125 Zander, 2000a.

126 *Auld Statement*, 2001.

127 Home Office, 2001, para 1.11.

Paper, and on subsequent occasions, that the views of the Auld Committee would not be treated lightly,[128] there is a danger that the *Auld Report* may be left aside to be used only where it is politically expedient to do so.[129] That is to say, that the *Auld Report* may feature prominently in all issues wherein the recommendations tend to support the Government's tentative plan, but it is unlikely to be the foundation of new or amended policy.[130] Rather, it is likely that the report will be used to inform the debate with respect to some points of fine detail.

It is to be recalled that a major review of the criminal process has taken place in each of the past two decades with mixed results. The Royal Commission on Criminal Procedure (Philips Commission)[131] reported in 1981 and the Royal Commission on Criminal Justice *(Runciman Report)* reported in 1993.[132] By contrast to the Auld Committee, each commission was well funded and had time to consider fully all evidence it gathered. Each commission report contained a number of well researched recommendations intended to improve the standard, and administration, of criminal justice. Each commission was accorded due respect. But, even then, only a portion of the recommendations resulted in legislative changes.

1.6.2 The cross over

The Government's plan covers almost all of the issues identified in the consultation questions circulated by the Auld Committee.[133] The Government drew upon indications by the Auld Committee that it was in favour of a unified criminal court[134] and that it was inclined to treat pre-trial disclosure as simply a matter of case management.[135] It was also apparent from the consultation questions circulated by the Auld Committee that the issue of withholding evidence from the defence on the basis of the public interest was to be given close scrutiny. This is one of the very few issues considered by the Auld Committee that was not mentioned in *The Way Ahead*.

It is respectfully submitted that the issue of disclosure is much too significant to be treated simply as a question of case management. As was suggested to the

128 Interview with Lord Williams on 26 March 2001.
129 The Government has set aside £0.5 m to consider and consult on the recommendations of the Auld Committee (CJS, 2001, p 9).
130 Kramer, 2001, p 2.
131 Philips Commission, 1981a.
132 *Runciman Report*, 1993.
133 The Criminal Courts Review circulated a document dated 27 April 2000 entitled 'Non-exhaustive list of issues', which contained 89 issues. The topic of case management and disclosure was raised in issues 33 to 45.
134 *Auld Review*, Consultation Seminar, 31 May 2000, London.
135 *Auld Progress Report*, 2000.

Auld Committee by the author, it is important to revisit the provisions regarding the investigation of crime, the recording and disclosure of evidence to the prosecutor and from him to the defence. The current provisions found in s 26 of the CPIA 1996 are inadequate. The enforcement mechanism does not provide an efficient and early opportunity to seek to remedies in respect of alleged violations of the code of practice.

1.7 THE CANADIAN EXPERIENCE AND DISCLOSURE IN ONTARIO

1.7.1 Introduction

The DPP, David Calvert-Smith QC, stated in an essay on the CPIA 1996 that: 'There are those, myself included, who would say that the principles set out in the case of *Keane* provide a sound basis…on which to operate a disclosure regime.'[136] The experience of the last decade of the Canadian criminal justice system has proven him correct. Canada continues to operate a disclosure regime on the basis of statute and common law provisions very similar to those in place in England and Wales before the CPIA 1996 and within a criminal justice system founded on the English model.[137]

1.7.2 Shared foundation

While the English model of criminal justice provided the basis for the criminal justice system in Canada, minor variations exist between the two models. Further, there are minor variations between each of the provincial jurisdictions in Canada, arising from the power of each province to administer the criminal justice system made by, or in conjunction with, the federal government. However, the variations are not significant and do not affect many of the major issues that will be discussed in this work. Where relevant differences do exist, they will be highlighted and any lessons to be drawn from them will be noted.

136 Calvert-Smith, 2000, p 6.

137 Reference to the Canadian experience will support the proposition that the enactment in England and Wales of a code of practice was a positive measure in effort to encourage police to follow the law pertaining to investigation and disclosure. However, it will also support for the argument that in either country, even a code of practice will not achieve that aim, and that to do so, a system must be in place for efficient and early intervention by the court.

Disclosure in criminal proceedings is a matter of federal law arising from the provisions of the Criminal Code of Canada, the Canadian Charter of Rights and Freedoms 1982 and the jurisprudence of the Supreme Court. For the purposes of this work, a general comparison with the law and practice of disclosure in Canada is often sufficient. However, where it is necessary to examine a particular issue of practice in some detail, it will be instructive to refer to the issue in the context of the framework of a provincial jurisdiction. In that case, the discussion will turn to the practice and procedure in the jurisdiction of Ontario.

1.7.3 A parallel history of disclosure

With respect to the developments in the early discovery and disclosure rules, commentators[138] and judges in Canada made specific reference to the situation in England and Wales, especially during the 1970s and 1980s.[139] A synopsis of the situation in each country pertaining to discovery and disclosure through to 1980 is provided in Pt 2.3. It demonstrates a high degree of similarity between the position in the two countries. During the 1990s, and for the same reasons as found in England and Wales, the common law of Canada pertaining to pre-trial disclosure of the prosecution case[140] and disclosure of 'unused' material also experienced significant revision.[141] However, legislative action was not taken. Most recently the House of Lords has quoted with approval the Supreme Court of Canada on matters relating to the common law rules of disclosure.[142]

138 Hooper, 1972, p 476.

139 Evans, 1982, pp 27–29; *Martin Report*, 1982; *Demeter* (1975) 25 CCC (2d) 417 Ont CA, p 445.

140 Martin, 1955; Law Reform Commission of Canada, 1974a; Cassells, 1975; Law Reform Commission of Canada, 1975; Law Reform Commission of Canada, 1977, Law Reform Commission of Canada, 1978; Law Reform Commission of Canada, 1984.

141 *Stinchcombe* [1991] 3 SCR 326 (decided November 1991). In *Stinchcombe*, the prosecution refused to disclose a statement given by a witness whom they regarded as not worthy of credit. The court ruled that the statement should have been disclosed and, on the facts, the lack of disclosure of the statement of the witness (who had given evidence favourable to the defence at the committal) to the police (given after the committal) was an important factor in the defence's decision not to call the witness. This evidence might have affected the outcome. Therefore, the court directed a new trial and the disclosure of the statements. See, also, the *Locke Report*, 1999.

142 *Mills and Poole* [1998] 1 Cr App R 43 HL. The House of Lords revised the law regarding prosecution disclosure of statements by witnesses which the prosecutor perceived to be unreliable. Previously, the Crown had relied on the rule in *Bryant and Dickson* (1946) 31 Cr App R 146 which restricted the Crown's duty of disclosure to only the name and address of a witness who had given a statement as to material aspects of the case, but whom the prosecution believed to be unreliable. However, the House of Lords found that the common law now requires the prosecution to supply to the defence copies of these statements. (This is consistent with disclosure under CPIA, s 7, as the statements might assist the defence case.)

It is instructive to notice that the key current developments in England and Wales and Canada took place almost simultaneously, yet independently. That is to say, while the Court of Appeal in England was enunciating a further evolution of the law of disclosure, the Supreme Court of Canada was making similar developments in the law of disclosure in Canada. The appellate courts did not make reference to the judgments of the other, a route that would have been open to them had the timing of the developments not been simultaneous. Each court returned to first principles to consider the ambit of the duty on the prosecution and defence in the period before trial.

1.7.4 Constitutional right to disclosure

In each part of this work, addressing the current law and practice of England and Wales, reference will be made to the position in Canada. This will be done to demonstrate the continuing close similarity of the position in Canada to the position in England and Wales prior to the CPIA 1996. This is done to address two possible arguments to distinguish the evidence from Canada. First, some might argue that, since the Supreme Court of Canada declared that accused persons enjoy a constitutional right of disclosure, the common heritage is now severed.[143] Secondly, others might argue that the disclosure regime in Canada survives only because the rules and practice in the Canadian justice system are now different to those in the justice system in England and Wales and, thus, justify the continuation of the broad disclosure regime in Canada. It will become obvious to the reader through the point by point comparison made in this work that the differences in the rules and practice among the justice systems in Canada and England and Wales are few in number. Further, the different rules in Canada serve only further to enhance the accused's right to a fair trial. The differences are not of the character or magnitude that might support the argument that the

143 *La* [1997] 2 SCR 680. In *La*, a 13 year old runaway girl was found by police in the company of a known pimp. A police officer audio recorded an interview with the minor that lasted 45 minutes. The conversation focused on issues relating to an anticipated secure accommodation application, but it raised concerns of sexual assault and prostitution. It also revealed mat the minor was not always truthful when questioned. Since the officer had recorded the conversation, he made only a basic notebook entry regarding the meeting. A few days later he obtained a written statement from the girl and other victims. After the application was made, the officer turned over his report and the written statements to detectives in the Vice Unit However, he forgot to turn over the audio tape. The detectives investigated the complaints of sexual assault involving the minor and charges followed. Prior to the trial the tape was negligently lost by me officer and, at triat the judge ordered a stay. On appeal, a new trial was ordered. Sopinka J reasoned mat, even though the police officer was negligent, there was no improper motive or unacceptable degree of negligent conduct. The officer was not involved in the criminal investigation and he was available to testify to the issue of the minor's questionable credibility. The court found that there was a right to disclosure which was independent of, rather than an element of, the right to a fair trial.

different rules in Canada narrow the protection of the accused so as to require a very broad disclosure regime as a balance in the system.

With respect to the constitutional guarantee of broad disclosure from the prosecution, it is significant in two respects, but it does not negative the validity of the comparison. The right to disclosure, when breached, allows the defence to immediately seek a remedy, as opposed to waiting to see if the breach is rectified during a trial process. The defence is not obligated to show actual prejudice and the remedy given will be the minimum necessary, often being a pre-trial disclosure order.[144] Secondly, it precludes any attempts to reduce the right through legislation, such as that found in the CPIA 1996.[145]

1.7.5 Ontario

The selection of Ontario as the jurisdiction for use where a detailed comparison is necessary can be justified on many grounds. First, Ontario grew out of settlements established by British settlers, and its systems were greatly influenced by the English model of criminal justice. Secondly, amongst the Canadian provinces, it has the best comparative demographics. Without venturing into great detail, it can be stated that Ontario has large cities, small towns and a large and growing diverse immigrant population. It has many institutional similarities, such as a history of strong local government, and multiple law enforcement agencies, such as Metro Toronto Police, Peel Regional Police, Ontario Provincial Police (OPP), the Royal Canadian Mounted Police (RCMP) and Canada Customs and Revenue Agency. Thirdly, because of its relatively large population, it has many seats in the national Parliament. Fourthly, Ontario is recognised amongst the legal profession as the leading jurisdiction on issues concerning the development of the law and it has the most influential court of appeal of the jurisdictions in Canada. For example, during the past 10 years, officials in Ontario have completed an in-depth review and revision of its legal aid system and received the reports of two advisory committees commissioned to consider pre-trial issues in criminal proceedings.[146] Also, the Attorney General of Ontario issued guidelines on prosecution disclosure.[147] The provincial Government continues to promote 'law and order' by providing more funds to

144 *La* [1997] 2 SCR 680, pp 692–93.

145 In theory, Parliament could seek to enact legislation which restricted the right on the basis of the restriction being a reasonable limit prescribed in law, '…demonstrably justified in a free and democratic society', Charter, s 1.

146 *Martin Report*, 1993; *Locke Report*, 1999. An extract from the *Martin Report* is found in Appendix 3. An extract from the *Locke Report* 'Model Disclosure Index/Checklist' is found in Appendix 4.

147 The guidelines are found in Appendix 2.

hire more police officers and to create specialist OPP squads to fight computer and organised crime;[148] after years of reduced funding for the Ontario Prosecution Service.[149] Finally, its officiais have been forced to consider the impact of investigative malpractice and non-disclosure in the wrongful conviction for murder of one of its citizens, Guy Paul Morin.[150]

1.8 HIGHLIGHTS OF THE DISCUSSION BY CHAPTER

The topics for discussion in this work are divided in the following manner. Chapter 2 will address the nature and goal of criminal justice. Chapter 3 will provide a framework for the discussion. It will address the need for pre-trial disclosure and provide an overview of modern history to support the discussion of the current law. Chapter 4 will provide an examination of the stated justifications for the enactment of the CPIA 1996 and discuss whether the CPIA 1996 complies with the relevant provisions of the HRA 1998. In Chapters 5, 6, and 7, the law of disclosure in England and Wales before the CPIA 1996 will be described and analysed. It will be contrasted with the disclosure regime in Canada, which has flourished without codification. The *Attorney General's Guidelines on Disclosure* (2000) are also discussed. Practical problems will be highlighted, and the reports of empirical studies will be used to demonstrate a number of defects in the current rules. Withholding information from the defence on the basis of the public interest will be discussed.

Moving ahead to Chapter 8, the discussion focuses on the current committal, sending and transfer process now in use to place a case in Crown Court. Consideration is given to the question of whether these processes assist the defence in the quest for pre-trial disclosure to the degree that they once did. The examination of the rules of disclosure in matters to be tried summarily is found in Chapter 9.

It is demonstrated in Chapter 10 that the trial judge has the power to grant a wide variety of remedies. The remedies range from simple adjournment to a stay of proceedings. However, the remedies are ill suited to address the greater problem of police investigative malpractice. Appellate remedies are no better suited to assist and the existence of a Criminal Cases Review Commission can

148 Brennan, 2000. The Solicitor General of Ontario announced more funding to hire more police, 1998, p 5. The Attorney General of Ontario announced the priorities of fighting crime and protecting victims' rights, 1998, p 1.

149 Former deputy Attorney General of Ontario, Michael Code, resigned in 1996 after continuous pressure to reduce the number of Crown Prosecutors. Many of these positions had been added the year before as the minimum first step in increasing the capability of the Ontario Prosecution Service to meets its obligations in the pre-trial stage (Harper, 1996, p 25).

150 *Kaufman Report*, 1998.

hardly be said to be a remedy.[151] Therefore, the discussion turns to the various methods of encouraging police and prosecutor compliance with the rules. It is argued in Chapter 11 that the police mindset should be changed. Proposals for reform found in the literature, and in *The Way Ahead*, are analysed. It is suggested that the CPIA 1996 code of practice should be amended to provide a more efficient means through which the court can monitor compliance with the rules of investigation, recording and disclosure of information.

Chapter 12 presents a discussion of defence disclosure to the prosecution and the CPIA 1996. It includes a discussion of the Government's proposal to expand the obligation of the defence to disclose evidence. In the penultimate chapter, the conclusions drawn from the analysis will be discussed and conclusions are stated as to whether the CPIA 1996 bolsters or undermines the right to a fair trial. A contrast to the position in Canada will be made. Canada's criminal justice system is functioning adequately with broad prosecution disclosure, a committal process where oral evidence is presented and disclosure issues are canvassed, and where the defence does not have the formal obligation to provide details of its defence to the prosecution.

In the final chapter, Chapter 14, some interim improvements are suggested for England and Wales. These include increasing the accountability of the prosecutor in the disclosure process and allowing the defence the opportunity to examine all non-sensitive unused material. Another proposal is the implementation of a system of special counsel for the defence where the prosecution seeks to withhold sensitive information. New proposals are presented as well. Ultimately, it will be argued that an appropriate amendment to the law would be to require the prosecution to demonstrate to the court, at a pre-trial stage, compliance with the code under the threat of adverse inference.

151 No new funding was announced for the Criminal Cases Review Commission (Home Office, 2001, para 3.128), in spite of the need for increased funding (CCRC, 2000).

CRIMINAL JUSTICE AND DISCLOSURE

2.1 INTRODUCTION

In this chapter the goal and nature of criminal justice as a first principle—and not as a 'joined up' system, as in the case of the Criminal Justice System—is discussed. It is beyond dispute that one aspect of the administration of justice is a fair trial. It is demonstrated below that disclosure by the prosecution to the defence is an important part of a fair trial. Historically, the decision as to the amount of information that would be disclosed and when disclosure would occur was a matter of discretion in the prosecution. It is instructive, therefore, to discuss the guidance provided by the courts as to the manner in which the discretion was to be exercised. The police have an important role in the criminal process and criminal justice. They serve as the investigators of crime and prepare the case papers for use by the prosecution. The role of the police is discussed in greater depth below. History demonstrates that when the police and prosecution do not properly complete their tasks in relation to investigation and disclosure, wrongful convictions can result. Some case examples are provided.

2.2 THE GOAL AND NATURE OF CRIMINAL JUSTICE AND THE ROLE OF DISCLOSURE

It has been argued for more than three decades that full disclosure to the defence of the evidence known to the prosecution before trial is required to ensure that the accused can properly consider how to answer the charge against him. It may be that providing this information will produce a truthful plea of guilty to the charge laid, a response which greatly benefits the whole community by avoiding unnecessary expense in trial and by starting the offender in the direction of rehabilitation. Alternately, disclosure will allow the defence and the prosecution to evaluate the merit of reducing the severity of the charge. Such an adjustment may draw a guilty plea or ensure that the charge tried is appropriate to the mischief. Disclosure assists the accused in the circumstances where he has a choice in the mode of trial to exercise his right in an informed manner. And, finally, when the accused decides to have his day in court, disclosure affords him the chance to put forward a full defence, thereby greatly increasing his chances of securing a fair trial. A fair trial instills confidence in the system in the public at large and increases the offender's chance of rehabilitation.[1] The

Philips Commission stated that: 'Openness is essential if the system is to work fairly for the accused.'[2]

Inherent in these comments are two of the basic tenets of the criminal procedure systems under study in this work. These are the goal and the nature of criminal justice.[3] The ultimate goal of the criminal justice system is to convict those who have committed a crime[4] and to acquit those who are innocent.[5] It is of utmost importance that the innocent should not be convicted. The need to ensure the acquittal of the innocent restricts the vigour with which the guilty can be pursued. Three key devices are used to facilitate this goal: the presumption of innocence, the principle that guilt must be proven beyond reasonable doubt and the entitlement to due process.[6] These principles are enshrined in Sched 1, Art 6 of the Human Rights Act (HRA) 1998 and in ss 7 and 11 of the Canadian Charter of Rights and Freedoms 1982 (Charter).

The principle of a fair trial is incapable of precise definition. In interpreting broad concepts like 'fairness', the court is required to engage 'in a delicate balancing to achieve a just accommodation between the interests of the individual and those of ete State in providing a fair and workable system of justice… Different balances may be achieved in different countries, all of which are fair'.[7] However, the presumption of innocence is more precise.[8] The question of the degree of commitment to the first principles will surface throughout this work. It is sufficient to say that the political commitment to the preservation and protection of core rights of the individual has been at times marginal.[9] As Professor Ashworth has correctly argued, rights that are capable of clear definition, like the presumption of innocence, have been subverted by the 'notion of balance'.[10]

1 *Brown* (Winston) [1995] 1 Cr App R 191CA and *Stinchcombe* [1991] 3 SCR 326.
2 Philips Commission, 1981a, para 8.12.
3 A discussion of these issues in the context of discovery is found in Hooper, 1972, p 446.
4 Conviction of the guilty brings the imposition of penalties which punish the offender, deter him from repeating and provide an example for the community at large to encourage compliance witn the law.
5 Home Office, 2001, paras 3.7 and 3.60.
6 The due process or 'fair trial' entitlement does not entitle the accused to the most favourable procedures that could possibly be imagined. 'What the law demands is not perfect justice, but fundamentally fair justice.' *O'Connor* [1995] 4 SCR 411, p 517, *per* McLachlin J.
7 *Harrer* [1995] 3 SCR 562, p 573, *per* La Forest J.
8 *Lifchus* [1997] 3 SCR 320.
9 On occasion, legislators, motivated by a fear that too many guilty are being acquitted, enact exceptions to these protections in the form of adverse inferences, presumptions and reverse onus clauses.
10 Ashworth, 1994, Chapter 10.

The nature of the criminal justice system, common to both England and Wales and Canada, is adjudication after an adversarial process. In the classic model, the adjudicator has an impartial role. The prosecution is responsible for establishing the guilt of the accused while the defence seeks to point to errors or omissions in the prosecution's case so as to leave that case less cogent than is required to allow the adjudicator to convict.[11] The advocates must present their cases and conversely attack their opponent's case, within the bounds of the rules of evidence, the rights of the accused and professional ethics. The prosecution has at its disposal the State's investigation agency. The police, through their large resources, have the power of immediate investigation and information collection. The defence plays a reactive role, often not knowing of a charge until weeks or months after an incident. It is often forced to investigate after the trail to witnesses and evidence has grown cold, under the constraint of limited resources.[12]

It is worth stating that both parties are affected (in varying degrees) by the fact that the criminal trial is not an open ended inquiry. All the evidence that is to be presented must be presented in a short time frame, generally with little leeway for prosecutors who seek to present their case in two or more portions, or defence counsel who seek adjournments to gather evidence not previously anticipated as required.[13]

Inevitably, a discussion of prosecution disclosure leads to the question of disclosure by the defence. It has been argued that the goals of the system can be better served through pre-trial disclosure of facts and legal arguments by the defence. The prosecution could test the defence evidence and either withdraw a charge, or continue its investigation to establish the prosecution case.[14] Also, it could avoid the consequences of ambush defences and the tailoring of evidence.[15]

It has already been stated in general terms that the purpose of prosecution disclosure is to afford the accused an opportunity to make full answer and defence to the charge. Disclosure assists in five ways. It allows the accused to know the case it must meet, binds the provider of the information to a particular version of the facts, develops a list of issues, garners admissions and supplies ammunition for use during plea bargaining, committal

11 The current model has adopted many features found in the inquisitorial model, leading some to suggest that certain reforms are required to re-assert values for the better protection of the accused; McConville *et al,* 1994, pp vii-x, and Ashworth, 1994, Chapter 10.

12 aConnor, 1992, p 456.

13 Hooper, 1972, pp 456–57.

14 *Kirkham* (1909) 2 Cr App R 253; *Moran* (1909) 3 Cr App R 25; *Jones* (1928) 21 Cr App R 27 (on the issue of the defence of alibi); Williams, 1959, p 548; Cassells, 1975, pp 282–83.

15 Home Office, 1995a; Home Office, 2001, para 3.42.

proceedings and trial. [16] These benefits flow to the prosecution when reciprocal disclosure is in place.

It is conceded in Chapter 12 that the continuation of the requirement on the defence to provide notice of the defence of alibi and expert evidence does advance the fair trial principle. Placing on the defence a general obligation to state the nature of its defence before trial might mesh with the goals of the criminal justice system, provided that all persons involved in the investigation and prosecution of offences adhere to appropriate standards.[17] Unfortunately, the evidence indicates that the standards of conduct required before a regime of mandatory defence disclosure might be justified are not present in England and Wales. Therefore, it is submitted, the nature of the criminal process cannot accommodate the regime of formal defence disclosure as found in the Criminal Procedure and Investigations Act (CPIA) 1996.[18]

Canada has resisted the call to implement reciprocal disclosure,[19] preferring to maintain a strict position based on a traditional interpretation of the principle.[20]

2.3 ROLE OF THE PROFESSIONAL AS A PROSECUTOR

One of the important issues that emerge in the discussion of the prosecution disclosure obligation is that of the exercise of discretion by prosecutors. Consequently, it is appropriate to consider the nature of the role of the professional who acts as the prosecutor.[21]

The prosecutor, as a representative of the State in the criminal process, has a duty to assist the court in coming to a just result. English jurist Baron Gurney said that it was the duty of counsel for the prosecution to be an assistant to the court in the furtherance of justice and not to act as counsel for any particular person or party.[22] Crompton J stated that counsel for the prosecution 'are to regard themselves as ministers of justice, and not to

16 Sopinka, 1975, p 289.

17 See Chapter 14 with regard to improving prosecution compliance with accepted standards. It could be argued that a general disclosure obligation on the defence might have the effect of lightening the burden of proof on the prosecution (Greer, 1994, p 107) and undermining the presumption of innocence (*Roskill Report*, 1986, para 6.71–84). See, also, Chapter 12.

18 Unhappily, the Government has indicated that it intends to expand the defence's disclosure obligation (Home Office, 2001, para 3.42).

19 McKinnon, 1996; Costom, 1996.

20 *P(MB)* [1994] 1 SCR 555; *Hebert* [1990] 2 SCR 151; *Cleghorn* [1995] 3 SCR 175 (late notice of alibi will affect the weight of me evidence).

21 The Access to Justice Act 1999 makes provision to extend right of audience to solicitors and employed barristers. The profession is fused in Canada.

22 *Thursfield* (1838) 8 C & P 269.

struggle for a conviction…nor be betrayed by feelings of professional rivalry'.[23] In more practical terms, 'those who prepare and conduct prosecutions owe a duty to the courts to ensure that all relevant evidence of help to an accused is either led by them or made available to the defence'.[24] These principles, also, were expressed in the Canadian context. Rand J stated that: 'It cannot be overemphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility.'[25]

Professional codes of conduct repeated these core concepts[26] and, since 1986, they have been codified in England and Wales.[27]

2.4 PROSECUTOR'S DUTY TO PROVIDE INFORMATION: HISTORICAL POSITION TO 1980

The interpretation of the concept of a fair trial has changed over time. This is demonstrated in the context of disclosure by comparing the modern common law position with the historical account given here. Briefly, the modern common law has concluded that an accused's right to disclosure is an inseparable part of his right to a fair trial. Fair disclosure includes early disclosure by the prosecution of its case and any unused information that may assist the defence case or lead to new lines of inquiry.[28] This topic is explored in Chapter 5.

The description of the historical position will be divided into the trial and pre-trial stage. It includes a comparison with the position in Canada to demonstrate the high degree of similarity between the jurisdictions.

23 *Puddick* (1865) 4 F & F 497, p 499. See, also, *Banks* [1916] 2 KB 621, p 623; *Russell-Jones* [1995] 1 Cr App R 538 CA; Farquharson Committee, 1986.

24 *Hennessey* (1979) 68 Cr App R 419, p 426, *per* Lawton LJ, following *Bryant and Dickson* (1946) 31 Cr App R 146.

25 *Boucher* [1955] SCR 16, pp 23–24; *Cook* [1997] 1 SCR 1113.

26 Eg, Boulton, 1975, p 74; Bar Council, 1990, annex F, para 11.1; Law Society, 1974, p 60.

27 *Code for Crown Prosecutors*, 1986, 1994 and 2000, para 2.

28 *Keane* (1994) 99 Cr App R 1 CA, *Brown (Winston)* [1995] 1 Cr App R 191 CA, p 198; *Brown (Winston)* [1998] 1 Cr App R 66 HL, p 70; *Mills and Poole* [1998] 1 Cr App R 43 HL, p. 62.

2.4.1 At trial

In Canada, the decisions of the Supreme Court in *Boucher v The Queen*[29] and *Lemay v The King*,[30] expressed the practical application of the duty of the prosecution. *All* 'material' witnesses must be called at trial.[31] *All* available legal proof must be presented.[32] A 'material' witness is one who can assist in bringing forward credible evidence relevant to the case.[33] This direction remained the law until the beginning of the extensive disclosure regime arising from the decision in *Stinchcombe*.[34] Thereafter, the court found that the prosecutor has a greater discretion in calling witnesses.[35]

In *Lemay*, the Supreme Court also made it clear that the prosecutor must not omit to present any material facts favourable to the accused.[36] It is left to the prosecuting counsel to exercise his discretion in determining who are the material witnesses.[37] Unless it is shown that the prosecution is withholding evidence that would assist the accused (or that he was otherwise influenced by 'oblique motive'),[38] the court would not interfere with the exercise of that discretion. If it is shown that evidence that would have assisted the accused was withheld, it might have been ground for quashing a conviction.[39]

By contrast, the position in England and Wales throughout the 20th century was always one of greater prosecution discretion. The Court of Appeal in *R v Bryant and Dickson*[40] confirmed the position[41] that the prosecution was not under a duty to call at trial all material witnesses. It was sufficient that the prosecution make known to the defence the name and address of any material witness which it does not call.[42]

Later, *Dallison v Caffery* confirmed this position.[43]

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29 [1955] SCR 16.
30 [1952] SCR 232.
31 *Boucher* [1955] SCR 16, p 19, *per* Kerwin CJ.
32 *Ibid*, p 24, *per* Rand J.
33 *Ibid*, pp 23–24, *per* Rand J.
34 [1991] 3 SCR 326.
35 *Cook* [1997] 1 SCR 1113.
36 *Lemay* [1952] SCR 232, p 257, *per* Cartwright J and p 241, *per* Rand J.
37 *Ibid*, p 241, *per* Kerwin CJ; Turner, 1962, p 453. See, also, *Re Cunliffe and Bledsoe and Law Society of British Columbia* (1984) 11 DLR (4th) 280, p 291 BCCA; Devlin, 1976, para 5.2; Home Office, 1979, para 47.
38 *Lemay* [1952] SCR 232, p 241, *per* Kerwin CJ.
39 *Ibid*, p 257, *per* Locke J.
40 (1946) 31 Cr App R 146.
41 *Banks* [1916] 2 KB 621.
42 JUSTICE, 1966, para 3.
43 [1965] 1 QB 348 CA. See, also, *Oliva* [1965] 1 WLR 1028 CCA (obligation on prosecution to call or tender a witness whose evidence was capable of belief), affirmed in *Armstrong* [1995] Crim LR 831 CA.

Consequently, the investigative and prosecutorial branches of the police (until the creation of the Crown Prosecution Service (CPS) in 1985) were left with a large measure of discretion in deciding what evidence was used at trial.[44]

Failure to provide evidence to the defence that was material could, however, lead to the quashing of convictions.[45]

In addition to the discretion of the prosecution in determining what information is material, the prosecution in each country has exercised certain powers to withhold material evidence from the trier of fact on the basis of the public interest, now known as immunity (PII). Withholding of information could be at the behest of the Government, independent of the prosecution (for example, on a matter of national interest),[46] or directly arising from the investigative process (for example, investigation techniques). The identity of a confidential police informant could be withheld unless it is shown to be essential to the defence.[47]

In sum, the accused in either country was entitled to notice at trial of evidence that tended to exonerate him. The formal duties of disclosure continued through trial and the duty of fairness was on going. If, during the trial, a prosecution witness gave evidence that varied materially from his earlier statement to the police, the prosecution was required to bring this to the defence's attention. But there was no rule that the witness' statement had to be produced at that time. There are instances in both jurisdictions where the court ordered the statements of prosecution witnesses to be disclosed to the defence, but it was a function of discretion rather than a rule. Failure to comply with a recognised disclosure duty could be remedied by a variety of orders, ranging from an adjournment to quashing the conviction without right of retrial.

2.4.2 Before trial

Before 1980, the obligation on the prosecution in England and Wales and Canada[48] formally to provide information to the defence in the pre-trial process

44 Devlin, 1976, paras 5.2 and 5.3; Home Office, 1979, para 47.

45 *Hassan and Kotaish* (1968) 52 Cr App R 291 (conviction quashed); *Leyland Justices ex p Hawthorn* (1979) 68 Cr App R 269 DC (conviction quashed).

46 Tapper and Cross, 1990, p 456; *Conway v Rimmer* [1968] AC 910 HL; *Lewes Justices ex p Secretary of State for the Home Dept* [1973] AC 388 HL; Sopinka *et al,* 1992, p 773; *Carey v Ontario* [1986] 2 SCR 637, p 639.

47 *Marks v Beyfus* (1890) 25 QBD 490 CA, p 494; *Hennessey* (1979) 68 Cr App R 419; *Lalonde* (1971) 5 CCC (2d) 168, p 178; *Canada (SG) v Ontario (Royal Commission of Inquiry into Confidentiality of Health Records)* [1981] 2 SCR 494, pp 527–30.

48 *Caccamo* [1976] 1 SCR 786 (on appeal from the Ontario Court of Appeal). After pointing to the general duty of fairness on the prosecution, the majority affirmed the conviction, saying that early disclosure was in the discretion of the prosecution and that any injustice that might have occurred was cured with the 10 day adjournment

was minimal and it was affected by practical considerations arising from the roles of the investigator and the prosecutor. Of course, there was a distinction in the obligation to provide information between magistrates' and Crown Court.

The prosecutor's duty to provide the defence with information that tends to show that the accused is innocent is greatly affected by the breadth of the information supplied to him by the investigator. Traditionally, the investigator controls the police files and notes and other evidence and determines the contents of the file sent to the prosecutor. In many cases, the file was forwarded at the committal for trial stage, or in summary proceedings just before trial. The discretion of individual investigators and the lack of generally accepted standards led to regional variations in practice. The provision of information was limited by the reality that investigations were made up of many documents, files and notes that were rarely in a single location.[49] It was common for defence advisors to seek advance information (discovery) and disclosure of unused material (often unsuccessfully) from the police.[50] More recently, file preparation occurs earlier, with greater standardisation and scope.[51]

In a magistrates' court, there was no obligation to provide to the defence details of the evidence to be called before a trial. This was the situation even though the vast majority of cases handled by the courts were tried summarily and, in some instances, the consequences of conviction on the accused could be very serious.[52] The only exception was the special procedure in England outlined in s 1 of the Magistrates' Courts Act (MCA) 1957, facilitating a guilty plea to very minor offences by letter. The prosecution in each country was bound by its general duty to present all material evidence at the trial,[53] or to give notice of any witness whom they did not intend to call at trial who could give material evidence.[54] The defence advocate was left with a difficult task. He had to analyse the evidence as he heard it, and consider the best route of attack within minutes. 'Solicitors in many areas have complained for years about being kept in the dark about the details of the charges their clients face and about the acute difficulties they encounter when a case is contested. The problems involved…what many solicitors describe as "trial by ambush".'[55]

49 Law Society, 1991, p 33, Danks, 1975.

50 Law Reform Commission of Canada, 1974a, p 5; McConville and Hodgson, 1993, p 43.

51 Home Office, 1992; Home Office, 2000a.

52 *James Report*, 1975, para 212; Home Office, 1979, para 14; Hooper, 1972, p 481.

53 *Adel Muhammed El Dabbah vAG for Palestine* [1944] AC 156 PC; *Lemay* [1952] SCR 232; *Boucher* [1955]SCR 16.

54 *Bryant and Dickson* (1946) 31 Cr App R 146 CCA; *Oliva* [1965] 1 WLR 1028 CCA.

55 Baldwin and Mulvaney, 1987a, p 316; cf Home Office, 1979, which describes the frequency of informal disclosure in more generous terms, including strictly summary matters, paras 14 and 22.

In matters to be tried on indictment, some advance information was to be given pre-trial. The main vehicle for formal disclosure in these matters was the committal hearing.[56] In the 1960s, committal hearings were held in only 2096 of the cases where it was potentially available (that is, offences that were either way or indictable) due to the mode of trial selection option.[57] Actual disclosure at the hearing was restricted by the fact that the committal hearing had, as its primary purpose, the determination of whether there was enough evidence against the accused to justify placing him on trial. The prosecution had only to present enough of the evidence to secure a committal for trial.[58] Discovery of the prosecution evidence, and some unused material, was recognised as a secondary purpose of the preliminary hearing, thus, ensuring a wider scope to the questioning at the hearing.[59] It is interesting to note that the committal process in Canada[60] was not recognised, initially, as a disclosure vehicle by the Supreme Court,[61] although some jurisdictions recognised this aspect of the proceeding.[62] However, in 1984, the Supreme Court of Canada observed that 'in the course of its development in this country, the preliminary hearing has become a forum where the accused is afforded an opportunity to discover and appreciate the case to be made against him at trial'.[63]

In spite of the accused's right to cross-examine witnesses at the committal hearing in each country, it was not common for this right to be exercised. It was thought that it served no purpose on the issue of committal and, with respect to disclosure, what knowledge might be gained may be received at the unacceptably high cost of revealing the thrust of the defence and assisting the prosecution by rehearsing its witnesses.[64] As there was no property in a witness, the defence was free to interview any witness who was likely to appear at trial, if that person consented to a meeting.[65]

There was no obligation to provide the statements made to the police by a witness who gave evidence at the committal. However, in England and Wales, the statements of any prosecution witness who had not appeared at the committal, but who would give evidence at the trial, had to be served on the

56 MCA 1952, s 7.
57 Philips Commission, 1981b, para 186. The statistic in Canada was 1696 (Hooper, 1972, P 479).
58 *Epping and Harlow Justices ex p Massaro* (1973) 57 Cr App R 499 DC.
59 Carlisle, 1967–68, p 149.
60 Criminal Code of Canada, Pt 18.
61 *Patterson* [1970] SCR 409.
62 Hooper, 1972, p 479; *Grigoreshenko and Stupka* (1945) 85 CCC 129; Salhany, 1966–67, p 397; *Mishko* (1945) 85 CCC 410 Ont HC, p 423; *Silvester and Trapp* (1959) 125 CCC 190 (BCSC TD), pp 192.
63 *Skogman* [1984] 2 SCR 93, p 105.
64 Carlisle, 1967–68, p 149.
65 *Grigoreshenko and Stupka* (1945) 85 CCC 129, p 132; *Mishko* (1945) 85 CCC 410, p 415.

defence. Further, if the special short form committal procedure, under the Criminal Justice Act (CJA) 1967[66] was used, the defence was served with the sworn prosecution witness statements that were to be relied on in committal prior to the hearing.

In Canada, there was no short form procedure to encourage the prosecution to provide the written statements of its witnesses before trial. Until 1975, various provinces required the prosecution to disclose the names of witnesses not called at the preliminary hearing, but who were due to be called at trial, while others required that a summary of evidence yet to come be disclosed. However, the Supreme Court addressed the issue and stated that greater discovery through the provision of witness names and expected evidence was the better practice.[67]

The accused was able to secure a copy of his formal statement given at the preliminary hearing in Canada, but he had no right to a copy of his statement to the police or his alleged confession. In England and Wales, the defence could obtain copies of these statements. They also could obtain the criminal record of the prosecution witnesses and the accused, as well as any evidence tending to show the accused was insane. No equivalent rights existed in Canada. In each country, the defence had rights allowing the examination and testing of evidence, but, in practice, they were restrictively interpreted. The accused in England and Wales was to receive notice of Home Office expert evidence,[68] but no such right existed in Canada. The existence of a wiretap was to be disclosed to an accused in Canada 90 days after the tap was removed[69] and, if the evidence was to be used against him, a transcript was to be provided before it was received in evidence at committal or trial.[70] England did not require the existence of wiretaps to be revealed, often on the basis that it was necessary to protect an informant, but if the evidence was to be used or was exculpatory it had to be disclosed.[71]

While statements of principle and rules are very important, the rules were, to a certain extent, hollow as no summary enforcement procedure existed in either jurisdiction. The defence would be left to *ex post facto* remedies. If the issue

66 Amending the MCA 1952, s 7. Under the provisions of the CJA 1967, s 2, it was possible to enter into evidence at the committal sworn witness statements that had been served on the accused or his counsel where no objection was raised.

67 *Caccamo* [1976] 1 SCR 786 (confirming the remedy of adjournment if the defence is surprised by new evidence).

68 JUSTICE, 1987, pp 9–10.

69 The Protection of Privacy Act SC 1973–74. Subject to listed restrictions.

70 The provisions relating to disclosure of the evidence are found now in the Criminal Code of Canada, ss 189(5) and 190.

71 *Hennessey* (1979) 68 Cr App R 419, p 426.

pertained to the propriety of the committal an application for certiorari was possible,[72] but otherwise it was a matter for appeal.

There were many prosecutors who provided disclosure to the defence on an informal basis. However the criteria in selecting those who received disclosure bore no relation to the prosecution's overall duty of fairness and, therefore, was unacceptable. Further, the legal culture was such that 'full disclosure' by pre-1980 standards would not qualify as 'full discovery' by the current common law standards. The 'tactical tit for tat' philosophy and the exercise of prosecutorial discretion in favour of only 'trusted' defence lawyers, and its dire consequences, is discussed in Pt 2.6.

2.5 ROLE OF THE POLICE IN INVESTIGATION, PROSECUTION AND POLICY

Until 1985, the role of the police forces in England and Wales in criminal proceedings was that of investigator (subject to specialist officers like customs and immigration) and prosecutor. In minor cases, an experienced police officer would act as the prosecuting advocate. In more serious cases, the investigators would refer the matter to police approved solicitors (either employed by a force or instructed by it) to conduct the prosecution in a magistrates' court,[73] or to instruct counsel to appear in higher courts, (now the Crown Court).[74] In Canada, the majority of the 13 provincial and territorial jurisdictions began with the English system. However, the development of an independent prosecution agency occurred earlier in most of the Canadian jurisdictions.[75]

The creation of an independent prosecuting agency for England and Wales was recommended by the Philips Commission in 1981. The Philips Commission recognised the need for a separation of responsibilities between the investigation and prosecution stages of the criminal process.[76]

The CPS was designed to provide checks and balances against unmerited prosecutions and to promote national standards in prosecutions.[77]

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72 *Epping and Harlow Justices ex p Massaro* (1973) 57 Cr App R 499 DC; *Mishko* (1945) 85 CCC 410 Ont HC

73 In 1975, 12 of the 43 police forces did not have a Department of Prosecuting Solicitor (Danks, 1975, p 64). Of those who had departments, some used a decentralised format, eg, Hampshire, where 17 assistant solicitors were stationed in seven communities, each responsible to prosecute non-minor magistrate court cases arising in the local police division (*ibid*, p 65).

74 The Courts Act 1971 repealed and replaced by the Supreme Court Act 1981.

75 Stenning, 1986, Chapter 7.

76 Philips Commission, 1981a, Chapter 7.

77 Prosecution of Offences Act 1985.

However, for the purposes of the provision of information to the defence, the courts recognise that, while independent by law, the police and the Crown prosecutors are, in fact, indistinguishable on many issues.[78]

One must not underestimate the power of the police in all aspects of the criminal process. At the most practical level, the police decide who will be investigated, who is a credible witness, what evidence pertains to a particular crime, whether a thing is preserved, whether and when someone is charged, the gravity of the charges and how long a suspect will be interviewed and whether the accused will be given police bail, and whether bail will be opposed before the magistrate. They also make many decisions on issues pertaining to disclosure. At a broader level, while the police have come to accept their revised role in prosecuting,[79] they have not reduced the degree to which they express views and attempt to form policy. While at one stage in the modern history of policing it could be said that the police were servants of the State and, therefore, not political,[80] this is certainly no longer the situation. The Association of Chief Police Officers (ACPO) lobby hard to have their views adopted as Government policy. In the most recent tri-annual policy paper presented by ACPO, they claim credit, yet again, for the current law and order focused legislation.[81] Therefore, in the discussion of the main issues of this work, disclosure and a fair trial, the political role of the police cannot be ignored.

2.6 WRONGFUL CONVICTIONS AND DISCLOSURE

It is now beyond dispute that when the police do not complete a proper investigation and the prosecution does not provide fair disclosure to the defence, some wrongly accused persons will be convicted.[82] Sadly, the number of proven wrongful convictions arising from the breach of the prosecution's formal duty of disclosure in the decades before 1990 was significant. A few examples will remind all concerned that wrongful convictions affect real people. Walter Rowlands was convicted of murder in 1947 and executed before it came to light that the police had withheld evidence that supported his defence of alibi.[83] Mattan was hanged for a murder that he did not commit while exculpatory

78 *Liverpool Crown Court ex p Roberts* (1986) Crim LR 622; *Ward* (1993) 96 Cr App R 1 CA; *Caccamo* [1976] 1SCR 786, p 796; *C(MH)* [1991] 1 SCR 763, p 775.

79 The police were not in favour of giving up their role in prosecutions and they kept the pressure on the CPS by often speaking critically of the performance of the CPS (House of Commons, 1990).

80 Reiner, 1992; also, in Canada, Copeland, 2000, p 13.

81 ACPO, 1998.

82 DPP, 1999a.

83 Fyfe, 1951, col 2552–5.

evidence remained undisclosed.[84] The conviction of Laszlo Virag was wrongful because the police did not disclose that fingerprints, apparently made by the actual thief, were not those of the accused.[85] The police pursuing the convictions of Cooper and McMahon withheld approximately 800 witness statements. These proved significant in obtaining the defendants' release.[86] The summary conviction of Hawthorn was quashed when the court heard that police had failed to disclose the existence of two important witnesses.[87] The Birmingham Six were released after alleged confessions were shown to be unreliable and some exculpatory scientific evidence was found to be undisclosed.[88] Detention records and inconsistent police notes were not disclosed at the trial of the Guildford Four and the exposure of this evidence led to their release.[89] Evidence that supported the alibi of Gerard Cordon also surfaced after being held for years in police files.[90] Exculpatory scientific evidence was also withheld by the police scientists in the Maguire Seven case, in spite of repeated defence requests for scientists' records. These wrongful convictions were also overturned.[91] Similarly, the conviction of Judith Ward was overturned when it came to light that the police, the DPP staff and counsel, the prosecution psychiatrist and the prosecution scientists all had failed to make various material disclosures.[92] The conviction in the Carl Bridgewater case (1979) was overturned due to the non-disclosure of the fact of statement fabrication,[93] as were the convictions of the Tottenham Three in the Broadwater Farm murder.[94] In 1983, the conviction of Mervyn Russel was quashed by the Court of Appeal due to the non-disclosure of exculpatory evidence.[95] The quashing of the murder convictions of Michelle and Lisa Taylor resulted from police failure to disclose important evidence that undermined the credibility of the key prosecution witness.[96] More recently, the

84 *Mahmoud Hussein Mattan* (1998) *The Times,* 5 March CA.
85 Devlin, 1976, paras 120 and 3.108. He was pardoned by the Queen.
86 (O'Connor, 1992, p 466. Although both men were released by the Home Secretary in 1980 and are now dead, their convictions were referred again in 2001 to the Court of Appeal (Woffinden, 2001, 544).
87 *Leyland Justices ex p Hawthorn* (1979) 68 Cr App R 269 DC.
88 *McIlkenny and Others* (1991) 93 Cr App R287CA.
89 *Richardson, Cordon, Armstrong and Hitt* (1989) *The Times,* 20 October CA.
90 (O'Connor, 1992, p 467.
91 *Maguire and Others* (1992) 94 Cr App R 133 CA. Anne Maguire later told her story in detail; Maguire and Gallagher, 1994.
92 *Ward* (1993) 96 Cr App R 1 CA.
93 Rozenburg, 1992, p 111; Morton, 1997a, p 282 (James Robinson, Vincent Hickey, Michael Hickey, (deceased) Pat Molloy).
94 *Silcott, Braithwaite and Raghip* (1991) *The Times,* 9 December CA; Rozenburg, 1992, p 108 (fabricated notes, 1985 convictions).
95 JUSTICE, 1989, p 8 (substance and position of a clump of hair found in the victim's hand).
96 *Taylor (Michelle)* (1994) 98 Cr App R 361 CA.

1989 wrongful conviction of Mary Druhan for murder was quashed by the Court of Appeal because material evidence about the addiction and consequent impairment of the sole witness regarding motive had not been disclosed.[97] The wrongful conviction of Eddie Browning was quashed by the Court of Appeal because the prosecution did not disclose the statements of a witness, an off duty police inspector, and a report by telephone of another witness, both of which cast doubt on critical evidence.[98] Randolph Johnson, one of the M25 Three, was eventually released by the Court of Appeal after his conviction was quashed on the basis that exculpatory evidence had not been disclosed. A statement by a police informant made the day after the murder and robberies indicated that Johnson was not one of the men involved in the crimes.[99]

The foregoing does not include miscarriages arising from unused material that was not exculpatory, but which opened an avenue of defence inquiry. For example, the convictions of Hassan and Kotaish were quashed because the complainant's previous convictions had not been disclosed.[100] The other two members of the M25 Three (Davis and Rowe) were not told of rewards to witnesses who, allegedly, were more likely suspects.[101] And the list goes on, as does the need for greater compliance with the rules that support the goal of not convicting the innocent.

Unfortunately, similar embarrassing reports were found in relation to the conduct of Canadian investigators[102] and prosecutors.[103]

A survey of prosecutors in Canada conducted by the Law Reform Commission in 1974 determined that 'prosecutors cannot be expected to ignore the adversary nature of their role in exercising their discretionary power as to whether or not to grant discovery'.[104]

The famous miscarriages of justice arising in part from this attitude, and police malpractice, have now been fully reported. Included are the wrong

97 JUSTICE, 2000, p 27.

98 *Browning (Edward)* [1995] Crim LR 277 CA.

99 *Davis, Johnson and Rowe* [2001] 1 Cr App R 115 CA.

100 *Hassan and Kotaish* (1968) 52 Cr App R 291. According to the research of the Philips Commission, 1981b, Appendix 28, some police forces in England did not follow the law requiring disclosure of prior convictions of prosecution witnesses.

101 *Davis, Johnson and Rowe* [2001] 1 Cr App R 115 CA. The prosecution withheld the evidence on the basis of the public interest. However, proper procedure was not followed, in mat the evidence was not shown to the trial judge.

102 Hooper, 1972, pp 477–78; Grosman, 1969, pp 20–28, 44–51, 75; Bowen-Colthurst, 1968–69, p 385; Brookbank, 1981, p 54.

103 Hooper, 1972, pp 477–78; Grosman, 1969, pp 20–28, 44–51, 75, Harris, 1956, pp 247–50, 254–57; Salhany, 1966–47, pp 396–97. *Re Cunliffe and Bledsoe and Law Society of British Columbia* (1984) 11 DLR (4th) 280 BCCA (prosecutor was found guilty of professional misconduct); Daisley, 1997, p 12.

104 Law Reform Commission of Canada, 1974a, para 45; Archibald, 1989, p 205.

convictions for murder of Donald Marshall Jr,[105] William Nepoose,[106] Guy Paul Morin[107] and David Milgaard.[108]

105 *Marshall Jr Digest*, 1989, pp 2–4. The Royal Commission found that the police failed to conduct a competent investigation and relied on statements made by unstable and intimidated witnesses who, days later, recanted. The prosecuting attorney also failed to disclose the contents of statements of other witnesses which were exculpatory. Further, the police withheld evidence of eye witness accounts alleging another man was the actual perpetrator which came to their attention shortly after the conviction and before the unsuccessful appeal.

106 *Reference Re: Nepoose* (1992) 71 CCC (3d) 419 Alta CA; *Sinclair Report*, 1991. The police failed to disclose exculpatory evidence which supported the defence of alibi. The victim negotiated a Government of Canada cheque the day after she was allegedly murdered by Nepoose. Her body was not discovered until days after her death. Other witness statements, helpful to the defence, were not disclosed.

107 *Morin* (1995) 37 CR (4th) 395 Ont CA; *Kaufman Report*, 1998. The police lied, fabricated evidence, hid evidence and colluded with a dishonest jailhouse informant

108 *Re Milgaard v Mackie and Others* (1995) 118 DLR 653 Sask CA; *Reference Re Milgaard* (1992) 135 NBR 81 SCC. The prosecution failed to reveal that a witness recanted his testimony after the trial, but before the unsuccessful appeal. DNA testing exonerated him 30 years later. Another man, Larry Fisher, a serial rapist and a suspect in the investigation, was convicted of the murder in 1999 (Perreaux, 1999, p 1).

THE EVOLUTION OF THE DISCLOSURE OF INFORMATION

3.1 FUNDAMENTAL PRINCIPLES AS A FRAMEWORK

The development of the rules of disclosure is better understood by first reviewing the framework in which they exist. Lord Steyn LJ, in *Brown (Winston),* stated:[1] '[T]he objective of the criminal justice system is the control of crime, but in a civilised society that objective cannot be pursued in disregard of other values…the right of every accused to a fair trial is a basic or fundamental right. That means that under our unwritten constitution those rights are regarded as deserving of special protection by the courts. However, in our adversarial system, in which the police and prosecution control the investigatory process, an accused's right to fair disclosure is an inseparable part of his right to a fair trial.'[2] The right to a fair trial has been affirmed in Parliament by the adoption of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) in the Human Rights Act (HRA) 1998. The interpretation of the right to a fair trial and fair disclosure will remain a question for the domestic court.[3] The relevant human rights issues are discussed in Pt 4.7.

The foregoing statements were by no means the first on the topic of disclosure and procedural fairness, nor the most colourful. Expressing a sense that room remained for gamesmanship in the process, Steyn LJ wrote: The question of discovery in criminal cases is not the sort of tactical tit for tat or a game of Happy Families played according to tactical rules such as if you do not say thank you for the card you lose your turn. It is a serious matter conducted in a court of law and, one piously hopes, in a court of justice as well.'[4]

It can be understood from the literature of the period before 1980 (and to an extent up to 1990) that the expectations of the defence were much lower. The frequent call of reformers was for the 'discovery of the prosecution case and access to unused witness statements' (or just the witnesses names) rather than 'prosecution disclosure of all unused material'. The focus of the defence was not what the prosecution should give, but what could be obtained from them.[5]

1 *Brown (Winston)* [1995] 1 Cr App R 191 CA, p 198, affirmed *Brown (Winston)* [1998] 1 Cr App R 66 HL, p 70.
2 *Brown (Winston)* [1995] 1 Cr App R 191 CA, p 198.
3 *Edwards v UK* (1992) 15 EHRR 417.
4 *Livingstone* [1993] Crim LR 597 CA, p 597.

The gamesmanship will be described after the need of the defence for information before trial is considered.

3.2 THE NEED FOR INFORMATION PRE-TRIAL

While disclosure of all material evidence at trial was fundamentally important, the practical value of the production at this late date is greatly reduced. Defence lawyers were left with little time to test the evidence through independent sources. Active defence strategies, such as a forensic analysis of reports and documents, traditionally generated by an investigator to determine if they were in proper order, required a lot of time.[6] (The same is true for the prosecution's discovery of the defence and, hence, the alibi notice provision of 1967.)[7] Even if disclosure was given post committal, the time lapse between the events in issue and the date of the disclosure made it extremely difficult to find other potential witnesses or evidence. It was early disclosure that allowed the defence to dissect, absorb and act on significant information.[8]

The timing of disclosure affects the accused in other important areas as well. Many critical decisions have to be made shortly after the charge is laid. In England and Wales, as in Canada, the vast majority of all charges, historically, are answered by early guilty pleas.[9] Early disclosure provided the opportunity for the defence to consider whether the charges were appropriate in light of the facts alleged. If the charge was inappropriate, representations could be made to the prosecution in an attempt to have the proper adjustments made. If a guilty plea were given, it would have been an informed choice. Informal plea bargaining also depended on accurate information and, thus, the importance of a reasonable amount of advance information in this process should not be ignored.[10]

Another early decision that certain defendants are required to make is the mode of trial. In both England and Wales and Canada, statutes define certain categories of offences in which the accused had the right to choose to be tried

5 Philips Commission, 1981b, paras 201 and Appendix 28; Law Reform Commission of Canada, 1984, p 3; Archibald, 1989, p 54.

6 Ede, 1997, p 3.

7 Criminal Justice Act (CJA) 1967, s 11.

8 O'Connor, 1992, p 470.

9 Zander, 1992, pp 280–81 (70–8096 in both magistrates, court and Crown Court); in Canada, nearly 80% (Hogarth, 1971, p 270). Currently, in the Crown Court the rate of guilty pleas in cases which proceed past initial charge screening and committal is approximately 84% (CPS, 1999, Chart 9) as opposed to 95% in magistrates, court (*ibid*, Chart 4).

10 Zander, 1992, p 290; Hooper, 1972, pp 459 and 465–66; Law Reform Commission of Canada, 1974a, p 26.

summarily by magistrates or upon indictment in a superior court. The consequences of this decision are many.[11] With respect to learning details of the prosecution case, the decision to proceed summarily forfeited the opportunity to have a committal hearing, one of the few opportunities for disclosure prior to trial until more recent times.[12] In spite of the importance of this decision, there was no requirement for the prosecution to reveal, even in summary form, the evidence upon which it intended to rely to the defence prior to the selection of the mode of trial.[13] This was changed by the promulgation of the Magistrates' Courts (Advance Information) Rules 1985. (These are described in Pt 3.5.)

3.3 THE 'TACTICAL TIT FOR TAT' YEARS (1945–80)

Before 1980, there was very little information provided to the accused as a matter of right.[14] However, assuming that the defence lawyer had the experience and the motivation to seek disclosure,[15] and assuming he was regarded as 'trustworthy', a certain degree of information was available informally from the prosecuting attorney, or the investigator. For example, Mr TC Humphreys QC commented that any evidence that might be helpful to the accused would be provided to the defence at the beginning of the trial. He was in favour of providing statements of witnesses who were not going to be called by the prosecution, though this was more than required by the case law. However, any disclosure given was not provided without the hope that the defence would reciprocate by indicating the nature of the defence.[16]

The image of the prosecutor as a minister of justice was, and is, an unhelpful allusion in both England and Wales[17] and Canada.[18] History demonstrates that prosecutors have exercised their discretion in inappropriate ways.[19] The exercise of discretion relating to disclosure was influenced by many factors including the human frailty of prosecutors and investigators.

11 Depending on the local circumstance, one level of court may be perceived as less likely to convict or sentence harshly (Baldwin and McConville, 1978, p 198; Banks, 1978, p 509; Moxon and Hedderman, 1994; Zander, 2000b).
12 *James Report,* 1975, para 212.
13 Home Office, 1979, para 29; Law Reform Commission of Canada, 1974a, para 56.
14 Home Office, 1979, para 47; Law Reform Commission of Canada 1974a, para 37.
15 McConville *et al,* 1994, p 277; Brookbank, 1981, p 62–63.
16 Humphreys, 1955, pp 741–5.
17 Baldwin, 1985, p 15, McConville *et al,* 1991.
18 Shapray, 1969, p 135; Grosman, 1968, p 586; Grosman, 1969, p 76.
19 Baldwin, 1985, p 15; Banks, 1975, p 72; Baldwin and Mulvaney, 1987a, p 317; Mullen, 1996, col 769.

For example, professionals, including prosecutors, like to be regarded as successful. In the adversarial system, success was often measured by conviction of the accused, or achieving the desired result in applications such as bail. The police were not afraid to use this criterion in relation to the prosecutors assigned to cases and reports indicate that they categorised as good lawyers those who follow instructions, rather than those who exercise their discretion independently.[20] Career objectives tend to be achieved where the advocate is known more as victorious than fair. The resource constraints of the criminal justice system tend to encourage the approach that, once the accused is at trial, it would be politically incorrect to abandon the trial on the basis of the interests of fair play, except in the most egregious situations.[21] Therefore, it was easy for some prosecutors to fail to disclose exculpatory evidence, or helpful evidence, assuming that the investigator has disclosed the information to him. Of course, sometimes disclosure was based on friendly relations. This left defenders with strictly 'arms length' relationships at a marked disadvantage.[22]

Police, as prosecutors or investigators, were even less inclined to be open.[23] In England, until the creation of the Crown Prosecution Service (CPS), the majority of informal disclosure was exclusively at the discretion of the police as the police were responsible for the investigation and prosecution of crime.[24] Only in the more serious cases, where the matter would proceed in Crown Court, would the police, through their solicitors, instruct counsel.[25] Therefore, it was late in the process before the police would lose control of the case and even later before counsel could be in a position to provide informal disclosure to the defence.[26] It is reported that investigating officers provided only limited information to the defence, unless the evidence was very strong and likely to induce a confession.[27]

Informal disclosure was also available from the investigating agency on a limited basis in Canada.[28] It was quite common for defence lawyers to seek disclosure, initially, from the investigating agency.[29] Often the prosecutor

20 It was difficult for a prosecuting solicitor to be a minister of justice when he took instructions from a police force (Danks, 1975, p 67; Melnitzer, 1998, p 1).

21 Grosman, 1987–88, pp 348–52.

22 Baldwin, 1985, p 15; Danks, 1975, p 72; Baldwin and Mulvaney, 1987a, p 317.

23 Lord Devlin stated it was inconsistent to ask police to be judicial, 1979, pp 54–83.

24 White, 1986, pp 23–2; Zander, 1992, p 212.

25 Brown, 1975, p 1; Zander, 1992, pp 215–16.

26 Brown, 1975, p 1; *Devlin Report*, 1976, para 5.2.

27 McConville and Hodgson, 1993, pp 43–14.

28 Brookbank, 1981, p 56 (it is a suggested that the police were even more selective as to whom they disclosed their case); Macfarlane, 1979, p 85.

29 McConville and Hodgson, 1993, pp 43–44; Brookbank, 1981, p 53. Only trustworthy lawyers were able to get information from police (Barton and Peel, 1979, pp 45–47).

referred defence counsel to the police for this purpose in any event. This was expedient because prosecutors were too busy to meet with lawyers for this purpose and had little knowledge of the actual evidence in support of the charge in any event.[30] Further, the police retained custody of the file.[31] This was true for both the period before the first court date and between later court dates.[32]

The extent of informal disclosure by prosecution counsel in England and Wales varied from counsel to counsel.[33] It also varied between Crown Courts and between magistrates' courts.[34] But one rule was certain, even at the level of the magistrates' court,[35] a prosecutor would never again provide candid disclosure, if a defence solicitor used that information in an overt way in court.[36]

The last word belongs to a Canadian barrister who later would be appointed directly to the Supreme Court of Canada. The late John Sopinka wrote that a 'Crown attorney is loathe to provide information unless he has had previous experience with the counsel who seeks it and feels that he can trust the information to him'.[37]

The concept of the trusted lawyer was institutionalised in a few parts of England through the development of pre-trial reviews in some magistrates' courts. The court, with the co-operation of practitioners, designed and participated in reviews. Their goal was to assist in the proper management of resources by better organising the parties to present their cases on the scheduled date or to encourage an early guilty plea. In a few locations, but in hundreds of cases over a number of years, full advance disclosure of the prosecution evidence was offered to the defence solicitor 'on the understanding' that information about the defence case would also be disclosed.[38] The Law Society made it clear that it did not approve of the practice of defence disclosure: 'It is no part of the function of the defence to help the prosecution prove its case, but the Criminal law committee can well understand the danger that that simple principle can be forgotten in the friendly atmosphere of an informal pre-trial review where

30 Cassells, 1975, p 285; Macfarlane, 1979, p 51.
31 Law Reform Commission of Canada, 1974b, p 5. Prosecutors from across Canada reported that in magistrates, court trials they obtained the file from the police anywhere from one to 14 days before trial.
32 Brookbank, 1981, p 55.
33 Humphreys, 1955, p 742; *Devlin Report,* 1976, para 52.
34 Baldwin, 1985, p 15.
35 Danks, 1975, p 72.
36 Carlen, 1976, pp 46–17; Scott, 1973, p 593.
37 Sopinka, 1975, p 289.
38 Baldwin and Feeney, 1986, p 599. The first locations studied were Nottingham and Birmingham.

the advocates for the prosecution and defence may know each other well.'[39] Apparently, the admonition had little effect because the benefits outweighed the risks.[40] It is of interest that various busy magistrates courts in Toronto and Ottawa began holding pre-trial reviews, in the late 1970s and early 1980s, with similar goals, and an atmosphere of co-operation.[41] Other issues relating to defence advocates are found in Pt 3.6.

3.4 RULES AND NATURAL JUSTICE

Both in England and Wales and Canada[42] the rules pertaining to disclosure by the prosecution grew from the principles of natural justice. The decision of the Divisional Court, in *Leyland Justices ex p Hawthorn*,[43] was an important and timely early statement. In *Hawthorn*, the denial of natural justice was seen in the prosecution's failure to give to the defence the names of two witnesses whom it did not intend to call, but whose statements might have assisted the defence. The court quashed the conviction and confirmed the important principle that certiorari may lie in cases of a clear denial of natural justice in the context of disclosure.[44] Lord Widgery CJ stated: There is no doubt that an application can be made by certiorari to set aside an order on the basis that the tribunal failed to observe the rules of natural justice… If fraud, collusion, perjury and such like matters not affecting the tribunal themselves justify an application for certiorari to quash the conviction, if all those matters are to have that effect, then we cannot say that the failure of the prosecution which in this case has prevented the tribunal from giving the defendant a fair trial should not rank in the same category.'[45]

39 Law Society, 1983, p 2330.
40 Baldwin and Feeney, 1986, p 602.
41 Law Reform Commission of Canada, 1977, p 259; Provincial Court, 1980, p 13.
42 *Savion and Mizrahi* (l980) 52 CCC (2d) 276 Ont CA.
43 (1979) 68 Cr App R 269 DC.
44 The order of certiorari is now called a 'quashing order'.
45 (1979) 68 Cr App R 269 DC, p 271.

3.5 THE ATTORNEY GENERAL'S GUIDANCE AND THE MAGISTRATES' COURTS (ADVANCE INFORMATION) RULES

3.5.1 Introduction to the changes made in the period 1980–90

During the 1980s, the *Attorney General's Guidelines on the Disclosure of Unused Evidence* (December 1981)[46] and the Magistrates' Courts (Advance Information) Rules 1985[47] were put in place. Discovery and disclosure policies and practices had varied greatly amongst the prosecuting authorities in England and Wales.[48] While the guidelines and rules featured the continuation of a large measure of discretion in the prosecution, it was a significant development in the evolution of the control of the exercise of discretion by prosecutors and indirectly, investigators. However, there was no change in the rule that only a small amount of information was provided to the accused as a matter of right. In either way, or in indictable proceedings via the committal, the defence was to be provided with enough of the prosecution evidence to constitute a *prima facie* case. Before the trial, or certainly before the close of the case for the prosecution at trial, all other evidence that was to be called was provided to the defence. The significance of this situation can be understood when one reflects on the large amount of unused information that sometimes exists in the hands of investigators. That information may have assisted the accused in having a fair trial. As history would prove, the interests of justice would have been better served had a more rigorous regime been adopted. But, at the time, it was a welcomed development.

In Canada, advance notice of the evidence to be used by the prosecution, and the threat of abolition of the long form committal process, dominated the reform discussion during the 1980s. Disclosure of 'unused' material was not central to the mainstream discussion.

3.5.2 Motivation and recommendations

The criticisms directed at the state of the law regarding pre-trial discovery and disclosure grew to significant proportions in the 1970s. Critics included Sir Henry Fisher in his report regarding the wrongful convictions in the Confait murder[49] and Lord Devlin, in his report arising from the Virag case

46 (1982) 74 Cr App R 302, para 2.

47 SI 1985/601.

48 Philips Commission, 1981b, paras 201 and Appendix 28. Canada experienced regional variations (Law Reform Commission of Canada, 1984, p 3).

49 *Fisher Report*, 1977–78, para 29.16 (Fisher concluded mat 'the fault was with the system which left such an important matter devoid of authoritative rules').

and other miscarriages.[50] Practitioners pressed for reform through organisations such as the Law Society (1965), JUSTICE (1966) and the Criminal Bar Association (1973).

Finally, the mood for change led to the enactment of s 48 of the Criminal Law Act (CLA) 1977, regarding rules for discovery in magistrates' courts, and the formation by the Home Office and the Attorney General of a working party assigned the responsibility of considering prosecution disclosure post-committal.[51] While rules were being considered under s 48 and the working party consulted and prepared its 1979 report, the issue of pre-trial discovery and disclosure in criminal cases came under the scrutiny of the Philips Commission.

It was widely agreed that disclosure by the prosecution would be better served if it was formalised and defined. The limitations were shaped by police concerns regarding logistics and the passing over of information to the defence and the Home Office concerns over the costs of providing information.

The working party recommended that in indictable matters the statements of witnesses to be called at trial, but who had not given evidence at committal, should be given. It was thought that cost would prohibit mandating the provision of all non-sensitive witness statements in indictable proceedings. The Philips Commission agreed that the fiscal issue was very important and it provided the same recommendation.[52] By contrast, Fisher had called for all non-sensitive witness statements to be disclosed, subject to the usual exceptions including witness protection and the public interest[53] The Philips Commission concluded that a mechanism for judicial review of prosecutorial discretion was not appropriate as it might create a burden on the courts[54] and because it was unnecessary as they had recommended that an independent prosecution service be formed, taking the responsibility of prosecution away from the police.[55]

The Philips Commission recommended that advance notice in magistrates' courts should take the form first of the presentation to the defence, upon request, of a summary of the prosecution's case.[56] Secondly, if the case was to be contested, then the defence should receive from the police

50 *Devlin Report,* 1976, para 53 (regarding Laszlo Virag).
51 Home Office, 1979, para 53.
52 Philips Commission, 1981a, para 8.18.
53 *Fisher Report,* 1977–78, para 29.36.
54 Philips Commission, 1981a, para 8.19.
55 *Ibid,* para 7.3–17.
56 In the event that the accused was unrepresented, a portion of the prejudice experienced by the accused under the then current practice could be removed by revising the procedure at plea. It was recommended that the prosecutor read aloud the summary of facts alleged before the accused enters his plea; *ibid,* paras 8.14 and 8.15.

a copy of the accused's statement, or a summary of the police notes when only an oral statement was given, and a list of witnesses to be called by the prosecution. If the defence wished to have copies of the prosecution witness statements then they were to be supplied, or made available for inspection, subject to the usual exceptions.[57] The Philips Commission agreed with the earlier assessment of the James Committee that improved advance discovery would assist also in securing the efficient use of resources.[58]

The James Committee had found that the lack of advance discovery in magistrates' courts was one factor that had led to an unduly large caseload carried in the Crown Court. Evidence indicated that one reason why the defence elected trial in the Crown Court was to maximise its opportunity for discovery of the prosecution's case. It was concluded that an increase in prosecution disclosure would reduce beneficially the number of defendants seeking trial on indictment. The committee added: 'It is most desirable in the interests of justice that defendants should be fully acquainted with the case against them as far as it is practicable to achieve this.'[59] However, in response to the fears expressed over an increased workload for the police, the recommendation was restricted to cases in the intermediate category of offences, excepting theft and criminal damage. Using the short form committal system as a model, the James Committee recommended that the defence be supplied with copies of the statements of witnesses who would be called at trial by the prosecution, subject to the usual exceptions. Statements would only be supplied upon receipt of a defence request (provided that it was informed of the right).[60]

3.5.3 *Attorney General's Guidelines for the Disclosure of 'Unused' Material to the Defence in Cases to be Tried on Indictment* (1981)

The guidelines[61] for cases to be tried on indictment stated that all 'unused material' should normally be made available to the defence solicitor, if it had some bearing on the offence charged and the surrounding circumstances of the case.[62] The phrase 'unused' material was defined to include, but was not limited

57 Philips Commission, 1981a, paras 8.16–19.

58 *Ibid*, para 8.12. These predictions were proved accurate in later studies (Feeny, 1985, p 104). The fears expressed by some police services that advance discovery would be abused and perhaps lead to witness tampering or circulation of sensitive information also proved to be unjustified (p 101).

59 *James Report*, 1975, para 212.

60 *Ibid*, paras 214–22.

61 Revoked and replaced by the *Attorney General's Guidelines* (2000a).

62 (1982) 74 Cr App R 302, para 2.

to,[63] all witness statements and documents which were not found in the bundle of materials served on the defence in the short form committal process, as well as the statements, and related documents,[64] of those witnesses to be called at the committal and the drafts of statements, if any.[65] Subject to the prosecutorial discretion retained in the scheme (para 6), no statement which assisted (or was neutral to) the defence could be withheld, even if they were of limited relevance or from a witness of questionable credit.[66] Any doubt whether the balance was in favour of, or against, disclosure was always to be resolved in favour of disclosure (para 9).

Disclosure should have taken place as soon as possible before the committal hearing date. Failing that, it should have happened as soon as possible after the committal. This was subject to the provision that, if the information to be disclosed might have a bearing on the conduct of the committal or the committal order, it might be appropriate to attempt to adjourn the proceedings to facilitate disclosure (para 3). In the event that the material to be disclosed was under (approximately) 50 pages, the prosecution was to provide copies either by post, by hand, or via the police (para 4). Otherwise, arrangements could be made for an opportunity for the defence solicitor to inspect the material at a convenient office of the police or prosecution and, if requested, have materials copied (para 5).

Discretion as to non-disclosure in certain situations was reserved for the prosecution. These situations can be loosely catergorised as addressing the interference in the administration of justice and sensitive evidence. The discretion not to disclose evidence for fear of interference in the administration of justice could be used where grounds existed for believing that disclosure might result in witness intimidation (para 6). Further, in cases where the maker of a wholly or partially untrue statement was, for example, a close friend or relative, non-disclosure was justified, if the prosecution might need to use the statement in cross-examination (para 6ii). Alternatively, the prosecution may have chosen not to disclose a statement thought to be substantially true (whether favourable to the prosecution or neutral), if fears existed that the maker might give a false statement to the defence and then give evidence for the defence,

63 O'Connor, 1992, p 470.

64 Documents include artists, impressions, photofits and notes of oral descriptions given by the identifying witness (Richardson (ed), 1992, para 4–272).

65 (1982) 74 Cr App R 302, para 1. This was expansively interpreted by Henry J, in *Saunders and Others*, unreported, 29 September 1989, London CCC, T881630, Henry J (the first Guinness trial), to include all preparatory notes and memoranda that led to the making of the witness statement. Dr Gisli Gudjonnson reports that prosecution witnesses are most susceptible to suggestion. Therefore, the first drafts of statements are critical to the defence (Hill, 1997, p 1110). Also, a first draft may be altered by subsequent viewing of a videotape of the incident, and still be evidence: *Roberts (Michael)* (1998) *The Times*, 2 May CA

66 Murphy, 1993, p 1240.

making the true statement useful in cross-examination (paras 6iii and 6iv). In the event that a statement was not supplied on the foregoing grounds, the name and address of the witness should normally have been supplied to the defence (para 6iv).

Non-disclosure also could be justified on the basis that evidence was 'to a greater or lesser extent "sensitive"', and, therefore, it was not in the public interest to disclose it (para 6v). This discretion was to be exercised with a view to balancing the degree of sensitivity against the degree to which it might assist the defence. It might be that the evidence was, in the opinion of the prosecution, of no value to the defence and, in such case, there was no need to reveal the name and address of the maker (para 8). It was open to the prosecution to edit witness statements, to remove the name of the maker, or remove the portion relating to sensitive information, or make similar arrangements (para 13).[67] By implication, the name and address of the maker should otherwise be revealed.

The guideline suggested that 'sensitive' statements included: those that dealt with national security, including the exposure of personnel working undercover; those which exposed police informants and, thereby, placed him or his family in danger; those which exposed the identity of a witness and, thereby, placed him in danger of assault or intimidation; those which revealed details which might facilitate the commission of other offences or alert someone not in custody that he was a suspect, or revealed some unique form of surveillance or method of detecting crime; those which were supplied on the condition that the contents would not be disclosed, at least until the maker had been served with a summons (for example, a bank official); those which related to offences, or serious allegations against someone other than the accused, or disclosed other matters (for example, previous convictions) prejudicial to the third party; those which contained details of private delicacy to the maker and/or might create risk of domestic strife (para 6).

Where unused material might fall into any of the general discretionary grounds which would allow non-disclosure, the prosecuting solicitor was required to consult with the investigating officer and counsel as appropriate before providing disclosure. In cases of exceptionally sensitive material, the Director of Public Prosecutions (DPP) was to be consulted (paras 10, 11 and 15). The guidelines contemplated the possibility of offering no evidence at trial to avoid the disclosure of relevant sensitive information (para 15).

67 Alternate arrangements included disclosing sensitive information on a counsel to counsel basis and obtaining a new statement for disclosure purposes omitting the sensitive material. Where the statement revealed a fact that was not sensitive, but helpful, to the defence, it was open to the prosecution to make an admission of fact pursuant to the CJA 1967, s 10.

3.5.3.1 The result

Unfortunately the guidance suggesting early disclosure found in the guidelines (1981) was often ignored due to a lack of resources and the low priority given to disclosure. As barrister O'Connor reported, 'disclosure is commonplace in the weeks before trial, or on the first day of the trial itself'.[68] The guidance to provide 'all "unused" material' was unduly ignored by the prosecution and regional variation remained.[69]

Part of the problem was that the guidelines lacked the force of law.[70] Defence requests for disclosure of evidence that normally would be gathered, but not disclosed in a particular case, could be rebuffed by vague prosecution assurances. Also, the guidelines did not provide a mechanism for the defence to ascertain whether all materials that should be disclosed were disclosed, nor a mechanism to review the exercise of discretion. The court tended to accept vague assurances from the prosecutor as sufficient to end any defence attempts for further disclosure.

A deeper concern also emerged. It was reported that civil actions against the police had uncovered many relevant documents that were not disclosed in the related criminal proceeding.[71] Certain police officers did not provide all relevant evidence to the prosecutor, making it impossible for the prosecutor to fulfil his professional obligation.[72] It was impossible for the defence to seek the court's assistance if the existence of material was not revealed.[73]

The guidelines were rendered obsolete in the early 1990s with the developments of the common law arising from the wrongful conviction cases.[74] The guidelines were fully updated internally by the CPS in 1994. They were the subject of positive judicial comment by Simon Brown LJ.[75] Commentator Enright concluded that: 'The procedures seem to lay down a presumption in favour of disclosure of all matters which may be relevant, including documentary and non-documentary material, all witness convictions, cautions of less than five years and police disciplinary records.'[76] New guidelines, taking into account the CPIA 1996, were published in 2000. They are discussed in Chapter 5.

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68 O'Connor, 1992, p 470.
69 *Ibid,* p 470; JUSTICE, 1987, para 25.
70 *Brown (Winston)* [1995] 1 Cr App R 191CA.
71 O'Connor, 1992, pp 470–73.
72 Law Society, 1991, para 3.5 (ie, Guildford Four and Maguire Seven); JUSTICE, 1989, p 8, regarding Mervyn Russel (Court of Appeal 1983) and p 19, regarding Paul Ngan (Court of Appeal 1984).
73 O'Connor, 1992, p 472.
74 *Brown (Winston)* [1995] 1 Cr App R 191 CA.
75 *Bromley Justices ex p Smith and Wilkins* [1995] 2 Cr App R 285 DC, p 289.
76 Enright 1996, p 308.

3.5.4 Magistrates' Courts (Advance Information) Rules 1985

The rules prescribed that in offences triable 'either way' (choosing a narrower path t han allowed by s 48 of the CLA 1977), the prosecution was required to give the accused notice of the right to seek discovery.[77] Upon a request from the defence (r 3), it was to provide the defence, with a summary of the prosecution's case, or copies of the witness statements that were to be adduced in evidence. This step was to be completed as soon as practicable and before the decision as to mode of trial (r 4). The prosecution retained the discretion to withhold the disclosure of material that may have led to witness intimidation or interference with the course of justice (r 5). Failure by the prosecution to comply with the duty imposed by the rules provided grounds for an adjournment,[78] unless the court was satisfied that the accused would not be substantially prejudiced (r 7).[79]

3.5.4.1 The result

It was no surprise that most prosecutors opted to fulfil the disclosure obligation by providing summaries rather than copies of witness statements.[80] History revealed a limited level of advance notice of the evidence to non-favoured defence lawyers under the previous system of unguided prosecutorial discretion and, therefore, human nature being what it was, the minimum requirement was the likely choice. The natural tendency to provide the minimum was reinforced in the difficult period experienced in the creation of the CPS, beginning in 1986. Baldwin and Mulvaney sympathetically commented that: 'It was always difficult to see how an emerging Crown Prosecution Service, following a traumatic gestation period and difficult birth, could possibly cope with the additional burden of providing full statements in either-way cases on request at such an early stage in the legal process.'[81] Even though the Government indicated in 1986 that it wished to remove the option of disclosure by summary when conditions permitted,[82] no change to the Advance Rules was forthcoming, although the CPS decided to provide statements in 1997.[83] A sampling of

77 SI 1985/601.

78 Failure to comply with the rules was not in and of itself grounds for a finding of abuse of process, *King v Kucharz* (1989) 153 JP 336 DC.

79 Magistrates had no power to order compliance with the rules, *Dunmow Justices ex p Nash* (1993) 157 JP 1153 DC.

80 Baldwin and Mulvaney, 1987b, p 409. Discovery by the provision of witnesses, statements was offered in some smaller centres, like Canterbury and Chatham, and centres where previous pre-trial review systems were developed to the extent that the extra burden could be managed, ie, Nottingham *(ibid)*.

81 *Ibid*, p 409.

82 Strong, 1986.

83 In 1997, the CPS decided to provide key witness statements (Ede and Shepherd, 1997, pp 156–57).

prosecutors conducted by Baldwin and Mulvaney in 1986 indicated they were pleased to retain the option.[84]

Summaries have long been recognised as less than an ideal disclosure vehicle for a number of reasons. The quality of the summary is dependent on the perspective of the writer, his writing skills, time allowance, and commitment to fairness. Even though an attempt was made to enhance the quality of the summaries provided under the rules, and in the opinion of senior prosecutors certain improvements were achieved, tremendous variation in the quality of the summaries remained. In some centres, many defence solicitors were seriously disgruntled about the quality of the summaries provided.[85]

Other deficiencies found in the rules include the omission from the disclosure obligations of incomplete or multiple witness statements.[86] The rules do not address 'unused' material.

The implementation of PACE 1984 (1 January 1986) and its Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers provided a supplemental source of informal discovery. Pursuant to para 11 of Code C, police officers were required to prepare contemporaneous notes of interviews with suspects. These notes, which were made widely available to defence solicitors, provided, in the opinion of some solicitors, more information regarding the prosecution case than did the prosecution summaries.[87]

Therefore, through the combined effect of the provision of summaries and copies of police suspect interview notes, the defence was provided with some indication of the prosecution's case in either way cases at an early stage.

Other consequences of the implementation of the Advance Information Rules included extra delay in the processing of cases. Defence solicitors, accustomed to doing things at court, failed to seek summaries at an early date. The CPS reported that advance disclosure frequently resulted in adjournments at the request of the defence, on the grounds that time was needed to consider the disclosed material. In May 1988, an analysis of adjournments in West Yorkshire indicated that adjournments at the behest of the defence were twice (approximately) those attributable to the prosecution.[88] In response to the Home Office concern over this phenomenon, the Law Society published guidelines on

84 Baldwin and Mulvaney, 1987b, p 410.
85 *Ibid*, p 410–11; Prowse, 1979, p 28.
86 Rule 4(2).
87 Baldwin and Mulvaney, 1987a, p 316.
88 Law Society Editor, 1989b, p 4.

seeking advance information in magistrates' courts.[89] Its members were exhorted to seek disclosure at the earliest opportunity rather than wait until the first appearance of the accused and avoid asking for disclosure where the accused intended to provide an unequivocal guilty plea.[90]

Additionally, the rules removed the willingness of defence solicitors in some locales to participate in the local pre-trial review schemes designed to facilitate case management and some disclosure. As a result, some pre-trial review schemes were abandoned. However, in schemes where prosecution disclosure exceeded that mandated by the rules, many pre-trial review schemes continued.[91]

3.5.5 Summary of the position in England and Wales

If the accused was charged with an offence that could be tried only on indictment, the defence was provided with a committal bundle and, possibly, a long form committal would take place. It would also receive the statements of witnesses that would be called at trial that were not called at the committal and any unused material pursuant to the prosecutor's duty under the guidelines (1981). If the accused was charged with an either way offence, the defence would receive, on request, a summary of the prosecution evidence before mode of trial selection and, if further disclosure was needed, the accused might select trial on indictment. He would then be entitled to the committal bundle and 'unused' materials, as per the guidelines. If the defence chose trial by magistrate, he received no further advance information as of right. Other material evidence, such as plainly exculpatory evidence, or the names of potential witnesses would be given, usually at trial. The guidelines and Advance Information Rules did assist in the better use of resources by reducing the number of elections to Crown Court (and later cracked trials) and provided a small degree of openness. However, in practice, the release of information was still controlled by the prosecutor, assuming that the police had disclosed it to him.

The guidelines and rules did not achieve the degree of behaviour modification that was seen as fair by the courts. It had become generally understood that 'openness is essential if the system is to work fairly for the accused'.[92] The common law pushed ahead to provide a review of the discretion exercised by prosecutors. This remedy would have a great impact on the actions of many

89 Law Society Editor, 1989a, p 3.
90 Law Society, 1989, p 3.
91 Baldwin and Mulvaney, 1987b, p 413.
92 Philips Commission, 1981a, para 8.12.

prosecutors. It did not, however, dramatically impact the police culture and the lack of production of evidence and information to the prosecutor.

3.5.6 Canada and guidelines and advance information

By way of comparison, in the 1980s, the Attorney Generals in the jurisdictions of Canada were still attempting to address the manner in which prosecutors were to be guided in the provision of advance notice of the evidence for the prosecution.[93] It was as late as 1975 that the point was settled, that the prosecution had to provide copies of prosecution witness statements to the defence if the witnesses had not given evidence at the committal.[94]

Ontario successfully piloted a set of guidelines pertaining to serious either way and indictable charges from 1979.[95] The guidelines were modified and expanded to include limited disclosure by standard form case synopsis in summary matters in 1981.[96] Stating that regional variations in resources required a large measure of discretion to remain in each prosecutor, the guidelines were written in passive language. The prosecutor was guided to provide an oral outline or synopsis of the evidence of the prosecution before the committal date was set. If a written request was received from the defence, the prosecutor was encouraged to provide copies of witness statements, if appropriate in the circumstances.

The guidelines met with strong criticism.[97] They maintained a high degree of discretion in individual prosecutors and they did not come up to the standard stated in certain contemporary cases.[98] The guidelines did not clarify the situation with respect to 'unused evidence', or direct the prosecutor to cross-check the police file for exculpatory information or provide a route by which a decision of the prosecutor could be reviewed.

The Uniform Law Conference of Canada, a body made up of representatives from the law officers of each jurisdiction, adopted model guidelines for advance disclosure of prosecution evidence for use in each province in 1985.[99] The model guidelines were similar to the Ontario Guidelines 1981 and were implemented in most provinces by 1990. Five

93 Federal Government indicated that it was considering legislating discovery rules (Evans, 1982, p 24), as was recommended by the Law Reform Commission of Canada (1984, p 13).

94 *Demeter* (1975) 25 CCC (2d) 417 Ont CA. Surprise or late discovery would be grounds for an adjournment.

95 Attorney General of Ontario, 1977.

96 Attorney General of Ontario, 1981.

97 *Martin Report*, 1982, pp 17–18; Evans, 1982, p 27.

98 Eg, *Savion and Mizrahi* (1980) 52 CCC (2d) 276 Ont CA (accused's statement to police should be given to the defence whether or not it is to be used by prosecution).

99 Uniform Law Conference of Canada, 1985, p 38.

provincial guidelines specifically addressed 'unused' material by directing prosecutors to simply inform the defence of unused material, 'which may assist the defence', if the defence requested that information. There was no requirement that it be provided to the defence.[100]

By 1986, the defence bar of Ontario began a campaign to have legislation enacted stipulating mandatory provisions for defence access to material held by the prosecution.[101] In his 1987 *Report of the Ontario Courts Inquiry*, Justice Zuber found that prosecutors were not uniformly following the guidelines. He recommended that the guidelines be upgraded to the status of a directive to be observed, unless the prosecutor could justify not disclosing a particular item in the context of the case.[102] Ultimately, new guidance in the form of a directive was issued on 1 October 1989.[103]

Consequently, by the close of the 1980s, Canada was still stalled in the debate regarding the notice to be given of the prosecution case. Fortunately, long form committals provided an opportunity for discovery in indictable or either way cases. In the last days of 1989, Mr Stinchcombe was in an Alberta court fighting for access to a statement of a witness whom the prosecution did not intend to call at his trial.

3.6 DEFENCE ADVISORS

Defence advisors were faced with a most difficult task during the period before 1990. Information was, and is, power and the law did not provide a readily enforceable duty of pre-trial prosecution disclosure. A 'tit for tat' game was played to gain information from the prosecutor. All stakeholders in the system knew the rules of the game, but not all defence advisors were willing to play by the rules. There is convincing evidence that the other stakeholders in the justice system attempted to condition defence advisors to be co-operative at the expense of adversarial principles. Clearly, many defence advisors were willing, or unwitting, cogs in the machinery of justice. Of particular concern were those defenders who survived on high volume legal aid funded magistrates' court work.[104]

It is instructive to recall that the criminal legal aid scheme expanded in the 1960s in England and Wales. It routinely provided funding for the defence in

100 The provinces were Manitoba, New Brunswick, Nova Scotia, Quebec and Saskatchewan. They followed the equivalent to the rule in *Bryant and Dickson* (1946) 31 Cr App R 146 CCA.

101 Brillinger, 1986, pp 10–11.

102 *Zuber Report,* 1987, para 8.26.

103 Criminal Law Division Directive #D2.

104 McConville *et al,* 1994, Chapter 3.

jury trials.[105] In the 1970s, legal aid funding was extended to more magistrates' court matters. By the 1980s, the majority of defendants appearing in all trial courts (other than those accused of motoring offences) were represented at trial through legal aid certificates.[106]

Traditionally, legal aid focused on assistance in court, initially at trial, then in plea and sentencing and bail. Very little provision was made for pre-trial defence work, either in investigation or preparation, or police station advice.[107] Consequently, legal aid defence work focused on me trial, or the moments before it. It became the accepted pattern that lawyers met their client and received instructions very late in the process.[108] Other systemic and practice norms reinforced this pattern. Police did not want lawyers assisting accused persons at the police station for fear that the accused might exercise the right to silence and avoid signing a 'confession'.[109] The Judges' Rules regarding detention and questioning were vague and enforced in limited circumstances.[110] Prosecutors were retained and instructed, originally by the complainant and later with the professionalisation of prosecutions, by the police forces. Prosecutors, while being influenced by their 'clients', were allowed to exercise their various discretionary powers without close scrutiny of the courts. Informal disclosure by the prosecution to the defence, if at all, was sought and received at the last minute. The court's primary concern was not on the level of early preparation completed by the advocates, but rather on having advocates present to ensure a timely and smooth completion of the day's business.[111] Even the introduction of paper committals,[112] while providing consistent early disclosure of the core of the prosecution's case, was supported by the court administration as a tool to reduce 'unnecessary' court time. Some courts encouraged defence solicitors to conform to the system in indirect ways. Until the Legal Aid Act 1988, the court determined the grant of and payments under the certificates. Delays in processing applications caused delays in the system and delayed defence preparation.[113] Additional pressure arose from the legal aid rates, which did not increase with inflation, and the fact that accounts were rarely paid on time by the legal aid fund administrators.[114]

105 The statistics reveal that of those pleading not guilty, 78% were legally aided, 18% paid privately and 4% were unrepresented (*Widgery Report,* 1966, para 45).
106 Goriely, 1996, p 44.
107 *Ibid,* p 45.
108 *Widgery Report,* 1966, para 39.
109 McConville *et al,* 1994, p 282 (until PACE was implemented in 1986).
110 [1964] 1WLR 152.
111 Goriely, 1996, p 47.
112 CJA 1967, providing that the accused was represented. By 1983, legal aid certificates were granted in 55% of committal proceedings (Home Office, 1984, p 188).
113 *Narey Report,* 1997, Chapter 4, p 2; Working Group, 1990, para 177.
114 Law Society, 1991, para 626.

It would be wrong to characterise the work of all defence lawyers who worked for indigent accused funded on legal aid schemes as sub-standard. Some defenders worked hard, displayed a client centred ethical approach and held firm to the adversarial ideals.[115]

A study of criminal defenders in England and Wales conducted by McConville and others provided more insight into the instances of, and factors leading to, sub-standard defence work. Poor quality defence work, in the firms observed, was the result of both economic (profitability or survival) and non-economic factors. These factors were of equal significance and overlapped in most situations.

The non-economic factors included poor standards of practice or case management. For example, the lack of initiative in seeking prosecution advance information (in either way and indictable cases), accepting the police evidence, assigning work to junior solicitors or caseworkers and passing clients between in-house caseworkers. The researchers observed that, in a high number of cases, evidence was being collected late in the process, in spite of it being available much earlier. Also, there appeared to be an absence of training in adversarial principles.[116] Another factor was the presence of systemic blocks to experts and information. JUSTICE (1987) wrote that defence advisors experienced problems when attempting to test physical evidence: 'The defence often ha[d] great difficulty in gaining access to exhibits and, in any event, the experiments already carried out may have effectively destroyed an exhibit for the purposes of further examination.'[117] Where the accused wanted to conduct independent tests on remaining samples, it was difficult to find an expert outside of the employ of police authorities or the Home Office laboratories. The Home Office laboratories suffered from the unfortunate restrictions that the sample had to be submitted through the police and the results shared with them.[118] Finally, the culture towards encouraging a plea of guilty was reinforced by the emphasis of courts on early guilty pleas in return for a lesser sentence.[119]

Equally grave criticism was made of many barristers in their approach to pre-trial work, failure to test evidence and encouragement of guilty pleas. Criticism also arose from the late return of the brief and not having spoken with the client before the beginning of the trial.[120]

115 McConville *et al*, 1994, p 267.
116 *Ibid*, pp 271–80.
117 JUSTICE, 1987, p 10.
118 *Ibid*, pp 8–10.
119 *Runciman Report*, 1993, p 113: '…to face defendants with a choice between what they might get on an immediate plea of guilty and what they might get if found guilty by jury does amount to unacceptable pressure,' to plead guilty.
120 McConville *et al*, 1994, pp 242 and 268.

In the opinion of McConville, the combined impact of the above factors on magistrates' court defence work was to mould it into a standardised and routinised process in many firms.[121] In one sense, the pressures of the system, and the factors stated above, made the defence advisor a cog in the machinery of the process 'serving more to transmit to the client the system's imperatives, whether for co-operation with the police or the administrative convenience of a guilty plea, as to assert or translate their clients own interests within the legal process'.[122]

In Canada, researchers also concluded that defence lawyers were greatly impaired by the attitude of the police and prosecutors and legal aid fund administrators[123] and that a group of defence lawyers were further impaired by their own self-interest. Broadly speaking, many defenders were also 'prisoners of the system'.[124]

It is encouraging that the Lord Chancellor has pledged to insist on higher quality defence services. The contracts offered by the new Legal Services Commission are expected to encourage adequate quality among defence firms. In addition, efforts by the profession to improve the quality of defence work over the last few years will yield positive results, as will the recent removal of the advocates' immunity from civil suit.[125]

However, all is for nought if the systemic pressures do not allow defenders to take an active adversarial approach. The defence must be given full disclosure of the evidence upon which the prosecution will rely and reasonable disclosure of 'unused' material, at an early date. This means that police investigators and prosecutors must faithfully follow the rules. It also brings into doubt the validity of the reciprocal information exchange regime in the CPIA 1996. It is submitted that, as presently equipped and constituted, the defence advocate cannot be expected to overcome the problems and challenges posed by investigators and prosecutors who do not obey the law.

121 McConville *et al*, 1994, p 278.

122 *Ibid*, p 281.

123 Court Liaison Committee of Ontario, 1982. On Saturdays, some lawyers voluntarily completed the accounts for the legal aid administrator to reduce the backlog (Levy, 1984, p 3).

124 Erickson and Baranek, 1982, p 78; Grosman, 1969.

125 *Hall (Arthur JS) & Co (A Firm) v Simons* [2000] 3 WLR 543 HL.

THE DEBATE REGARDING THE CRIMINAL PROCEDURE AND INVESTIGATIONS ACT 1996

4.1 INTRODUCTION

The contrast between the common law of England and Wales and Canada and the Criminal Procedure and Investigations Act (CPIA) 1996, which is featured in Chapters 5, 6, and 7, will be better understood if the motivation for the legislative action in England is examined. Also, it is informative to summarise the process used in England and Wales in the prosecution of serious and complex fraud under the Criminal Justice Act (CJA) 1987 and to acknowledge that some 'radical' changes had already been introduced to the legal culture by that act.

It will be recalled that the miscarriages of justice exposed in the early 1990s greatly embarrassed the Conservative Government. All of the high profile miscarriages were caused, in part, by systemic problems and, to a greater or lesser extent, by non-disclosure. As a result, the Royal Commission on Criminal Justice (Runciman Report) was instituted to placate the critics and recommend the way forward. In the years following the Runciman Report (1993), some political manoeuvring resulted in a series of 'law and order' statutes, including the CPIA 1996, rather than liberal legislation. The CPIA 1996 was significantly different in detail from that which had been recommended by the Runciman Report.

In Canada, miscarriages of justice also occurred as a result of systemic failures, some more closely related to a lack of disclosure than others. When the wrongful convictions were revealed in the 1980s and 1990s the reaction of the relevant provincial governments was also to appoint commissions of inquiry and make recommendations on the way forward. The Supreme Court, in rewriting the rules of prosecution disclosure in *Stinchcombe*,[1] was influenced by the *Report of the Royal Commission on the Donald Marshall Jr Prosecution*.[2] In Canada, no serious attempts have been made to reduce the scope of disclosure or the role of the court in supervising prosecutorial discretion, or to formalise defence disclosure. Rather, discussion is focused on improving the remedial process in the event of a wrongful conviction, although the proposal to adopt the model of the Criminal

1 [1991] 3 SCR 326, pp 336–337.
2 *Marshall Jr Report*, 1989.

Cases Review Commission (CCRC) was rejected. Even the long form committal appears likely to weather the calls for abolition.[3]

4.2 CURRENT COMMON LAW RULES

The common law rules that emerged in the early 1990s in England and Wales can be usefully summarised here. The common law imposed a positive continuing duty on the prosecution to provide certain material and information to the defence, without requiring a defence request. The duty was over and beyond the statutory duty to provide notice or details of the evidence to be called by the prosecution. The duty includes disclosure of information that might arguably undermine the prosecution case or assist the defence. The test is materiality not admissibility. The scope of the duty is limited by legal professional privilege and public interest immunity (PII). It is a material irregularity in the trial to fail to disclose.[4]

The court will review decisions made by the prosecution to withhold information on the basis of PII. Disclosure will be ordered only where the sensitive information is relevant or material to the issues in the case. The test of materiality is very wide, including information that can be seen on a sensible appraisal by the prosecution as possibly relevant to an issue in the case, or possibly raising new issues not apparent from the prosecution case, or having a real prospect of providing a lead on evidence which goes to these tests.[5]

By 1995, the broad materiality test was applied to all disclosure issues. The governing principle was distilled in the judgment in *Mills and Poole*.[6] Lord Hutton adopted the statement of Sopinka J in *Stinchcombe:*[7] 'the fruits of the investigation' which are in the possession of the prosecution are not the property of the prosecution for use in securing a conviction, 'but the property of the public to be used to ensure that justice is done'. This obligation is rooted in the right in the accused to make full answer and defence and, alternatively, the need to preserve the integrity of the judicial

3 Planned modifications to the scope of the committal process and the provisions concerning the miscarriage of justice (Criminal Code, s 690) can be found in House of Commons of Canada, Bill C-15, 1st Session, 37th Parliament, 49–50 Elizabeth II, 2001. For a commentary, see Goetz and Lafrenière, 2001. See Chapter 8 for details pertaining to committals.

4 *Brown (Winston)* [1995] 1 Cr App R 191 CA, affirmed HL; *Maguire and Others* (1992) 94 Cr App R 133 CA; *Ward* (1993) 96 Cr App R 1 CA; *Preston* [1994] 98 Cr App R 405 HL, pp 428–29.

5 *Davis, Johnson and Rowe* (1993) 97 Cr App R 110 CA; *Keane* (1994) 99 Cr App R 1 CA.

6 [1998] 1 Cr App R 43 HL, p 62.

7 [1991] 3 SCR 326, p 333.

8 *Leyland Justices ex p Hawthorn* (1979) 68 Cr App R 269 DC; *Beckford* [1996] 1 Cr App R 94 CA; *O'Connor* [1995] 4 SCR 411, p 468.

process.[8] The reasoning of Lord Hutton and Sopinka J bear a striking resemblance to the words of the Commission of the European Court of Human Rights in the case of *Jespers v Belgium*.[9]

Before moving ahead, it is instructive to repeat the admonition of JUSTICE regarding statutory regimes that seek to alter the rules of the common law, or international human rights, which have been developed to protect the accused's right to a fair trial: 'Any change which risks interfering with those principles needs to be justified as necessary and proportional to the mischief it seeks to correct.'[10]

4.3 SERIOUS FRAUD PROSECUTIONS

By the 1980s, it had become apparent that a significant amount of serious fraud was being perpetrated in England and that the difficulties and delays involved in prosecuting this category of offence were leading to an unsatisfactory situation.[11] An interdepartmental committee under the chairmanship of Lord Roskill was given the task of studying the problems and recommending solutions. From their recommendations came the CJA 1987. This act was unique in the sense that it combined, and placed on a statutory footing, many of the different proposals that had been raised in the criminal procedure reform debate over the years and experiments arising therefrom. The act featured administrative committal for trial in the Crown Court, advance disclosure of documents orders, preparatory hearings, reciprocal pre-trial information exchange and sanctions for non-compliance. The latter two topics require further explanation at this point.

The Roskill Committee considered evidence that a formal pleading system, akin to civil proceedings, was appropriate.[12] It also acknowledged that the length and complexity of fraud trials could be greatly reduced by pre-trial defence disclosure. However, some argued that reforms of this nature would run afoul of fundamental principles, such as the right to remain silent, the presumption of innocence and the burden of proof and the protection against self-incrimination. The Roskill Committee concluded that the law should be amended to require the defence to outline, in writing, the nature of its case in general terms at the preparatory hearing stage. Failure to comply was to be treated as grounds for adverse comment by the prosecution

9 (1981) 27 DR 61 (ECtHR Com).
10 JUSTICE, 1995, p 24.
11 *Roskill Report*, 1986, para. 1.2.
12 *Ibid*, para 6.71–84.

and judge and the jury would be invited to draw adverse inferences.[13] Consideration was given to whether the defence should also be required to give notice of the names and addresses of defence witnesses and whether the accused was personally going to give evidence. However, the committee decided that such a dramatic change was not appropriate. It reasoned that the accused himself is rarely in a position to make the decision to take the stand until the prosecution's case is closed. Similar difficulties arise in the decision on which witnesses, if any, to call.

The recommendations of the majority were accepted and enacted in the CJA 1987. It was understood that a radical solution was required to deal with a limited, but very expensive, problem. Over the past 10 years, the Serious Fraud Office (SFO) has had in progress, on average, 63 cases annually. In the last reporting year, the prosecutions completed resulted in 27 convictions.[14]

The Act, in s 8, made provision for early documentary disclosure. Authorisation was given to the judge to order the prosecution to provide the defence with a 'case statement' and, when that order was complied with, it was open to the judge to order the defence to provide a reply. A case statement was defined to include (s 9(4)): (i) the principal facts of the prosecution case; (ii) the witnesses who will speak to those facts; (iii) any exhibits relevant to those facts; (iv) any proposition of law on which the prosecution proposes to rely; (v) the relationship of any of the foregoing to the charges. The defence reply statement was defined to include (s 9(5)): (i) a written statement setting out in general terms the nature of his defence and indicating the principal matters on which the defendant takes issue with the prosecution; (ii) notice of any objections that the defendant has to the case statement; (iii) notice of any points of law which the defendant intends to take, including admissibility of evidence, and the legal authority for the points; (iv) notice of the extent to which the defendant agrees with the prosecution as regards to documents, and other matters raised under a prosecution notice to admit facts pursuant to s 9(4)(c), and the reason for disagreement.

In the event that either party departed at trial from the position as disclosed at the preparatory hearing, the judge, or the opponent with leave of the judge, may make such comment as appears appropriate and the jury may draw a negative inference.[15] When adjudicating upon a leave application, the judge was directed to consider the extent of the departure and whether there was justification for the same.[16]

13 The question of appropriate sanctions to enforce the obligation was seen as problematic. An order of costs would not deter the rich or the legally aided. Exclusion of defence evidence was too draconian (*Roskill Report*, 1986, para 6.76).

14 Serious Fraud Office, 1998–99, Pt 3.

15 CJA 1987, s 10(1), replaced by GPIA 1996, Sched 3, s 5.

16 *Ibid*.

4.4 THE RUNCIMAN REPORT AND DISCLOSURE RULES

Police evidence to the Runciman Commission stated that, if the common law disclosure obligations (arising from Henry J's ruling in *Saunders and Others*[17] which were affirmed in *Ward* and *Keane)* were taken literally, it would be impossible to comply with the law.[18]

In the face of this powerful lobby, the Runciman Report stated boldly (at para 6.49) that it '…strongly support[ed] the aim of the recent decisions to compel the prosecution to disclose everything that may be relevant to the defence's case', excepting materials covered by PII. In an attempt to find what it defined as a reasonable balance between the duties of the prosecution and the rights of the defence, the Runciman Report recommended a two stage approach to prosecution disclosure: 'The prosecution's initial duty should be to supply to the defence copies of all material relevant to the offence or to the offender or to the surrounding circumstance of the case, whether or not the prosecution intend to rely upon that material. Material relevant to the offender *includes evidence which might not appear on the face of it to be relevant* to the offence but which *might be important to the defence*…[emphasis added].' Also, 'the prosecution should inform the defence at this stage of the existence of any other material obtained during the course of the inquiry into the offence in question'.[19]

This was to be accomplished by the Crown Prosecution Service (CPS) providing to the defence a schedule of the material obtained by the police and the expert scientific witnesses. The defence, in considering the schedule, may have wished to seek some of the material on the basis that it was relevant. To facilitate the goals of justice within the bounds of 'reasonable' resource allocation, the Runciman Report recommended that further disclosure could be sought after the nature of the defence had been revealed. The disclosure of the defence would focus the inquiry. It was recommended that these reforms be completed through primary legislation, with the appropriate provision for PII concerns.[20]

These recommendations had great merit at the time when they were given. However, their value was soon undermined by a series of 'law and order' provisions that were so radical as to justify a full re-examination of the recommendations. For example, the provisions of ss 34–37 of the Criminal Justice and Public Order Act (CRIMPO) 1994 had the effect of limiting the right of the accused to refuse to answer police questions or remain silent at trial.

17 Unreported, 29 September 1989, London CCC, T881630, Henry J.
18 *Runciman Report*, 1993, para 6.41.
19 *Ibid*, paras 6.50–51.
20 *Ibid*, paras 6.51–54.

In the years to follow, the courts continued to refine the rules of prosecution disclosure. At the same time, pressure from the prosecution to limit disclosure obligations increased. Professor Ashworth observed[21] that the Association of Chief Police Officers (ACPO)[22] were justified in claiming that the Criminal Procedure and Investigations (CPI) Bill was principally a product of their lobby.[23] Support for the Bill also came from prosecutors in England, who had argued that the common law disclosure obligation was too onerous, creating 'huge amounts' of work.[24] In spite of calls for the involvement of the Law Commission, the Government simply circulated a consultation paper.[25]

4.5 HOME OFFICE CONSULTATION PAPER AND AN EXAMINATION OF THE JUSTIFICATIONS

The Consultation Paper *Disclosure* (1995) identified what the Home Office claimed to be seven main problems in the state of the law. The problems were practical difficulties and cost, defence 'fishing expeditions', risk of revelation of sensitive information or being cornered into abandoning the prosecution, tailoring of evidence by the defence[26] or ambush defences, the lack of a clear statutory code and the negative impact of a lack of pre-trial 'disclosure' by the defence.[27] Professor Ashworth quickly recognised that prominence was 'given to the burdens inflicted on police and prosecutors,' while defence lawyers were depicted as using the disclosure rules to attempt 'to obscure the real issues' (para 17) and 'to discover what may be profitable lines of argument' (para 19). Ashworth observed correctly that no mention was made of fundamental principles or the miscarriages of justice: 'It is sad that these Government documents prostitute the notion of "balance" [para 18] by failing to identify the proper principles before setting off in the direction of a one sided expediency.'[28] It is instructive to examine the concerns raised in the consultation paper.

21 Ashworth, 1995, p 585.
22 ACPO, 1998, para 3.16.
23 *Hansard,* CPI Bill [Lords], 27 February 1996, Second Reading; Michael Howard also claimed the support of the Police Superintendents Association and the Police Federation (col 740).
24 Niblett, 1997, p 222; Calvert-Smith, 1999, p 23.
25 Eg, Lord Steyn in *Brown (Winston)* [1995] 1 Cr App R 191 CA, p 202.
26 Home Office, 1995a, paras 10, 12, 14 and 17.
27 *Ibid,* paras 22, 48 and 16.
28 Ashworth, 1995, pp 585–86.

4.5.1 Resources

When considering the rules of disclosure at a practical level, it has been said that extensive and early pre-trial disclosure by the prosecution in non-summary cases consumes a large measure of resources. This general assertion bears close scrutiny. It includes not only the issue of the actual cost of making and providing photocopies of all material information for the defence, which is discussed here, but also management issues, discussed immediately below. The assertion contradicts some judicial comment. For example, Sopinka J, in *Stinchcombe*, opined that the additional burden on a prosecutor in organising disclosure was relatively minimal and should not cause extra delay because disclosure was often provided on an informal basis to certain advocates in any event.[29] More recently, Collins J rejected the CPS argument that disclosure of the prosecution case in summary only cases would be an unbearable burden on the CPS on the basis of evolving technologies.[30]

4.5.1.1 Time and copying costs

Although accurate calculations regarding costs had not been completed in England and Wales prior to the Runciman Report[31] or before the CPI Bill[32] some general assertions, although period specific, are valid. Advance disclosure led to increased man hours in assembling and sifting materials, and photocopying and disseminating the copies of used and unused material.[33] However, the extent of this expenditure is minimal in routine cases.[34] Often the amount of 'unused' material was minimal—50–100 copies would be sufficient in many of the routine cases[35]—and much of this expense would be incurred at some point in the process in many cases, in any event, in organising and preparing the committal bundles. JUSTICE correctly pointed out that the scheme proposed, and eventually enacted in the CPIA 1996, would do little to reduce the cost of standard cases.[36]

In more complicated proceedings, experience showed that costs increased quickly.[37] However, continued advances in Information Communication

29 [1991] 3 SCR 326, p 333.
30 *Stratford Justices ex p Imbert* [1999] 2 Cr App R 276 DC, p 283.
31 *Runciman Report,* 1993, para 1.16.
32 Statistics were not given by the Home Office or the CPS.
33 Zander, 1992, p 266; *Glidewell Report,* 1998, para 2.34.
34 Law Society, 1995, para 2.
35 The *Attorney General's Guidelines* 1981 (Attorney General, 1982, para 5) suggested the provision of 50 copies without fee.
36 JUSTICE, 1995, p 9.
37 Burton, 1994, p 1492. In the tax fraud case of *Hallstone Products Ltd* (1999) 140 CCC (3d) 145 (Ont SCJ), the cost of labour and materials to provide prosecution disclosure was $340,000 (£150,000).

Technology (ICT) will soon allow the prosecution to provide disclosure electronically if it desires.[38] Technology will reduce a significant portion of the direct costs of disclosure and will provide savings in other budget areas, thereby reducing somewhat overall budget pressures. Early examples are found in the 'Operation Ocarina' insurance fraud conviction where, according to the CPS, the 'case made use of evidence presented on CD ROMs (including unused material)'.[39] Similar advanced technologies were in use in Ontario. By 1999, Ontario prosecutors were providing disclosure by way of CD ROM disks.[40] The Crown Attorney for Toronto has predicted that within two years disclosure by email and CD ROM will be standard practice in all cases in Ontario.[41] Systems that are fully integrated with the Police IT Organisation will have significant case management and cost benefits.[42] For example, email communication will provide reliable and immediate communication between stakeholders in the justice system. Court calendars and schedules can be immediately accessed.[43] And the prosecution file, from the police first interview notes to the indictment, can be electronically recorded and accessed as appropriate. Technology that can revolutionise the recording of witness statements exists in the form of palm held computers with email attachment capabilities. Similarly a thumb print will serve as a signature on a computer recorded statement.[44]

4.5.1.2 Cost and management

Other arguments offered to suggest that broad disclosure was too costly fall within the concept of the 'additional burden' on the prosecution. The arguments used can be generally characterised as management based. These arguments were worthy of little credit in advancing the Home Office's call for legislative change to the disclosure rules. The principal reason is that the underlying assertions often failed to discriminate between issues of inadequate numbers of support staff, increased programme responsibilities for prosecutors and poor management, all within the context of an unreasonably low budget allocation for the CPS.[45] These are issues internal to Government policy and priorities. The issues will be mentioned in reverse order and, admittedly, they do overlap.

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38 Rice, 2001, p 630.
39 CPS, 1999, Chapter 3, p 5.
40 Interview with John Pearson, Senior Crown Prosecutor, Hamilton, Ontario, 27 September 1999.
41 Letter from Paul Culver, Crown Attorney, Toronto, Ontario, 9 April 2001.
42 Early initiatives in Gloucester and Durham were in place by 1997 (CPS, 1998, p 12).
43 Williams, 1999, para 32.
44 Eg, Interpol's MorphoTouch Multi-Application Fingerprint Identification System (Catlin, 2000).
45 CPS, 1999, Chapter 6, p 1.

The CPS had a poor management structure and some poor managers. The review of the CPS conducted by Glidewell LJ (1998) recommended that resources, such as staffing, needed to be redistributed away from management towards casework and advocacy.[46]

In addition to an increased awareness of disclosure obligations post-*Ward*, other contemporaneous demands made the work responsibilities of prosecutors untenable on occasion. For example, Glidewell LJ stated that 'the workload per case has increased and become more difficult as a result of factors such as changes to the law on disclosure, [Victims] Charter initiatives, internal monitoring and increasing incidence of more serious crime'.[47] To compound the problem, the CPS was not allocated enough funds for support staff to complete traditional duties and complete the copying to provide disclosure.[48]

The issues were further clouded by uncertainty between the police and the CPS as to who was to bear the cost of providing disclosure and by disputes regarding budget allocations between Government departments. Similar concerns in planning and accounting, and internal management were found in the police [49] The 'Masefield Scrutiny' (1995),[50] the *Narey Report* (1997) and the *Glidewell Report*, highlighted the need for agencies in the criminal justice system to cooperate to achieve better results. As a result, various issues were referred to joint department working groups under the auspices of the interdepartmental Strategic Planning Group.[51] In April 1999, the CPS, Home Office and Lord Chancellor's Department combined to publish a single set of common aims and objectives and regular meetings are held at the ministerial level to consider issues of reducing delay and improving efficiency 'without sacrificing fairness and equality'.[52]

These factors were not unique to the situation in England. Canadian experience reveals the same resource and management problems.[53] However, it

46 *Glidewell Report*, 1998, para 2.38–39. It is reported that 64 of the 75 recommendations made by Glidewell were accepted by the Government (CPS, 1999, Chapter 3).

47 *Glidewell Report*, 1998, paras 1.11 and 3.21.

48 *Ibid*, para 2.37; Bawdon, 1998, p 491.

49 Eg, HMI Constabulary, 1997, Appendix C, reported that some police forces required twice as many forms to be completed than the national standard, all of which would have to be accounted for in disclosure. See, also, Chapter 5 (on the relationship with other agencies) and Pt 6.6 (on unnecessary non-prosecution paper work). The Working Group on Pre-trial Issues also noted these concerns (Working Group, 1990, para 20).

50 This report, entitled the Administrative Burdens on the Police in the Context of the Criminal Justice System, was written by representatives of the Home Office, Lord Chancellor's Department, CPS and police and it was not published. The findings are summarised in HMI Constabulary, 1997, Appendix A. See rec 37.

51 CPS, 1999, Chapter 3, p 1.

52 Williams, 1999, paras 7–8.

53 *Kaufman Report*, 1998, p 1233; *Locke Report*, 1999, p 1; *Zuber Report*, 1987, pp 233–34. In Saskatchewan, some regional prosecution offices had no support staff at all. [contd]

is important to note that the broad rules of disclosure continue to function reasonably well in Canada. This result can be attributed to the continuing opportunity and willingness of the courts to review alleged shortcomings of those involved in the disclosure process.

It is submitted that, in England and Wales, the issue of cost should have been clarified and that it should have been discussed at a more principled level. It is difficult to place a price on preventing miscarriages of justice and the value of confidence in the administration of justice. The Runciman Report observed (para 1.16): 'Although…every law-abiding citizen has an interest in a system in which the risk of mistaken verdicts is as low as it can be, there will always be argument about how much public money should be spent on arriving marginally closer to that ideal.' In this context, the argument in favour of broad disclosure without fee seems to be found in its likely consequence. It will facilitate a fair trial. Also, it is generally recognised that early guilty pleas and issue resolution will offset the increased costs and, perhaps, realise large savings in the cost of administering justice.[54] This prediction is premised on active case management, which certainly is in vogue currently, and informs the debate on disclosure and delay.

4.5.2 Delay

Another practical concern associated with early and broad disclosure was the addition of delay in concluding proceedings. In the late 1980s, the Law Society of England and Wales accepted that the Magistrates' Court (Advance Information) Rules 1985 were one of many factors contributing to the overall delay in completion of cases.[55] However, more current research has clarified the impact of disclosure on delay and concluded that other factors are of greater significance in systemic delay.

The first study of note was a study of selected magistrates' courts and Crown Courts by CPS researcher Stokes. Stokes found that adjournments pertaining to disclosure under the Advance Information Rules amounted to 8% of adjournments in magistrates' courts. Of this small percentage of the adjournments associated with advance disclosure, almost half were due to prosecution inefficiency.[56] Certainly, the fact that an adjournment had been requested by the defence to read disclosed materials, that had been just received or not yet been received, was not a matter of discovery causing delay, but of

53 [contd] Prosecutors were left to complete all basic office tasks. Since no computers had been provided, handwritten carbon paper duplicate memos to head office was the suggested practice in 1997 (Martin and Wilson, 1997, p 43).

54 *Narey Report,* 1997, Chapter 9; *Martin Report,* 1993, p 335.

55 Law Society Editor, 1989a, p 3.

56 Stokes, 1990, para 53.1.

delay caused by poor prosecution organisation. In the Crown Court, disclosure was not listed as a reason for the adjournments in the month long study period.[57] These findings were accepted as part of the Working Group's recommendation that advance disclosure in magistrates' courts, including the witness statements, '…be prepared automatically and made available at the first court hearing date'.[58]

Subsequent studies were also completed in the time frame before the impact of the *Ward*[59] and *Keane*[60] decisions could be measured. For example, studies for the Runciman Report have addressed the problems of postponed and cracked trials in the Crown Court. The conclusion to be drawn from the data is that disclosure was not a significant factor in delay.[61]

However, these studies did not provide the basis for the same conclusion at the time of the consultation in 1995, given the change in the legal landscape of disclosure since 1993. More current information, arising from action on some of the recommendations found in the Narey Report (1997) fills the void. The results of the pilot studies refute the conclusion that disclosure of the prosecution case was in and of itself a significant factor in delay.[62] Therefore, the allegation of increased delay in the consultation document lacked substance.

For example, Narey identified as a major cause of delay the inertia of many defendants in claiming legal aid and the lack of the courts' proper diligence in determining the claims.[63] This delay had broader repercussions, including inaction by defence solicitors due to the fact that they were uncertain if they were to be paid.[64] He found no evidence to find defence solicitors as a cause for delay.[65] After it was accepted that inconsistent practices, poor co-ordination between agencies and soft deadlines were a sources of delay, the CPS and the police sought to reduce the problem through agreements which set joint management performance targets.[66] By 1997–98, the CPS reported that, in over 77% of cases, advance disclosure was supplied within seven days of receipt of request.[67] This result improved by 5% in 1998–99[68] and another 4%, to 86% in 1999–2000.[69] Other aspects of

57 Stokes, 1990, para 6.1.
58 Working Group, 1990, para 154.
59 (1993) 96Cr App R 1 CA.
60 (1994) 99 Cr App R 1 CA.
61 Zander and Henderson, 1993, p 150.
62 Ernst and Young, 1999. The CPS accepted the findings, CPS, 1999, Chapter 4, p 1.
63 See, also, LSC, 2001a, p 5.
64 *Narey Report,* 1997, Chapter 4, p 2.
65 *Ibid,* Chapter 3, p 5.
66 CPS, 1998, p 11.
67 *Ibid,* p 36.
68 CPS, 1999, Chapter 6, p 2.
69 CPS, 2000a, Chapter 3, p 2.

the performance measure relating to timeliness, for example, provision of committal papers and delivery of briefs to counsel, improved by 1.5% in 1998–99[70] and by more than 5% in 1999–2000.[71] When performance targets in the CPS have not been met, the explanation offered included 'the many distractions brought about by a sustained period of substantial change with staff being uncertain as to their future roles'.[72]

The consultation document's assertion on delay and disclosure is further undermined by the statistics produced by the Court Service and observations of the CPS Inspectorate. During the period 1994 and 1997, there was a reduction in waiting times from committal to trial, a fact that is inconsistent with an allegation of disclosure causing delay. Including London, the area most vulnerable to delay, waiting times for trial from committal have reduced for custody cases from 13.0 weeks in 1993–94 to 8.7 weeks in 1997–98, and for bail cases from 17.2 weeks to 13.3 weeks over the same period.[73]

The CPS Inspectorate observed that delays in providing primary disclosure delayed the Plea and Directions Hearing (PDH) and reduced its effectiveness.[74]

Also, some delays in summary proceedings were attributed to late delivery of the schedules from the police, and/or late primary disclosure.[75]

In addition to the foregoing evidence, in relation to the magistrates' courts, the current evidence demonstrates that disclosure continues to be no more than a minor factor in the vast majority of delayed proceedings. When disclosure was the reason for delay, it arose from the late delivery of the 'advance disclosure' packet.[76]

It can be argued that early pre-trial disclosure actually reduces delay. Facilitating the early delivery of information to defence advisors enables them to enter into meaningful discussions informally or in PDH, which, in turn, can reduce the frequency of postponed or cracked trials. Of course, effectiveness of PDH depends on the willingness of the judge to be robust in questioning advocates.[77] Similarly, the CPS reported that administrative hearings in magistrates' courts were useful in reducing delay, as long as a robust approach was taken by the stipendiary magistrate (now district judge), lay justice (or

70 CPS, 1999, Chapter 6, p 2. In CPS, 1998, p 27, it was reported that '66.3% of briefs were delivered to counsel within agreed timescales and 50.6% of committal papers were sent to the defence within agreed timescales (14 days from when CPS received trial ready full file from police)'.

71 CPS, 2000a, Chapter 3, p 2.

72 CPS, 1999, Chapter 6, p 2.

73 Court Service, 1998, p 3.

74 CPS Inspectorate, 2000, para 4.125.

75 *Ibid*, para 4.22–26

76 Whittaker *et al*, 1997, p vii.

77 Plotnikoff and Woolfson, 1997, p 20.

clerk) presiding over the meeting.[78] Therefore, it is not surprising that the current approach to reducing pre-trial delay, seen both in England and Wales and Canada,[79] centres on active case management, in addition to stakeholder co-operation and management targets.

4.5.3 Fishing expeditions

Allowing the defence to trawl through every piece of sensitive or confidential information about anyone and everyone who might be mentioned in the prosecution file was not justifiable. However, evidence of widespread abuse did not emerge during the consultation.[80] JUSTICE expressed doubt about the extent of the problem on the basis that defence lawyers, as part of the profession, have a code of ethics and work under severe constraints of time and costs.[81]

The statement in the consultation that the common law rules encourage defendants to 'come forward with a plausible but fictitious defence [para 17],' was presented without evidence and it was the view of the Law Society that none existed.[82] Also, the consultation implied that too many lines of defence were presented. This point appears to be wrong in principle according to the Law Society. It replied that: 'The defence is entitled to take any point which is available in order to cast doubt upon the reliability of the prosecution case and should have access to any information which assists them to do this, whether it is consistent with the defence being run or not'.[83] This is a necessary consequence of the fact that it is for the prosecution to prove their case, not for the accused to prove his innocence.

4.5.4 Risk of revelation of sensitive information or being cornered into abandoning the prosecution

Police evidence to the Runciman Commission on disclosure stated that, in addition to the general concern regarding disclosure in straightforward cases, the problems were exacerbated by the need to protect informants, undercover police officers and information regarding investigation techniques.[84] The Runciman Report responded by stating that 'the procedure

78 CPS, 1998, p 48; see, also, *Narey Report,* 1997, Chapter 5.
79 *Locke Report*, 1999, Chapters 3, 5, and 6.
80 Law Society, 1995, para 4.
81 JUSTICE, 1995, p 13.
82 Law Society, 1995, para 10.
83 *Ibid*, para 20.
84 *Runciman Report*, 1993, para 6.43.

laid down in *Johnson, Davis and Rowe* for the disclosure of material that may attract public interest immunity strikes a satisfactory balance,' subject to minor variation in relation to sensitive information meeting the criteria of PII.[85] JUSTICE[86] added their endorsement of the court's solution in *Davis, Johnson and Rowe*.[87] In the time leading up to the CPIA 1996, the police were complaining vociferously about the number of prosecutions that were being dropped because, as a condition of continuing with the prosecution, the police would have had to disclose sensitive (but ultimately irrelevant) information. Some of the examples were included in the consultation document.[88] JUSTICE and others stated that the implication that the examples provided in the document were close to the norm,[89] and that there was an overburdening risk that sensitive information will be revealed or that the prosecution will be cornered into abandoning the prosecution, was misleading.[90] Difficult situations are as old as PII, for example, *Marks v Beyfus*,[91] and they would continue to arise,[92] but a balance can be struck in each case.

The scheme proposed in the consultation was subject to two further criticisms.[93] The proposed restricted duty of disclosure would reduce the ambit of materials that may have been listed as potentially disclosable to the defence, but for PII, and the defence may never know if an improper decision to retain information has been made. The schedule of unused material provided by the investigator to the prosecutor was not to be provided to the defence.[94]

4.5.5 Clarification of the rules

JUSTICE supported the decision to provide a clear statutory framework for disclosure which clarified the law and the duties and responsibilities of the defence and prosecutor.[95] This would reduce the possibility of incomplete disclosure of exculpatory material or material that would lead to a line of defence. To this could be added the point that comprehensive rules reduce the burden on prosecutors, because it reduces the number of decisions to be made. It also

85 *Runciman Report,* 1993, para 6.47, that is, details of commercial security arrangements given to the police in confidence.
86 JUSTICE, 1995, p 16.
87 (1993) 97 Cr App R 110 CA.
88 Home Office, 1995a, para 15; Pollard, 1994, p 42.
89 JUSTICE, 1995, p 15.
90 LCCSA, 1995, para 42.
91 (1890) 25 QBD 490 CA.
92 Phillips, 1996, p 15.
93 Home Office, 1995a, para 43.
94 Padfield, 1997, p 8.
95 JUSTICE, 1995, p 1.

reduces the risks inherent in the use of unqualified staff members to prepare the bulk of straightforward disclosure bundles. Of course, by the date of the consultation, the Court of Appeal had come close to completing the task of defining all of the common law rules of disclosure.[96] By 1997, the House of Lords had ruled on others.[97] Remaining issues could have been solved by the creation of a committee made up of stakeholders in the justice system. Therefore, the CPI Bill was of limited importance in this regard.

4.5.6 Tailoring evidence, defence ambush and pre-trial co-operation

The London Criminal Courts Solicitors Association (LCCSA) and the Law Society dismissed the suggestion that there was a problem, let alone one of significance, with defence witnesses tailoring evidence.[98] In considering a portion of this issue in *Phillipson*, Ralph Gibson LJ rejected the argument that disclosure will encourage defendants or other potential witnesses to tailor their evidence to conform with earlier statements given to the police.[99] This was a potential peril of discovery and disclosure, but the honest witness was enabled to assist in the search for the truth when he was fully aware of what he said at a time closer to the incident in question.[100]

The consultation paper did not provide any evidence to support the assertion that there was a problem in frequent 'ambushes' by the defence.[101] Research into the issue completed for the Runciman Report clearly indicated that it was not a significant problem.[102] Since the studies, and before the consultation, the likelihood of an ambush defence had been reduced to nil by the limitations to the right to silence in ss 34–37 of CRIMPO 1994.[103]

The consultation paper expressed the concern that the law did not include incentives for the defendant to contribute to narrowing issues or to prepare early for trial so that evidence might be disclosed,[104] a concern raised earlier by the Runciman Report.[105] It complained that judges were not enforcing the

96 See Pt 4.1.
97 *Mills and Poole* [1998] 1 Cr App R 43 HL (disclosure of witness statement); *Brown (Winston)* [1998] 1 Cr App R 66 HL (disclosure of statement needed for cross-examination).
98 LCCSA, 1995, para 42; Law Society, 1995, para 30.
99 (1989) 91Cr App R 226 CA, p 235.
100 *Stinchcombe* [1991] 3 SCR 326.
101 Law Society, 1995, para 30.
102 Zander and Henderson, 1993, pp 142–43; Leng, 1993, pp 45–58.
103 Bucke *et al,* 2000, p 59. The effect of the abolition of the right of silence in Northern Ireland is reported by Jackson *et al,* 2000. For a summary, see Zander, 2001.
104 Home Office, 1995a, para 48.
105 *Runciman Report,* 1993, para 6.59.

existing provisions relating to advance disclosure of alibi.[106] This begs the question of whether the disclosure regime was in need of change in the radical manner proposed or whether the judges were to be encouraged to enforce the existing law. The Law Society suggested greater refinement of the PDH procedure.[107] The Home Office contemporaneously released another consultation paper, *Improving the Effectiveness of Pre-trial Hearing in the Crown Court*, and suggested binding pre-trial rulings.[108]

Again, it can be concluded that the CPI Bill could not be justified on these issues.

4.6 POLITICS: THE LAW AND ORDER MANTLE

In the light of the foregoing discussion, it is not surprising that critics could easily challenge the validity of the description of the problems, the anecdotal evidence and some of the proposed solutions in the Government's document. Many of the proposals flew in the face of the recommendations of the Runciman Report, or picked out portions of the recommendations, which was against the express wishes of the Runciman Commission.[109] The LCCSA stated that the proposals would 'exacerbate rather than alleviate the current problems and lead to an increase in…miscarriages'.[110] They provided a litany of new examples of potential or actual miscarriages of justice arising from the abuse of the prosecution's revised common law disclosure duties.[111] The Law Society made the point that the proposals contained a fundamental flaw, as they did not ensure that the police make proper disclosure to the prosecution in the first place.[112] Even the most seasoned of prosecutors, for example, Roy Amlot QC, warned of the dangers.[113] Time would prove the warnings to be accurate.[114]

One needs to recall the test to be applied to statutory regimes that seek to alter the rules of the common law or international human rights law that have been developed to protect the accused's right to a fair trial.[115] It appears that the mischief that was to be corrected by the CPIA 1996 was minimal, while the risks of interfering with the right to a fair trial were disproportional.

106 CJA 1967, s 11.
107 Law Society, 1995, para 31.
108 Home Office, 1995b.
109 *Runciman Report*, 1993, para 6.3.
110 LSCCA, 1995, para 2.4.
111 *Ibid*, Chapter 6.
112 Law Society, 1995, para 40.
113 Gibb, 1996.
114 Ede, 1999, p 1; CPS Inspectorate 2000, Chapter 5.
115 JUSTICE, 1995, p 24.

The CPI Bill was moved forward in the months prior to the 1996 election without proper scrutiny or debate in Parliament. Those in favour of the Bill, including the CPS and police, were better positioned than its detractors, for example, the Law Society, the Bar, JUSTICE and Liberty. More importantly, it appeared that both the incumbent Conservatives and the opposition Labour Party wished to attract voters on the basis of being the most tough on crime.[116] However, a more complete picture of the principles adhered to by the Government was revealed shortly thereafter. The Government was about to be exposed for inciting a miscarriage of justice through non-disclosure in the Matrix Churchill and Blackledge affair.[117] It was ironic that this Government should enact a statute in this form and content in response to the revelations of the miscarriages of justice and the subsequent recommendations of the Runciman Report.

4.7 THE HUMAN RIGHTS ACT 1998 AND THE CPIA 1996

4.7.1 Introduction

The Human Rights Act (HRA) 1998 came into force fully in October 2000. It incorporated into domestic law the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The HRA 1998 will have a major impact[118] on some aspects of criminal procedure,[119] but there is no consensus on its likely impact on the provisions of the disclosure regime in the CPIA 1996. JUSTICE expressed the view that the regime would not withstand scrutiny in the light of the human rights principles in the fair trial provisions of the ECHR.[120] Mr Emmerson QC took the opposite view in arguing the practical

116 Murray, 1996, p 1288. See, eg, the exchange between Mr Donald Anderson (Labour) and Sir Ivan Lawrence (Conservative) in *Hansard* [Lords] during the debate following the second reading of the CPI Bill (cols 757–60).

117 Scott Inquiry (1995–96), into the trial of Henderson, Allen, and Abraham, unreported, 5 October 1992, CCC, Smedley J which collapsed on 9 November 1992 when Alan Clarke, former trade minister admitted he has been 'economical with actualité' (Wastell, 1995, p 18; *Blackedge and Others* [1996] 1 Cr App R 326 CA).

118 Previously, the ECHR provisions were a relevant consideration for a court exercising its discretion, eg, upon the admission of evidence under PACE 1984, s 78, *Khan (Sultan)* [1996] 2 Cr App R 440 HL, p 456, or in considering an application for a judicial stay in cases of inadequate prosecution disclosure in summary only trials, *Stratford Justices ex p Imbert* [1999] 2 Cr App R 276 DC, p 284.

119 The court may be tempted to maintain its traditional position that the fair trial principles of the ECHR differ very little from the principles of the common law: *Khan (Sultan)* [1996] 2 Cr App R 440 HL, p 456, *per* Lord Nicholls; *Stratford Justices ex p Imbert* [1999] 2 Cr App R 276 DC, p 285, *per* Buxton LJ.

120 JUSTICE, 1995, p 27.

position that it is unlikely that the entire regime would be impugned.[121] The Attorney General stated that the CPIA 1996 is compatible with the ECHR.[122] Others suggested that specific provisions, such as primary disclosure, might be in violation.[123]

The arguments concerning primary disclosure, discovering the defence and withholding disclosure on the basis of PII will be addressed later in this part.

4.7.2 Approach to rights and remedies

The debate concerning the extent of prosecution disclosure is framed in the context of the right to a fair trial at common law[124] and in the ECHR.[125] While the right is absolute,[126] its various elements are interpreted in the context of various competing interests, including crime control, and the rights of witnesses.[127]

In practical terms, the degree to which the right to a fair trial is protected by the HRA 1998 will depend on the ease with which the accused can access a remedy and the breadth of the remedies. The breadth of the remedies in the HRA 1998 was shaped by the decision to respect fully the English tradition of the supremacy of Parliament.[128] The effect of this decision was to reduce and limit the scope of the remedies by precluding the court from striking down a legislative provision that it finds incompatible with the ECHR. The access to remedies, on the other hand, is reasonably open. Pursuant to the HRA 1998, the trial judge is to deal with questions regarding a potential violation as they arise. Consequently, the HRA 1998 may have an impact, although a limited one, for the benefit of the accused in addressing problems in relation to the CPIA 1996.

When the defence argues that a statutory provision is incompatible with the ECHR, the court is to attempt to give effect to applicable legislation, but it is to interpret the legislation in a manner that is compatible with those rights if

121 Emmerson, 1999, p 62.
122 Attorney General, 2000b, p 22.
123 Sharpe, 1999a, p 273; Wadham, 1997, p 697.
124 *Brown (Winston)* [1995] 1 Cr App R 191CA, affirmed HL.
125 Article 6.
126 *Procurator Fiscal, Dunfermline, and the Advocate General for Scotland v Margaret Anderson Brown* (2000) *The Times,* 5 December PC, http://www.privy-council.org.uk/judicial-committee. Brown's conviction for drunk driving was upheld. Brown was required to tell the police, in accordance with the Road Traffic Act 1988, s 172, the identity of the driver of her car. The Privy Council found that, although mere may have been some limited interference with her freedom from self-incrimination, it did not compromise her right to a fair trial.
127 *Rowe and Davis v UK* (2000) 30 EHRR 1 (ECtHR), para 61.
128 *Lambert, Ali and Jordon* (2000) *The Times,* 5 September CA.

possible,[129] taking into account European Court of Human Rights (ECtHR) jurisprudence.[130] However, the HRA 1998 does not allow immediate relief for the defence when a compatible interpretation cannot be made. The matter will be a ground of appeal. The Crown Court judge's function does not include the power to make a declaration of incompatibility regarding a provision. This power is reserved to the High Court, Court of Appeal and House of Lords. A declaration does not nullify the impugned section, but, rather, refers the section to the Executive. The accused is still tried under the impugned provision.[131] There is one other remedy that might apply in a few cases. If there is a 'blatant and obvious' breach, the defence may argue that the proceeding is an abuse of process. Of course, the trial judge has many powers in his inherent jurisdiction at common law to ensure a fair trial.[132] If a court believes that the trial can be fair in the light of the possibility that the trial process might cure the alleged breach, then the trial will occur and the question of the safety of the conviction can be considered on appeal.[133]

By contrast, the Parliament of Canada invited the Supreme Court to interpret finally the provisions of the Canadian Charter of Rights and Freedoms, including the fair trial provision.[134] The Charter requires the court to interpret the right and if it has been violated, immediately fashion a remedy for the accused.[135] If the issue arises from legislation, the provision may be declared of no effect and the accused can be tried without reference to it.[136]

One relevant example of the impact of this structure in Canada is seen in the evolution of the right to disclosure on the part of the prosecution. Through to 1995, the issue of disclosure was addressed as one aspect of the right to a fair trial in Canada.[137] However, in the decision of *La,* the Supreme Court declared that the accused had a right to full disclosure (subject to legal professional privilege and PII) as a right that existed apart from, and independent of, other fair trial issues.[138] Therefore, in the Canadian context, it is very accurate to speak of the 'right to disclosure' on the part of the prosecution. Within the context of the declaration of a violation of the right and the remedy process, the

129 HRA 1998, ss 3 and 6.

130 *Ibid,* s 2; Ashworth, 1999a, p 272; *Davis, Johnson and Rowe* [2001] 1 Cr App R 115 CA.

131 HRA 1998, s 3(2)(b).

132 These remedies are discussed in Chapter 10.

133 CPS, 2000b, para 6.

134 The relevant features are found in s 7, 'fundamental justice', and are deliniated in ss 8–14, eg, s 11(d) presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

135 Section 24.

136 *Reference re:* s 94(2) *of Motor Vehicle Act* [1985] 2 SCR 486, 502.

137 *O'Connor* [1995] 4 SCR 411 introduced the idea of a disclosure right.

138 [1997] 2 SCR 680, where the alleged breach of the right to make full answer and defence is based on lost evidence, the accused must establish actual prejudice to his or her right.

distinction has some significance. For example, the issue of disclosure does not need to be determined in the broader context of whether the trial could be fair. However, the remedy must be crafted to meet the needs of justice for the accused and the State and any other affected parties.[139]

It the light of the different approach to constitutional issues, it is submitted that it is unlikely that the fair trial provisions of ECHR will evolve in a manner similar to the situation in Canada.[140]

4.7.3 The HRA 1998 and a fair trial

The fair trial provisions of the HRA 1998 are found in Art 6 of the ECHR. Article 6 states:

1. In the determination of…any criminal charge…everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law…

The guarantees in Art 6.3 are specific aspects of the right to a fair trial set out in Art 6.1.[141] Article 6.3 states the right: '(a) to be informed promptly in a language he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence.' From Art 6 emerged the principle of the equality of arms.[142]

With reference to discovery and disclosure, the Commission of the ECtHR provided guidance in the case of *Jespers v Belgium*.[143] The Commission took the view that 'the "facilities" which everyone charged with a criminal offence should enjoy include the opportunity to acquaint himself, for the purpose of preparing his defence, with the results of investigations carried out throughout the proceedings… Any investigations…carried out in connection with criminal proceedings and the findings thereof consequently form part of the "facilities" within the meaning of Article 6, paragraph 3(b) of the Convention'.[144]

139 *O'Connor* [1995] 4 SCR 411.

140 In the recent case of *Ferguson v AG of Trinidad and Tobago* [2001] UKPC 3, the Privy Council was invited to consider disclosure in the context of the guarantees of due process and fair hearing under the Constitution of Trinidad and Tobago. The court opined that sufficient protection was provided to the accused in the remedies available from the trial judge found at common law (paras 20–24).

141 *Edwards v* UK (1992) 15 EHRR 417, p 431, para 33; Sharpe, 1999a, p 275.

142 JUSTICE, 1995, p 25.

143 (1981) 27 DR 61 (ECtHR Com).

144 *Ibid*, pp 87–88.

JUSTICE argued that the Commission interpreted Art 6.3 as entitling the accused 'to have at his disposal, for the purpose of exonerating himself or of obtaining a reduction in sentence, all relevant elements that have been or could be collected by the competent authorities,' and to have sight of documents which 'may assist him in the preparation of his defence'.[145]

Emmerson QC submits that the ECtHR Commission opinion[146] appears to require disclosure of material which: (a) is adverse to the accused or neutral in its effect; (b) may undermine the credibility of a defence witness; (c) may be relevant to sentence; and/or (d) may be obtained by the police from a third party and is broadly relevant.[147]

More recently, in *Edwards v UK*[148] and *Rowe and Davis v UK*,[149] the ECtHR reaffirmed the point that the disclosure by the prosecution of all material evidence for and against the accused was a requirement of a fair trial.

The current issue is whether or not the CPIA 1996 is compliant, or more accurately, within the margin of appreciation afforded to Member States.[150] This must be considered in the light of the broad approach taken by the ECtHR. In considering fair trial issues, its mandate is to consider the overall proceedings and the effect of the evidence issue on the proceeding as a whole.[151] The Court of Appeal has accepted this mandate.[152]

4.7.4 *Ex p Imbert* and a provisional view

With reference to prosecution discovery, Buxton LJ, in the case of *Ex p Imbert*,[153] expressed a provisional view on the domestic impact of ECtHR jurisprudence. He acknowledged that the ECtHR had ruled that the proceedings are to be viewed as a whole, including the remedies in the appellate courts, to determine if the proceedings in their entirety were fair. The process is not separated into discrete stages of pre-trial, trial and appeal.[154] Consequently, he opined that,

145 JUSTICE, 1995, p 25.
146 *Jespers v Belgium* (1981) 27 DR 61 (ECtHR Com).
147 Emmerson, 1999, p 53.
148 (1992) 15 EHRR 417, pp 431–32, para 36.
149 (2000) 30 EHRR 1 (ECtHR) para 60.
150 Buxton LJ explained: 'Although the doctrine of the margin of appreciation does not appear to be expressly cited by the Strasbourg Court in respect of complaints about criminal proceedings under Art 6, very similar expressions of policy have formed part of the Strasbourg Court's exposition of its role in respect of the rules of criminal procedure of the Member States.' *Stratford Justices ex p Imbert* [1999] 2 Cr App R 276 DC, p 287.
151 *Edwards v UK* (1992) 15 EHRR 417, p 431, para 34.
152 *Craven* (2001) *The Times*, 2 February.
153 [1999] 2 Cr App R 276 DC, p 288.
154 Citing the example of the approach in *Edwards v UK* (1992) 15 EHRR 417, paras 34–39.

incomplete disclosure by the prosecution of its case pre-trial in summary matters would not be likely to be a violation of Art 6.[155]

4.7.5 The primary disclosure challenge

To extrapolate from *Ex p Imbert* in terms of incomplete primary disclosure under the CPIA 1996, it may be argued that the opportunity of secondary disclosure, or the PII review process, may be sufficient to satisfy Art 6.

In addition, the opportunity for pre-committal disclosure in the situations recognised by *DPP ex p Lee* may further undermine criticism of the CPIA 1996.[156] In *Exp p Lee,* the court recognised that it was empowered to order early pre-trial disclosure of 'used' and (some) 'unused' material. The appropriateness of providing early disclosure is recognised, and reinforced, by the *Attorney General's Guidelines*.[157] It is to be recalled that Art 6 does not create an obligation to disclose immaterial 'unused' information or materials.[158]

However, there may be two possible exceptions to the conclusion that the primary disclosure provision will satisfy the fair trial criteria.

Sybil Sharpe suggested that the primary disclosure regime in s 3 of the CPIA 1996 is 'unconstitutional', as violating the fair trial principle for the following reason.[159] In cases where the defence does not file a statement, potentially being unaware of information that would assist in a specific defence,[160] the secondary disclosure regime, which includes review, would not be available. Evidence useful to the defence may never be seen by anyone other than the prosecution. In her view, where the fairness of proceedings has been challenged, the provision of an avenue for judicial supervision has been an important safety net for the Crown.[161] This would be an important development. If the court assumes a supervisory role over primary disclosure,[162] the concept of 'equality of arms' would be fortified.

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155 *Stratford Justices ex p Imbert* [1999] 2 Cr App R 276, 289 DC; cf Emmerson 2000a, p 128.

156 [1999] 2 Cr App R 304 DC.

157 Attorney General, 2000a, para 34.

158 Sharpe, 1999b, p 81; *Edwards v UK* (1992) 15 EHRR 417, para 36. Art 6 does not mandate full disclosure, out rather all material evidence for or against the accused.

159 Sharpe, 1999a, p 275.

160 Mr Chris Mullin, MP, raised this point in the debate regarding the CPIA 1996 (Mullin, 1996).

161 Sharpe, 1999a, p 281, citing as an example, *Miailhe v France* (1996) 23 EHRR 234, para 44. See, also, *Edwards v UK* (1992) 15 EHRR 417; *Rome and Davis v UK* (2000) 30 EHRR 1 (ECtHR); Murphy, 2001, p 1182.

162 The supervision will be limited by resources. The court is not to assist a prosecutor in determining whether sensitive material that falls short of the PII standard should be disclosed under s 3; B [2000] Crim LR 50 CA.

Secondly, the admission of the DPP regarding the failure of some police and prosecutors to follow the CPIA 1996 may provide a new avenue of attack. Even though the HRA 1998 does not make perfect prosecution disclosure a prerequisite, it appears inherently unfair, in the context of the HRA 1998, to leave the accused facing conviction when the police are known not to comply with the CPIA 1996.

Potentially, the court may 'interpret' the primary disclosure obligation in a most liberal manner under the authority of construing the CPIA 1996 in accordance with the rights under the ECHR. A liberal interpretation of s 3 has been encouraged by the DPP.[163] The expectation is that this matter will come to be decided sooner rather than later.

4.7.6 The HRA 1998 and disclosure of the defence

The provisions of the CPIA 1996 relating to disclosure of the defence[164] may also face a challenge based on Art 6. The provisions in relation to the possibility of an adverse inference in relation to a defence statement in the CPIA 1996[165] mirror the provisions relating to the refusal to answer police questions found in CRIMPO 1994.[166] The accused can choose not to call evidence and simply put the prosecution to the proof of its case. JUSTICE argued that mandatory defence disclosure under the threat of adverse inference is a violation of the protection against 'self-incrimination'.[167] The protection against self-incrimination is implicit in Art 6.2[168] and, therefore, the HRA 1998 should affect this provision.

However, since JUSTICE considered its position, the ECtHR has rendered a number of decisions[169] on the provisions relating to silence in the face of pre-trial questioning found in CRIMPO 1994. Drawing on the first two decisions, *Murray v UK*[170] and *Saunders v UK*,[171] Sharpe focused the debate:

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163 Calvert-Smith, 1999, p 25

164 See s 5, regarding defence disclosure and s 11, regarding penalty for failure to comply.

165 Section 11(3).

166 CRIMPO 1994, ss 34–38. These were based on the Northern Ireland provisions tested in *Murray v UK* (1996) 22 EHRR 297.

167 JUSTICE, 1995, p 24.

168 *Murray v UK* (1996) 22 EHRR 297, para 45; *Saunders v UK* (1996) 23 EHRR 313, para 68.

169 Eg, *Averill v UK* (2000) *The Times*, 20 June, www.echr.coe.int, and confirming the validity of an adverse inference from the defendant's failure to supply an explanation for material on his cloths, and later raising explanatory evidence at trial. *Condron v UK* (2000) 8 BHRC 290, where the accused refused to answer on the advice of their law who felt they should not answer due to drug withdrawal symptoms. The trial ju must be careful properly to instruct the jury that, if they were satisfied with explanation given, it was inappropriate to draw an adverse inference from the applicants' silence in the police station.

170 (1996) 22 EHRR 297.

171 (1996) 23 EHRR 313.

'The crucial question must be whether the CPIA 1996 provisions negate the principle that the Crown must bear the entire burden of proving guilt without assistance from the defendant.'[172] Section 11(5) of the CPIA 1996 has made it clear that a person cannot be convicted solely on the inferences that might have been drawn under s 11(3). An adverse inference may only be drawn in limited situations and it is a matter of judicial discretion. Together, these provisions appear to satisfy the criteria of the ECHR.[173] In addition, as Sharpe points out, the Continental systems, while recognising the right of silence, have a general expectation of pre-trial co-operation by the defendant. Consequently, it does not appear likely that a successful attack can be expected in an English court. Similarly, the ECtHR is unlikely to impugn the validity of the defence disclosure provisions if the domestic courts do not do so.[174]

Two caveats must be made. First, the English courts must consider the issues arising from CRIMPO 1994 and the CPIA 1996 afresh, against the HRA 1998.[175] The Government has acknowledged that the provisions of CRIMPO 1994 are not beyond challenge and, therefore, have taken steps to modify the provisions.[176] Certain cases, such as *John Tibbs*,[177] may require the judge to provide instructions to the jury regarding the possibility of the drawing of adverse inferences under both acts. It may be impossible satisfactorily to formulate such instructions.[178] Secondly, the admission of the DPP regarding the failure of some police and prosecutors to honour the law may provide an additional avenue of attack.[179] It appears inherently unfair, in the context of the HRA 1998, to leave the defence in jeopardy of an adverse inference when the Crown is ignoring the law. Yet, the domestic court may find the provisions compatible on the basis the DPP s admission may be taken into account in deciding whether it is fair to draw an adverse inference in any case.

172 Sharpe, 1999a, p 284.
173 *Murray v UK* (1996) 22 EHRR 297, para 54.
174 Sharpe, 1999a, p 285.
175 HRA 1998, s 6.
176 Youth Justice and Criminal Evidence Act 1999, s 58, stating that inferences from silence are not permissible where no prior access to legal advice, and s 59 restricting the use of answers obtained under compulsion.
177 [2000] 2 Cr App R 309 CA. The instructions were incomplete, but the Court of Appeal found that the conviction was safe.
178 The Court of Appeal is unable to provide an effective remedy, as in *Condron v UK* (2000) 8 BHRC 290, para 66.
179 DPP, 1999a.

4.7.7 The HRA 1998 and PII

The ECtHR ruled that *Rowe and Davis*[180] were not given a fair trial on the basis of the non-disclosure of 'sensitive' material.[181] The court was of the view that, since the trial judge had not seen[182] the material withheld by the prosecution under a claim of public interest, the defendants' hope for a fair trial was undermined. The ECtHR restated the modern common law position that it is for the trial judge to determine whether the material is properly withheld from the defence on the grounds of PII. The trial judge must keep the question of disclosure of those materials under continuous review during the trial in the event that the interests of justice require him to revisit the withheld material with a view potentially to ordering its release.

Since the CPIA 1996 requires that the prosecutor bring an application to the trial judge for an order allowing non-disclosure, the regime complies with the ECHR in that regard.[183] Similarly, the CPIA 1996 codifies the common law duty of continuous review of the non-disclosed material by the Crown Court[184] and, therefore, satisfies the criteria of the ECHR.

It is clear that some degree of PII is legitimate. The question remains how to protect the accused within the adversarial system if he is not represented during the PII application. It has been suggested that a special security cleared counsel should be appointed to protect the interests of the defence in public interest applications.[185] This is discussed in Pt 14.2.

180 (2000) 30 EHRR 1 (ECtHR). They became known as part of the M25 Three, Davis, Johnson and Rowe, before conviction in 1990.

181 It was not disclosed that substantial reward money had been paid to accessories who were prosecution witnesses and this information was not submitted to the court at all, let alone under any process similar to the one in the CPIA 1996.

182 The facts are less extreme in the other cases decided at the same time. In *Jasper v UK* (2000) 30 EHRR 441 (ECtHR) and *Fitt v UK* (2000) 30 EHRR 480 (ECtHR), the ECtHR held that, since the trial judge took the opportunity to consider an oral summary of the withheld information (although not defence counsel in Jasper), and defence counsel had been allowed to make representations, the appellants had received fair trials.

183 *Smith (Joe)* [2001] 1WLR 1031CA (even the *ex parte* process is compliant).

184 Section 15(3).

185 This was unsuccessfully argued in *Rowe and Davis v UK* (2000) 30 EHRR 1 (ECtHR).

PROSECUTION DISCLOSURE IN MATTERS TO BE TRIED ON INDICTMENT

5.1 INTRODUCTION AND THE CURRENT COMMON LAW

For decades, the common law has imposed a duty of fairness on the prosecution in England and Wales and Canada. However, detailed judicial guidance on the issues of disclosure by the prosecution of its case and unused material was limited. Often, it cited the rule that the pre-trial release of information by the prosecution to the defence was primarily a matter of discretion for the prosecution, except where mandated by one of the few statutory provisions.[1] In the 1990s, advance disclosure of the evidence upon which the prosecution intended to rely[2] became better organised and was given more consistently in England and Wales as a result of Joint Performance Agreements between the police and the Crown Prosecution Service (CPS).[3] This was not only a matter of assisting the accused to exercise his right of making a full answer and defence. For the administrators, it was vital to the efficient functioning of the courts and the caseflow management system.[4] This result, combined with improvement in the timing of the dispatch of the committal papers to the defence, improved the position of the defence.[5]

Also in the 1990s, the courts defined the rules of disclosure of unused evidence or information and changed the law of disclosure by declaring that the courts would review the use of prosecution discretion regarding the pre-trial release of information. In England, the key decisions, in the order in which they were decided, were as follows. *Saunders* (1989)[6] stated that it was for the defence, not

1 See Pts 2.4 and 3.5.
2 Magistrates' Courts (Advance Information) Rules 1985 SI 1985/601.
3 Since the standardisation of police-CPS files was achieved in 1996–97, the police supplied an additional copy of key witness statements to the CPS. Usually, the CPS provided the additional copy of the key witness statements to the defence when requested, or, if no request was made or the accused was not represented, it was provided at trial (Ede and Shepherd, 1997, p 156; Sprack, 2000, p 108).
4 Mackie *et al,* 1999, p 460.
5 The CPS reported that in 1999 advance discovery was sent to the defence within seven days of request in 86% of the cases compared with 82% in the previous year. The CPS dispatched committal papers within the target time (14 days from when the CPS received the trial ready full file from the police) in 60% of cases in 1999 compared with 52% in 1998 (CPS, 2000a, Chapter 3, p 2). Pursuant to the new regulations governing sending indictable only cases to the Crown Court for trial, discovery of the prosecution case must be made within 42 days from the date of the first hearing in the Crown Court (Crime and Disorder Act (CDA) 1998, s 51 (effective 15 Jan 2001), SI 2000/3305).
6 Unreported, 29 September 1989, London CCC, T881630, Henry J, p 6D transcript (the first Guinness trial).

the prosecution, to decide whether unused material had some bearing on the case and that 'unused' was to be construed in a broad manner. *Maguire* (June 1991)[7] stated that members of the prosecution, for the purposes of the duty to disclose, included police and experts. *Ward* (October 1992)[8] stated that the duty on the prosecution includes early investigations relating to the accused and that there is no protection for sensitive material outside of PII, and that PII was to be determined by the court and not the prosecutor. *Livingstone* (March 1993)[9] stated that the prosecution was to gift the unused relevant material to the defence. *Melvin (Graham)* (December 1993)[10] stated that the duty to disclose included giving the defence material to put it in a position to establish another line of defence. *Keane* (March 1994)[11] adopted the test in *Melvin (Graham)* as to what material was *prima facie* to be disclosed. The statement in *Ward* regarding the process by which applications for PII could be brought *ex parte* was refined by *Davis, Johnson and Rowe* (January 1993).[12] *Mills and Poole* (1997)[13] stated that, if the prosecution knows of a witness, but does not intend to call him, it must provide a copy of the statement of the witness, or, if none, a copy of the note of the investigator.

As demonstrated in the comparative study to follow, Canadian jurisprudence took a parallel route and, eventually, provided one of the more colourful phrases describing the core concept of the rules of disclosure. Sopinka J wrote, 'the fruits of the investigation' which are in the possession of the prosecution are not the property of the prosecution for use in securing a conviction, 'but the property of the public to be used to ensure that justice is done'.[14]

In the following part, topics in the common law disclosure rules of England and Wales and Canada will be addressed and contrasted with the changes brought about in England and Wales by the Criminal Procedure and Investigations Act (CPIA) 1996.[15] Reference will also be made to the new *Attorney General's Guidelines for England and Wales* (2000) *Disclosure of Information in Criminal Proceedings*.[16]

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7 (1993) 94 Cr App R 133 CA.
8 (1993) 96 Cr App R 1 CA.
9 [1993] CrimLR 597 CA
10 Unreported, 20 December 1993, Jowitt J.
11 (1994) 99 Cr App R 1 CA.
12 (1993) 97 Cr App R 110CA.
13 [1998] 1 Cr App R 43 HL.
14 *Stinchcombe* [1991] 3 SCR 326, p 333. This was adopted by Lord Hutton in *Mills and Poole* [1998] 1 Cr App R 43 HL, p 62.
15 The CPIA 1996 came into effect on 1 April 1997. It applies to investigations that began on or after that date. An investigation into an offence can begin before that offence is committed, *Uxbridge Magistrates' Court ex p Patel, City of London Magistrates' Court ex p Cropper* [2000] Crim LR 383 DC
16 Attorney General, 2000a, reproduced in Appendix 1.

5.2 WHO IS THE 'PROSECUTION'?

5.2.1 Police, advocates and Government

For the purpose of disclosure the 'prosecution', at common law, includes the prosecuting lawyers, police investigators and prosecutors and separate Government departments involved in the interdepartmental consideration of relevant matters, such as licences.[17] In *Blackledge and Others*,[18] one of the 'arms to Iraq' prosecutions, the broad definition was applied and it resulted in embarrassing circumstances. The accused proposed to defend the charge of illegally exporting weapons by arguing that the prosecution was either an abuse of process, or that there was, in fact, no prohibition in force. The defence sought documents that would support its theory, and in response, the prosecutor reviewed the files of the Department of Trade and Industry. Post-conviction, it was revealed that relevant documents existed in the files of the Department of Defence, Foreign and Commonwealth Office and Security Services. The Court of Appeal found that the documents had 'some bearing on the offences charged and the surrounding circumstances of the case', and that a failure to disclose them amounted to a material irregularity. The convictions were set aside.[19]

The courts of Canada have adopted the broad view in defining those who are part of the 'prosecution' for disclosure purposes.[20] The criminal and civil division of the Attorney General's Ministry are considered one unit for the purposes of disclosure,[21] as are other departments participating in the investigation.[22]

The CPIA 1996 limits the definition of the 'prosecution' by referring only to investigators and prosecutors.[23] However, it is reasonable to predict that this provision will be interpreted broadly under the Human Rights Act (HRA) 1998, certainly in relation to information in the control of Government The *Attorney General's Guidelines* (2000), in para 29, address this issue by stating that reasonable steps should be taken by the prosecution to identify and consider relevant material in the control of other Government departments.

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17 *Ward* (1993) 96 Cr App R 1 CA, pp 23, 50.

18 [1996] 1 Cr App R 326 CA.

19 Having been enticed by an offer of a light penalty, the defendants had pleaded guilty. Their convictions were nevertheless set aside as being 'founded on' the material irregularity and therefore unsafe and unsatisfactory, *Blackledge and Others* [1996] 1 Cr App R 326, p 339.

20 *C(MH)* [1991] 1 SCR 763.

21 *Ross (No 2)*, unreported, 4 July 1995, Kitchner, Ont Gen Div, Salhany J.

22 *Arsenault* (1994) 93 CCC (3d) 11NBCA.

23 Sections 1(4) and 22 and Code of Practice, para 1.2.

5.2.2 Experts

Experience has shown that those employed or retained by the Crown or the police can lose their objectivity and, therefore, they are best acknowledged as part of the prosecution team, as opposed to third parties. This includes professionals, such as doctors and scientists.[24] Their findings must be included as part of the material in the hands of the prosecution for the purposes of the common law rules of disclosure. The wrongful conviction of the Maguire Seven[25] provides one example of the desirability of including experts as part of the 'prosecution'. Home Office scientists testified in 1976 that traces of nitroglycerine (TLC) found under the fingernails of the male defendants was likely to be the result of handling that explosive. The possibility of innocent contamination was stated as ruled out. The prosecution did not disclose the scientists' notes regarding the experiments. Within months of the conviction, Home Office scientists began recording the results of experiments that showed that innocent contamination was possible, and in 1982 published a paper in the *Journal of Forensic Sciences* to that effect. Yet, it was years before the results were linked to the Maguires' case. Also, it was revealed that it was known that another explosive, PETN, could provide a wrongful positive test result in the search for traces of TLC.[26] In the end result, the Court of Appeal set aside the convictions and stated that experts were required to disclose exculpatory information to the defence.[27] The conclusion in *Maguire* has been followed in Canada and remains the law.[28]

Returning to England, the CPIA 1996 limits the definition of the 'prosecution' by reference only to investigators and prosecutors. The arguments in favour of restricting the definition of prosecution to exclude experts included two substantive factors, namely, the existence of the new independent status of the Forensic Science Service (FSS) and the coming into effect of the CPIA 1996 Code of Practice (the code).

The code requires the police to make reasonable inquiries and material coming to the attention of the police is subject to the disclosure regime.[29] This is supplemented by the Crown Court (Advance Notice of Expert Evidence) Rules 1987 and the Crown Court (Advance Notice of Expert Evidence) (Amendment) Rules 1997.[30] The *Attorney General's Guidelines* (2000) encourage the prosecution to make inquiries of providers of forensic services, if there is reason to suspect

24 Ede and Shepherd, 1997, p 125; Roberts and Willmore, 1992, Chapter 4.

25 *Maguire and Others* (1993) 94 Cr AppR 133 CA.

26 *May Interim Report,* 1990.

27 Followed in *Ward* (1993) 96 Cr App R 1 CA, pp 23, 50; *Runciman Report,* 1993, para 7.45.

28 *Agat Laboratories Ltd* (1998) 17 CR (5th) 147 (Alta Prov Ct), affirmed (1998) *Lawyers Weekly,* 20 March, p 17 (Alta QB); *Perlett,* unreported, 19 October 1998, Thunder Bay, Ont Gen Div, Doc 450/97, Paltana J.

29 Paragraph 3.4.

30 SI 1997/700: r 3(1) provides for the disclosure of the expert's working notes and records. Contrast the Magistrates' Courts (Advance Notice of Expert Evidence) Rules [contd]

that they may have material or information likely to undermine the prosecution case or assist a known defence.[31]

An independent national agency was recommended by the Runciman Report[32] and formed in 1996. It has one division for defence work and another division to assist the prosecution.[33]

Not all observers are convinced that the structure of the agency has merit. For example, since the police are their main customers, the agency's structure was modelled after the way the police are organised to combat crime. This structure may prove to be an unfortunate decision in terms of the need for greater independence from the police. Had a more generalised structure been adopted, it might have reduced the ease with which some investigators exert influence over individual scientists. Although this result is not certain, the chances of it occurring at a rate less frequent than it did in the past have not been altered by the organisational structure. The police can exert a tremendous amount of pressure over any officeholder or civilian and scientists are no different. It is helpful to recall the words of Glidewell LJ in *Ward:* 'Forensic scientists may become partisan. The very fact that the police seek their assistance may create a relationship between the police and the forensic scientists. And the adversarial nature of the proceedings tends to promote this process.'[34]

Any opportunity in the early days for the defence to assist in encouraging independence, by playing the role of watchdog, was limited by legal aid restrictions. The restrictions and delays in advance disclosure by the prosecution requiring defence experts to work on short notice and under time pressure contribute to a continuing sense that the concept of the 'equality of arms' is being ignored.[35] Finally, experts can be retained from abroad.[36] Even the most famous foreign laboratories, such as the FBI Laboratory,[37] continue to have problems with objectivity and quality.[38] Consequently, a cause for concern

30 [contd] 1997 SI 1997/705 which provides (r 3) that notice is to be given as soon as practicable after plea and (r 5) if a party does not give notice then he needs leave to call the expert evidence.

31 Paragraph 30.

32 *Runciman Report,* 1993, para 9.24.

33 Priston, 1997, p 5.

34 *Ward* (1993) 96 Cr App R 1 CA, p 51. Greater Manchester Police's experts claimed, to avoid criticism from British and American fingerprint experts, that they had developed a new technique to lift fingerprints, even though the technique had not been shared with experts outside their force. The GMP's experts evidence led to the conviction of Alan McNamara in 2001, a result that critics believe is wrong. *Panorama,* 2001.

35 Ede and Shepherd, 1997, p 341; Mansfield, 1998, p 3.

36 In the near future, they will be able to give evidence via videolink; Home Office, 2001, para 3.46.

37 Reuter, 1997.

38 Scheck *et al,* 2000, Chapter 5. New York State Trooper Lab fingerprint expert David Harden was convicted of perjury after giving false expert evidence. It is suspected that approximately 33 convictions based on his testimony may be wrongful. *The Hunt,* 2001b.

remains in the decision to limit the definition of the 'prosecution' by reference only to investigators and prosecutors to the exclusion of experts.

5.3 PRESERVATION OF EVIDENCE

Inherent in the common law duty of disclosure is a duty to preserve material gathered in the investigation.[39] This includes the results of any tests completed on potential evidence[40] and any documents that were being withheld on the basis of PII.[41] The police have a duty to pass on information to the CPS and the CPS has a duty to ensure that this is done in a timely fashion.[42] The code makes specific provision for the retention and recording of material obtained in a criminal investigation, assuming that the police view it as relevant.[43] Material must be retained until a decision is made not to institute proceedings or, if proceedings are instituted, until the various time and result criteria stated in the code are satisfied. For example, material must be retained until the case ends in an acquittal, or for one year after conviction in a summary trial where no appeal is commenced.[44]

It is disturbing, however, that the act refers to 'prosecution material', so as to perpetuate the (incorrect) impression of ownership rather than trusteeship.[45] One can see the consequence of that point of view in cases under the CPIA 1996. For example, last year a large police corruption and drug trial was ended months into opening argument when it became clear that the police had not disclosed relevant information to the prosecutor, let alone the defence.[46] Other early indications regarding the degree to which investigators are complying with the new code are not encouraging.[47] The Attorney General, in the *Guidelines* (2000), para 5, saw fit to remind investigators and disclosure officers to comply with the law. It is unfortunate that this state of affairs exists.

39 *Beckford* [1996] 1 Cr App R 94CA; *La* [1997] 2 SCR 680.
40 *Ward* (1993) 96 Cr App R 1 CA, p 52; *Maguire and Others* (1993) 94 Cr App R 133 CA; *Mills and Poole* [1998] 1 Cr App R 43 HL, p 62; *Egger* [1993] 2 SCR 451, p 472; and *La* [1997] 2 SCR 680, p 693.
41 *Menga and Marshalleck* [1998] Crim LR 58 CA.
42 *Beckford* [1996] 1 Cr App R 94 CA; *Ward* (1993) 96Cr App R 1 CA.
43 Paragraphs 4.1–4.4, 5.1–5.5 and 6.12 (sensitive).
44 Paragraphs 5.6–5.9.
45 Murray, 1996, p 1290.
46 *Humphreys and Others*, unreported, 14 February 2000, Maidstone CC, T19990290, T19990344, Crush J.
47 CPS Inspectorate, 2000, Chapters 3 and 13.

5.4 AMBIT OF PROSECUTION DISCLOSURE AND UNUSED MATERIAL AND THE TEST

5.4.1 Introduction

The amount of information that the police and prosecutor may have which might in some way relate to an accused is potentially voluminous. Information could relate to his associates, his history, the crime and its circumstances, informants and investigation techniques, State interests, witnesses and the complainant.[48] A requirement to disclose all unused material, however remote from the proceedings, would be an onerous obligation. Therefore, certain limits were set at common law and in the CPIA 1996.

5.4.2 Prosecution material

Traditionally, the type of material passed from the investigator to the prosecutor limited the ambit of prosecution material for the purposes of disclosure. The prosecutor would select from the material received that which would be used in the case for the Crown and the remainder was 'unused'.[49] However, the type of material to be passed to the prosecutor was expanded in the Guinness One trial.[50] Henry J ruled that the term 'unused' material, for the purposes of prosecution disclosure, applied to all the material collected by the investigators. This necessitated a co-ordinated system of recording the information in the possession of the police or their experts. Upon reflection, this appeared to be an impossible task for the police and that a great deal of sensitive material and, perhaps, PII material would be at risk of being disclosed.[51] Therefore, the court accepted the task of defining the limits of the ambit of disclosure, bearing in mind the fundamental principles and the resources available.

5.4.3 The *Keane* materiality test

The test for the ambit of disclosure was initially stated in the Court of Appeal with reference to 'relevance to the defence *cause*' and the boundary created by the need to protect recognised categories of information in the

48 *Runciman Report,* 1993, para 6.33–41.
49 CPS Inspectorate, 2000, para 3.2.
50 *Sounders and Others,* unreported, 29 September 1989, London CCC, T881630, Henry J.
51 *Runciman Report,* 1993, paras 6.40–43.

public interest In *Ward,* the Court of Appeal approached it in the following manner: 'We would emphasise that "all relevant evidence of help to the accused" is not limited to evidence which will obviously advance the accused's case. It is of help to the accused to have the opportunity of considering all the material evidence which the prosecution have gathered, and from which the prosecution have made their own selection of evidence to be led.'[52] The common law test was refined by Lord Taylor CJ, in *Keane*.[53] He adopted the test provided by Jowitt J[54] regarding what was, *prima facie,* material in the realm of disclosure. The *prima facie* test, which was referred to as the 'materiality' test, set out the obligation to provide 'that which can be seen on a sensible appraisal by the prosecution: (1) to be relevant or possibly relevant to an issue in the case; (2) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use; (3) to hold out a real (as opposed to a fanciful) prospect of providing a lead on evidence which goes to (1) or (2)'.

It is helpful to know that 'an issue in the case' is not to be construed narrowly, as it is in civil proceedings,[55] and 'the duty to disclose applies equally to written and oral statements'.[56] Materiality is not dependent on admissibility of the evidence.[57] The defence were also entitled to know, without exception, when an application for an order to withhold material on the basis of PII was to be made, a rule modified shortly thereafter, in *Davis, Johnson and Rowe*.[58]

In Canada, the Supreme Court, in three decisions[59] beginning with *Stinchcombe,* also defined a broad scope for the *prima facie* prosecution disclosure obligation.[60] The end result was that virtually identical tests exist in Canada and England at common law.

5.4.4 The formulation in the CPIA 1996

The CPIA 1996 redefines 'prosecution material' and states a narrower test for the disclosure by the prosecution of 'unused material' than that found in the common law test in England or Canada. Prosecution material is limited to

52 *Ward* (1993) 96 Cr App R 1, p 25.
53 (1994) 99 Cr App R l, p 6.
54 *Melvin (Graham),* unreported, 20 December 1993, Jowitt J.
55 *Brown (Winston)* [1995] 1 Cr App R 191 CA, p 198, *per* Lord Steyn.
56 Lord Hope affirmed this view, *Brown (Winston)* [1998] 1 Cr App R 66 HL, p 73.
57 *Preston* (1994) 98 Cr App R 405 HL, p 429.
58 *Davis, Johnson and Rowe* (1993) 97 Cr App R 110 CA.
59 *Egger* [1993] 2 SCR 451, p 467 (blood test); *Chaplin* [1995] 1 SCR 727, paras 22 and 30 (accused persons sought disclosure of the fact of whether they had been named as primary or secondary targets in wiretap authorisations),
60 *Dixon* [1998] 1 SCR 244, p 261.

information and objects of all descriptions, which have come in the prosecutor's possession for the purposes of the particular proceeding, or which the prosecutor has inspected pursuant to the code.[61] The primary disclosure obligation relates to 'unused' material among that found in the 'prosecution material' which 'in the prosecutor's opinion might undermine' the prosecution's case.[62] This can be compared with the common law position where all information in the police file was to be considered and the prosecution was objectively to assess whether the information might assist the defence cause. Secondary disclosure is narrow in its purpose, directing disclosure of prosecution material which can 'reasonably be expected to assist the defence as disclosed'.[63] The wisdom of the primary and secondary disclosure system is discussed in Pt 5.9.

5.5 GATHERING AND SIFTING

5.5.1 Gathering

As at common law, the initial decision regarding relevance is left with the investigating officer, subject now to the provisions of the code[64] and the *Attorney General's Guidelines* (2000). He is directed, in relation to recording and retention of material during an investigation, to gather relevant material, that is material which has some bearing on any offence under investigation, or any person being investigated, or on the surrounding circumstance of the case.[65]

5.5.2 Sifting at common law

Lord Taylor CJ, in *Keane*,[66] and Sopinka J, in *Stinchcombe*, placed the initial obligation to separate 'the wheat from the chaff on the prosecutor.[67] The Supreme Court directed prosecutors to use a 'coarse sifter' and err on the side of disclosing potentially irrelevant statements. In each jurisdiction, it is recognised that the prosecutor can assign part of the task to the police, and support staff, but the

61 Section 3(2).
62 Section 3(1).
63 Section 7; *Stratford Justices ex p Imbert* [1999] 2 Cr App R 276 CA, p 280; *DPP ex p Lee* [1999] 2 Cr App R 304 DC, p 313.
64 Paragraph 2.1.
65 Attorney General, 2000a, para 6.
66 *Keane* (1994) 99 Cr App R 1 CA, p 6.
67 *Stinchcombe* [1991] 3 SCR 326, p 339; *Dixon* [1998] 1SCR 244, p 257.

prosecutor bears ultimate responsibility of considering the material in the control of the prosecution.

The process of sifting and evaluating the material in the possession of the prosecution is to occur well before the trial at common law. Where difficult decisions are to be taken, counsel should be instructed to advise.[68] Lord Taylor CJ directed that, where materiality was uncertain in the minds of the prosecution, the court should be consulted.[69]

The decision of the prosecutor is open to review by the trial judge.[70] The prosecutor must defend his decision that the document is irrelevant or not subject to disclosure. It is reasonable to suggest that, in most disputes, the trial judge will examine the material in question, for example, the statement of a witness.[71]

5.5.3 Sifting and the CPIA 1996

Pursuant to the CPIA 1996, the responsibility of sifting and evaluating material is placed on the newly created office called the disclosure officer.[72] He is required to provide a series of lists of information to the prosecutor, including schedules of sensitive unused material and non-sensitive material.[73] If the disclosure officer

68 *Sansom* (1991) 92 Cr App R 113 CA, p 123; *Stinchcombe* [1991] 3 SCR 326, p 343.

69 *Keane* (1994) 99 Cr App R 1 CA, p 6; *Taylor (Paul)* [1995] 2 Cr App R 94; this was not a question for examining magistrates, *CPS ex p Warby* (1993) 158 JP 190 DC) *Girimonte* (1997) 121CCC (3d) 33 Ont CA.

70 *Ward* (1993) 96 Cr App R1 CA; *Stinchcombe* [1991] 3 SCR 326, p 340.

71 *Rowe and Davis v UK* (2000) 30 EHRR 1 (ECtHR); *Stinchcombe* [1991] 3 SCR 326, p 346.

72 The code, paras 2.1 and 7.1.

73 In the current edition of the *Manual of Guidance for the Preparation, Processing and Submission of files,* the police are to prepare either an expedited file or a full file for the CPS (Home Office, 2000a, para 3.1). The forms used are found in para 7.1ff. The following documents must be included in the expedited file: MG1—file front sheet; MG4—copy of charge sheet(s), or summons(es); MG7—remand application (if applicable); MG10—witness non-availability; MG11—key witness statements (including victim statement where applicable); short descriptive notes of interview (SDNs)/contemporaneous notes—MG15/MG11 or MG5 as applicable. The following documents are to be included where applicable and available: MG4A–police conditional bail form; MG4B—request to vary police conditional bail from; MG4C—surety/security forms for police conditional bail; MG5—case summary; MG6– confidential case file information form; MG8—breach of bail conditions; MG11—other witness statements that have been taken; copy of documentary exhibits/photographs; Phoenix print of all previous convictions—defendant(s); Phoenix print of all previous cautions/reprimands/warnings—defendant(s); MG18—TIC form; MG19 -compensation form (and supporting documents where available); police racist incident form/crime report (in racist incident cases). The following documents must be included in the full file: MG1—file front sheet; MG4—copy of charge sheet(s) or summons(es)); MG6 series—confidential case file information and disclosure forms; MG9—witness list; MG10—witness non-availability form; MG11—copies and originals of statements from all witnesses; MG12—exhibit list; custody record. The following documents to be included where applicable and available: MG4A—police conditional bail form; MG4B—requests to vary police conditional bail form; MG4C—[contd]

has a question regarding relevance, he is to obtain advice from the CPS prosecutor, not independent counsel.[74] When independent counsel is prosecuting, he is required to consult with the CPS prosecutor before a decision is made about reversing a decision to withhold information.[75]

It was suggested in *Keane* that 'the more full and specific the indication the defendant's lawyers give of the defence, or issues they are likely to raise, the more accurately both prosecution and judge will be able to assess the value to the defence of the material'.[76] At first glance, one might mistakenly conclude that these comments place some onus on the accused to disclose his defence when seeking full disclosure. Rather, these comments are simply an invitation to direct or assist the prosecutor to look where he might not otherwise have had reason to look. It is helpful to recall the efforts in the 'arms to Iraq' prosecution of first defence counsel, and eventually prosecuting counsel, in pressing 'other' Government departments for exculpatory information.

The CPIA 1996 takes a very different approach in requiring the accused to file a defence statement before the prosecutor must undertake the process of a more detailed inquiry as to unrevealed 'unused material'.[77] This process is termed secondary disclosure. While the CPIA 1996 does not specify a power of judicial supervision at the primary disclosure stage, one is provided at the secondary disclosure stage.[78]

Of course, the prosecutor can only disclose that which has been provided to him. The decisions of disclosure officers and the accuracy of the schedules have been called into question.[79] This issue is addressed in Pt 5.9.

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73 [contd] surety/security forms for police conditional bail; MG5—case summary; MG15– record of tape-recorded interview(s)/contemporaneous notes; copy of documentary exhibits/photographs; Phoenix print of all previous convictions—defendant(s); Phoenix print of all previous cautions/reprimands/warnings—defendant(s); Phoenix print of witness convictions/cautions/reprimands/warnings as per the Joint Operational Instructions; disclosure of unused material; MG18—TIC form(s); MG19—compensation form and supporting documents(where available); details of circumstances of last three similar convictions and/or offence(s) with a Community Service Order (CSO) still in force (recorded on MG6); Police racist incident form/crime report (in racist incident

74 The code, para 6.1. Mackie *et al*, 1999, review the changes since 1990 in the standard contents of police-prosecution files.

75 CPS, 2000b, para 4. 'It is desirable that the disclosure officer should also be consulted' (Attorney General, 2000a, para 25).

76 *Keane* (1994) 99 Cr App R 1 CA, p 7; *Richards* (1996) 70 BCAC 161 CA.

77 Section 5.

78 Section 8.

79 CPS Inspectorate, 2000, Chapter 4.

5.6 TIMING AND TRIGGER

5.6.1 Introduction

The exact timing of prosecution discovery and disclosure is left to the discretion of individual prosecutors at common law, subject to the points below. In contrast, the CPIA 1996 creates a two stage scheme with respect to unused material. The duty to disclose exculpatory, or useful, material to the defence is not limited to the pre-trial period. It continues throughout the proceedings.[80] This important principle is preserved in the CPIA 1996.[81]

5.6.2 Timing

It is widely recognised that the greatest benefits would occur, in principle and practice, if disclosure occurred before committal and plea in matters triable on indictment only or before mode of trial selection and plea in either way matters.[82]

The *Attorney General's Guidelines for the Disclosure of Unused Material* (1981) stated that disclosure should occur before the committal date, along with the committal bundle, unless to do so would have the effect of delaying the committal. However, if the unused material might influence the committal, then it should be given, even if a postponement resulted.[83] The *Attorney General's Guidelines* (2000) state that, if justice requires, some information ought to be given at an early date, for example, information affecting the bail application.[84] Where the defence is unhappy with the discovery and disclosure pre-committal, it can apply to the court for assistance pursuant to *Ex p Lee*.[85]

In Canada, the timing of disclosure remains in the discretion of the prosecution. The Attorney Generals of each jurisdiction in Canada have published updated guidelines in the years after the decision in *Stinchcombe*[86] to assist in practical aspects of the duty of disclosure. They encourage early disclosure when possible. It is the view of the influential Locke Report, that

80 *Ward* (1993) 96 Cr App R1 CA, p 50; *Stinchcombe* [1991] 3 SCR 326, p 343.
81 Section 9.
82 Working Group, 1990, para 154; *Runciman Report*, 1993, para 5.55; *Stinchcombe* [1991] 3 SCR 326, pp 342–43.
83 Paragraph 3.
84 Paragraph 27. The 'remand file' will be an 'expedited file' and it will contain a summary of evidence and copies of statements from witnesses (Home Office, 2000a, para 3.2.12).
85 *DPP ex p Lee* [1999] 2 Cr App R 304 DC.
86 *Stinchcombe* [1991] 3 SCR 326.

standard time deadlines should be created, facilitated initially through police-Crown agreements, regarding the preparation of the file.[87]

5.6.3 Early information and *Ex p Lee*

In the period between arrest and committal, the disclosure rules of the CPIA 1996 do not apply.[88] The common law requires prosecutors to maintain constant attention to the interests of justice and fairness, even if the likely committal date is in the foreseeable future.

In some cases, it will be appropriate for the prosecutor to provide the equivalent of 'primary disclosure' to the accused before committal. Kennedy LJ, in considering an application for the pre-committal disclosure of unused materials in *Ex p Lee*, gave the following examples:

> (a) previous convictions of a complainant or a deceased if that information could reasonably be expected to assist the defence when applying for bail; (b) material which might enable a defendant to make a pre-committal application to stay the proceedings as an abuse of process; (c) material which might enable a defendant to submit that he should only be committed for trial on a lesser charge, or perhaps that he should only be committed for trial on a lesser charge, or perhaps that he should not be committed for trial at all; (d) material which would enable the defendant and his legal advisers to make preparations for trial which would be significantly less effective if disclosure was delayed, for example, names of eye witnesses whom the prosecution did not intend to use.

With respect to the latter example, informal defence disclosure would assist to ensure the validity of the request for early disclosure. The decision in *Ex p Lee* is of great importance, and will provide an avenue to gain relief in situations where prosecutors are not being reasonable.

5.6.4 Discretion

Clearly, the interests of justice require a measure of flexibility as to the timing of the release of information. In contrast to those cases where the prosecution provides early disclosure to meet special needs in the defence, the Crown may exercise its discretion to postpone disclosure to the defence where investigations are not complete or where PII applications are in progress. This is evident in the wording of s 13 of the CPIA 1996.[89] It directs that primary disclosure of 'unused' material must take place as soon as is 'reasonably practicable' where the accused

87 *Locke Report*, 1999, p 42.

88 *DPP ex p Lee* [1999] 2 Cr App R 304 DC

89 No regulation had been made for this issue under s 12 so the transitional provision in s 13 applies.

pleads not guilty in summary proceedings, or after committal in either way cases, or sending[90] for trial in proceedings on indictment only cases.[91] It is regrettable that the Attorney General has still not yet given firm guidance on this issue.

5.6.5 Trigger of disclosure of unused material

With respect to the mechanism that triggers the disclosure obligation, at common law in England, the duty to disclose existed whether or not a specific request was made.[92] The Canadian position is fundamentally different. The obligation to disclose is triggered by a request by or on behalf of the accused made any time after the charge is laid.[93]

Pursuant to the CPIA 1996, the obligation on the prosecutor to disclose material to the defence in the 'primary' phase is triggered by a plea of not guilty in a magistrates' court, or committal, sending or transfer of a case for trial to the Crown Court.[94] Again, primary disclosure is the provision of any 'prosecution material' that has not been previously disclosed to the accused and which, in the prosecutor's opinion might undermine the case for the prosecution.[95] Secondary disclosure will be provided if the defence provides the prosecution with a defence statement.[96] The prosecution will then consider, with the assistance of the disclosure officer, whether other material that has not previously been disclosed might reasonably be expected to assist the accused's defence as notified and then provide that material to the accused,[97] as soon as reasonably practicable.[98] If the proceedings involve two or more co-accused, the same material must be provided to each accused person.[99]

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90 CDA 1998, s 51 (effective 15 January 2001). The prosecution must serve its case on the defence within 42 days from the date of first hearing in the Crown Court (SI 2000/3305). CDA, Sched 3, para 1, as amended by Access to Justice Act (AJA) 1999, s 67, allows a judge to extend the period.

91 In indictable only cases the time limit for service of unused material runs from the date of service of the evidence on which the charge is based (AJA 1999, s 67(2), amending CPIA 1996, s 13(1)).

92 *Ward* (1993) 96 Cr App R 1 DC, p 52.

93 *Stinchcombe* [1991] 3 SCR 326, p 343; Dixon [1998] 1 SCR 244, p 257.

94 Section 1(1), (2). The preferment of a voluntary bill of indictment is a trigger also, s 1(3).

95 Section 3. If material attracts PII, then the prosecutor must apply to the court for a non-disclosure order or end the prosecution.

96 Section 5(6) states the contents of the defence statement to be the nature of the defence, matters in issue, with reasons for taking issue.

97 Section 7. Again this is subject to PII issues.

98 Section 13(2).

99 *Humphreys and Others*, unreported, 14 February 2000, Maidstone CC, T19990290, T19990344, Crush J.

5.6.6 Continuing duty and practice

As at common law,[100] the prosecution is under a continuing duty to review unused material throughout the proceedings under the CPIA 1996.[101] However, certain problems in the design of the new regime have made compliance with the duty impractical in certain cases. The main problems in design arise from the division of responsibility between the disclosure officer and the prosecutor. The disclosure officer is to consider and catalogue unused material and review the unused material when the defence statement is provided. As the case progresses, the prosecutor is to reconsider whether unused material summarised on the schedules should be disclosed, or form the basis of an application for permission to withhold information in the public interest. However, since the prosecutor does not hold the material, it is possible that information may be overlooked, or 'fall through the crack'. For example, in cases where the investigator might serve as the disclosure officer and, later, be required to give evidence, or be in court to assist, then it is not possible for the officer to assist by reviewing the unused material in a timely fashion.[102]

It is reported that prosecuting counsel will ordinarily have read little or none of the unused material.[103]

The *Attorney General's Guidelines* (2000) place renewed emphasis on this duty: 'The prosecution advocate must continue to keep under review until the conclusion of the trial decisions regarding disclosure. The prosecution advocate must in every case specifically consider whether he or she can specifically satisfactorily discharge the duty of continuing review on the basis of the material supplied already, or whether it is necessary to inspect further material or to reconsider material already inspected.'[104]

100 *Ward* (1993) 96 Cr App R 1CA, p 50; *Stinchcombe* [1991] 3 SCR 326, p 343.

101 Section 9.

102 Attorney General, 2000a, commentary para 19. In some proceedings, according to the CPS Inspectorate, police have not informed the prosecutor of unused material that came into existence after the schedules were provided, such as negative fingerprint and forensic evidence. In others, mere was no member of the prosecution team in court who had personal knowledge of the contents of all unused material (CPS Inspectorate, 2000, para 7.3–9).

103 CPS Inspectorate, 2000, paras 7.3–9.

104 Paragraph 24.

5.7 DISPUTES REGARDING MATERIALITY, EXISTENCE OR TIMING

If the defence seeks disclosure of information that the CPS says is immaterial or does not exist, or if the CPS is not prepared to supply it in a timely fashion, an effective dispute resolution mechanism is needed. The court may, among other things, order the prosecutor to disclose the information, or stay the proceedings as an abuse of process. It is submitted that the dispute resolution process is not favourable to the accused in most instances.

5.7.1 Disputes and materiality

With respect to materiality, it is open to the defence to seek the court's assistance at common law. The approach, however, must be made very cautiously. Simon Brown LJ stated: 'Courts should certainly decline even to examine further documents unless the defendant can make out a clear *prima facie* case for supposing that despite the prosecutor's assertion to the contrary, the documents in question are indeed material.'[105] Steyn LJ warned that: Trial judges need to firmly discourage unnecessary and oppressive requests for discovery.'[106] The prosecution is not required to respond to 'forensically manufactured' requests for information from the defence which amount to no more than an 'opportunity for a general trawl through the prosecution papers, with the risk that the burden imposed on the prosecution will defeat the interests of justice'.[107]

While the desire of the court to minimise unnecessary applications has merit, the standard set by the court in the foregoing test may leave some defendants in an impossible or 'Catch 22' situation. Roger Ede explained in *The Times:* 'Though the defence may apply to the court to order the disclosure of material held by the police, it first has to show how this helps its particular case. Without seeing it, the defence may not know how it is relevant and unless it can show its relevance will not be allowed to see it.'[108]

The English position is stricter than the one in Canada. In Canada, the defence must establish a basis upon which the presiding judge could conclude that material that may be useful to the defence is being withheld. Of course, caution will be exercised to avoid fishing expeditions.[109]

105 *Bromley Justices ex p Smith and Wilkins* [1995] 2 Cr App R 285 DC.
106 *Brown (Winston)* [1995] 1 Cr App R 191 CA.
107 *Guney* [1998] 2 Cr App R 242 CA, p 257.
108 Ede, 1997.
109 *Chaplin* [1995] 1 SCR 727, p 745; *O'Connor* [1995] 4 SCR 411, p 477.

The CPIA 1996 restricts the role of the court in deciding disputes regarding materiality. The prosecutor is to use his own discretion as to what might undermine the prosecution case and he should not ask the trial judge for his view, unless the matter raises issues of PII.[110] Where the issues raise questions of secondary disclosure, s 8 makes provision for an application by the defence if the accused has reasonable cause to believe that material which may assist his case, as revealed in his defence statement, has not been disclosed. This perpetuates the 'Catch 22' situation.

5.7.2 Disputes and existence

When the dispute concerns the existence of a document or other information, the route to be taken is less certain. The nature of the problem is demonstrated by the proceedings in the Crown Court against Mr Blackledge in the 'arms to Iraq prosecution'. The defence requested sight of a category of documents that were thought likely to exist and to contain a document that might reveal exculpatory evidence. The trial judge required counsel for the Crown to answer the request from the defence, but rather than insisting on testimony, accepted his assurance as an officer of the court, that the documents did not exist. Some time after the conviction, the existence of the documents was eventually revealed.[111]

As in England, it is for the defendant in Canada to 'establish a basis which could enable the presiding judge to conclude that there is in existence further material which may be useful to the accused in making full answer and defence'. This burden may be satisfied by counsel's representations in some cases.[112]

The question remains as to how the lawyer is to go about establishing the existence of the material. There appear to be four methods of addressing this problem. The first method is to leave the matter to the forensic skills of the defence lawyer. From his experience in other cases, and keen attention to detail and systematic review of the disclosed material in the proceedings, and, perhaps, supplemented by knowledge of his client, he can identify a document that is missing.[113] As a general approach, this is an unsatisfactory solution. Defence advisors have varying skills and experience. They are constrained by time and resources. It must not be forgotten that disclosure of certain materials in the hands of the prosecution is part of the right to a fair trial.

110 Section 3. *B* [2000] Crim L R 50 CA.
111 *Blackledge and Others* [1996] 1 Cr App R 326 CA, p 311.
112 *Chaplin* [1995] 1 SCR 727, p 745; *O'Connor* [1995] 4 SCR 411, p 477.
113 Ede and Shepherd, 1997, Chapter 8.

The second method of addressing this problem is to invite the court to look at the prosecutor's file. In *Tattenhove and Doubtfire*,[114] Lord Taylor CJ answered the protestations of the defence regarding incomplete disclosure regarding information (if any) about certain potential witnesses by accepting the invitation of the prosecutor to inspect his file, *ex parte*, and to affirm for the defence that no material information remained undisclosed. Of course, if the prosecution does not want to reveal the existence of a document then, its existence will not be evidenced on the prosecutor's file.

The third method of addressing this problem is to require the police or prosecutor to create a list of all the information gathered. This has been the practice in England for many years. The police create three separate lists that between them cover all the information in their files. The lists, or schedules, which are created on standard forms, catalogue the non-sensitive material (MG 6C), the sensitive material (MG 6D) and information that might undermine the prosecution case or assist the defence (MG 6E). The investigator is required to describe each item individually, with sufficient detail to enable the CPS to make an informed decision as to whether it should be disclosed. The lists are considered then by the CPS and the prosecutor annotates any document protected from disclosure by PII.[115]

Until the variation in practice arising from s 4 of the CPIA 1996 and the code, the schedules of unused material, with annotations, were forwarded on to the defence. However, the effect of s 4 of the CPIA 1996 and the code was to alter the process by prohibiting the release to the defence of the schedule of sensitive material. JUSTICE[116] and the Runciman Report[117] suggested that it was wrong in principle to withhold information regarding the decision and the schedules of sensitive and unused material from the defence. Without it, the defence is left in the unenviable situation of having no practical way of discerning how the disclosure discretion was exercised and whether the police or prosecutor had innocently or negligently omitted to apply for an exemption from the disclosure provision. The defence lawyer will be required to work diligently to read between the lines and spot non-disclosed materials[118] that would have been obvious from a schedule, otherwise supplied.[119] Of course, if the schedule created by the

114 *Tattenhove and Doubtfire* [1996] 1 Cr App R 408, p 413.

115 Home Office, 2000a, s 7.

116 JUSTICE, 1995, pp 14–17. The previous system was of great benefit to the defence, in not only addressing what was in existence, but also in gaining experience as to the documents normally generated.

117 *Runciman Report*, 1993, para 6.3: 'We endorse the principle that it should not be a matter purely for the prosecution to decide what is relevant and what is not: the defence should have the right to see a schedule of all the evidence in the prosecution's hands and to ask for the disclosure of any further material that seems to them to be relevant to the case.'

118 Ede and Shepherd, 1997, p 267.

119 Corker, 1997a, p 885.

investigator is not complete, then the defence will be no further ahead, even with all the schedules.

The final method to be considered hails from the courts of Saskatchewan. The Court of Appeal, in *Laporte,* agreed with the decision of the pre-trial judge that the prosecution should file the equivalent of the statement of documents used in civil litigation; a list certified as complete by the practitioner.[120] Unfortunately, this has not been adopted as the national standard in Canada.[121] Lord Williams rejected a similar proposal[122] made during consultations regarding the *Guidelines* (2000).[123] The preparation of such a statement and list would focus both the minds of the police and prosecution. The prosecutor would work closely with the police to ensure a list that is complete. It is fair to say that, in some situations, the prosecutor may be frustrated in his efforts by rogue policemen. However, police supervisors could be consulted and further cross-checks could be considered.

5.7.3 Disputes and timing

The mechanisms by which the court will resolve the issue of the timing of early disclosure are set out in *Ex p Lee*[124] and *Ex p J*.[125] Once committed for trial to the Crown Court, the CPIA 1996 applies. The CPIA 1996 makes no provision for the defence or the court to review the prosecutor's discretion as to the timing or extent of the provision of primary disclosure.

The case examples can be highlighted here.[126] In *Ex p J,* the defence sought complete and unrestricted disclosure of the exhibits to the statement of the principal prosecution witness, that is, the audio and videotapes of his meetings with the accused while an undercover drug officer. Auld LJ acknowledged the importance of scrutiny by the defence of this evidence before the committal or at least pre-trial. He referred to the fact that a magistrate conducting a committal has the power to ensure that the proceeding is conducted fairly.[127] Consequently, a magistrate could grant an adjournment or other remedies including granting an application for a stay of proceedings based on non-disclosure. Auld LJ surmised that it is unlikely that restricted discovery or disclosure of prosecution

120 *Laporte* (1993) 84 CCC (3d) 343.
121 Eg, *Richards* (1996) 70 BCAC 161 CA.
122 The Law Society (2000, para 8.4) suggested that the prosecutor be required to certify that he had considered all the unused material and had made a reasoned decision about which of it should disclosed.
123 Attorney General, 2000a, 'Commentary', para 14. He credits the Criminal Bar Association with suggesting a certification process.
124 *DPP ex p Lee* [1999] 2 Cr App R 304 DC.
125 *X Justices ex p J* [2000] 1 All ER 183 DC.
126 They are discussed in more detail in Pt 83.
127 *Horseferry Road Magistrates' Court ex p Bennett* (1994) 98 Cr App R 114 HL, p 126.

evidence pre-committal will result in a stay. Restricted access, as suggested by the CPS, was found to be the best solution.[128] In *Ex p Lee,* the defence requested from the CPS early disclosure of specified unused material. When the request was refused, an application for stay was entertained by the High Court. However, the court made it clear that, saving extraordinary circumstances, the issue was best left for the trial judge by way of an early motion.[129] Some materials were ordered to be disclosed. It can be concluded that, in extraordinary situations, remedies are available from either the examining magistrate, or the Crown Court pre-trial judge, or the trial judge.[130]

Section 8 of the CPIA 1996 provides for a defence challenge after secondary disclosure if the accused 'has reasonable cause to believe' that a disclosable document has not been provided.[131] This may have been intended by the drafters of the CPIA 1996 to replace the discretion of the pre-trial judge under the common law, although this result now appears unlikely as a result of *Ex p Lee*. Clearly, any application made after committal and, therefore, within the boundaries of the CPIA 1996 will be decided with reference to s 8. According to the applicable rules, the court may dispose of the application without hearing argument.[132] This provision does nothing to alleviate the 'Catch 22' situation of the defence in some cases.

5.8 THE RETURN OF UNFETTERED PROSECUTION DISCRETION IN THE CPIA 1996

Although the disclosure scheme enacted by the CPIA 1996 bore a general resemblance to the recommendations of the Runciman Report, it differed in detail. Two provisions were of particular importance in the context of prosecution disclosure. First, the *Keane* materiality test was replaced with a narrower test that has a subjective element. This issue will be discussed in Pt 5.9. Secondly, the police and prosecutor were assigned afresh the principal decision making powers over the selection of material to be disclosed to the defence.[133]

128 *X Justices ex p J* [2000] 1 All ER 183 DC, p 189.

129 *DPP ex p Lee* [1999] 2 Cr App R 304 DC, pp 318–19 and *X Justices ex p J* [2000] 1 All ER 183 DC, p 190.

130 In Canada, the result is the same, excepting that the committal judge has no power to make an order pertaining to prosecution disclosure: *Girimonte* (1997) 121 CCC (3d) 33 Ont CA; *Laporte* (1993) 84 CCC (3d) 343 Sask CA.

131 This provision is much more restrictive than the recommendation of the Runciman Report (1993, para 6.51–52).

132 Crown Court (CPIA 1996) (Disclosure) Rules 1997, SI 1997/698, r 7(6).

133 The *Runciman Report* (1993, para 6.3) expressed reservations about such an approach.

5.8.1 Police discretion and disclosure

With respect to the police discretion, the CPIA 1996 and code place the *de facto* decision regarding which material is to be disclosed to the defence in the hands of an investigating and disclosure officer.[134] In all but a small percentage of cases, the prosecutor and the defence are completely dependent on the correctness of these officers' decisions. It is open to speculation, then, as to whether this decision can be justified through improved police practices since the 1980s.

5.8.1.1 The reaction of the profession

The reaction to the suggested change was negative.[135] The Law Society argued that this change alone had the effect of setting the law back 25 years. The potential exists anew that incomplete disclosure will ensure that weaknesses or inconsistencies in the prosecution case will never be revealed and, even, that exculpatory evidence might never come to light. Tony Girling, then President of the Law Society, commented: 'The new rules will considerably reduce access by the defence to the police material. It puts a heavy reliance on the investigator to decide what is to be disclosed. But the police investigator cannot be—and cannot be expected to be—impartial.'[136] The London Criminal Courts Solicitors' Association (LCCSA) agreed, stating: 'With the best will in the world police officers have a vested interest in establishing their own case and in not assisting defendants. To expect otherwise is naïve.'[137] Ede argued that 'too many officers regard any probing by the defence as an unnecessary barrier to convicting the "plainly guilty" instead of an essential safeguard and the natural course will be for the officer to select and reveal only material that supports the police version of events'.[138]

5.8.1.2 Reaction to provision in CPIA 1996 of secondary disclosure

It is apparent that the critics were not appeased by the provision in the CPIA 1996 that provides for secondary disclosure after defence disclosure. Even then, the system is reliant on the diligence of the police in revisiting files that had long since been transferred to the CPS as being completed.[139] And for those diligent disclosure officers who take great care rereading the file, it is

134 Paragraphs 6.51 and 7.1.
135 Home Office, 1995a, para 44.
136 Gibb, 1997.
137 LCCSA, 1995, para 6.9.
138 Ede, 1997.
139 Sprack, 1997, p 316.

open to question whether they will have the training or skill[140] to recognise a piece of evidence that an advocate might use to further the defence case.[141] Unfortunately, there are no detailed manuals or guidance notes to assist disclosure officers to complete this task. To make matters worse, some prosecutors are not always advising disclosure officers on the points made in the defence statement.[142]

The job of disclosure officer is one that the more senior or experienced officers will not wish to fill and since the code does not stipulate the qualifications of the post, it might be given to the junior members of the unit. As Corker points out, the junior officer is least able to demand compliance from colleagues in relation to the handing over of all relevant material'.[143] He needs to be of sufficient rank to access information held by other police forces or agencies. Surprisingly, it is now known that, often times, the investigator serves as the disclosure officer.[144] The *Attorney General's Guidelines* (2000) indirectly sanctions this practice by stating only that an officer must not be appointed as disclosure officer if a conflict of interest would result.[145]

5.8.1.3 The survey shows

In a book published by the Law Society in 1997 entitled *Active Defence,* Ede and Shepherd argue that lawyers should never assume the police are competent or playing fully by the rules. This harsh appraisal has now been convincingly documented by the studies of the Criminal Bar Association and Law Society conducted in 1999 with the British Academy of Forensic Scientists (co-BAFS).[146]

The independent barristers and solicitors responding to the study's questionnaires reported that the police were failing to comply with the CPIA 1996 in many important ways.

Eight out of 10 respondents said that:

> schedules of non-sensitive unused material are either unlikely or highly unlikely to be comprehensive and reliable;
>
> the information listed on the non-sensitive unused material schedule is either insufficiently or highly insufficiently described to enable the disclosure officer's assessment as to disclosability to be independently considered by the prosecutor and the defence;

140 CPS Inspectorate, 2000, Chapter 5.
141 Ede, 1999, p 5.
142 CPS Inspectorate, 2000, para 5.31–46.
143 Corker, 1999, p 36.
144 CPS Inspectorate, 2000, paras 4.7–10.
145 Paragraph 7. See, also, Home Office, 2000a, para 7.8.
146 Ede, 1999, p 2.

> disclosure officers' analyses as to whether items listed on non-sensitive unused material schedules undermine the prosecution case or assist the defence case are either unreliable or highly unreliable…

Seven out of 10 respondents said that:

> the disclosure provisions of the CPIA 1996 are unworkable in the interests of justice.[147]

The criticism of the schedules of non-sensitive unused material compiled by the police was repeated in the CPS Inspectorate's *Thematic Review of the Disclosure of Unused Material*.[148]

A more fundamental problem was, objectively speaking, the lack of integrity of some policemen who are caught up in the 'culture' and 'working rules' of the police service. The working rules are based on an overzealous feeling of mission and team spirit, and it is found in certain sections of the police. Some members of certain working groups are conditioned to bend or break the rules to protect fellow officers from proper discipline, or to facilitate without proper adherence to the law the conviction of those suspects who the police believe to be guilty. A few policemen are blatantly corrupt and their behaviour risks undermining the entire system.

In one example given in the Law Society's survey, a police officer who was the subject of a formal complaint of assault by the accused and was the alleged victim of an assault by the accused was also the disclosure officer, responsible for deciding what information should be released to the defence. In that case, the police withheld a record of a telephone call to the police station from a member of the public at the scene of the incident in which it was alleged that members of the public were, in fact, being assaulted by the police.[149]

The *Attorney General's Guidelines* (2000) states that an officer must not be appointed as disclosure officer if a conflict of interest would result.[150] It is respectfully submitted that the ability of the administrators of justice to ensure a high rate of compliance by the police with the fundamental principles of justice, as reflected in the disclosure principles and rules, is the most important and most vexing issue in the topic of disclosure. This topic will be addressed fully in Chapter 11.

147 Ede, 1999, p 2.
148 CPS Inspectorate, 2000, para 4.44.
149 Ede, 1999, p 4.
150 Paragraph 7.

5.8.2 Prosecution advocates' discretion and disclosure

With respect to the prosecutor's discretion and disclosure, it is instructive to consider the results of the co-BAFS survey and the CPS Inspectorate's review and the decision to place prosecutors in police stations.

5.8.2 1 Prosecutors, the survey and thematic review

The studies completed since the implementation of the CPIA 1996 provide evidence of a continuation of improper practice by some prosecutors. Returning to the combined results of the co-BAFS studies:

> Eight out of 10 respondents said that:
>
> the Crown Prosecution Service and other prosecuting authorities do not usually inspect the items listed on the unused material schedule before making primary or secondary disclosure decisions (ie, prosecuting authorities do not usually call for sight of items listed on unused material schedules but they rely on the disclosure officers' judgment);
>
> prosecuting authorities' decisions on secondary disclosure are either unreliable or highly unreliable…;
>
> the disclosure provisions of the CPIA are 'not working well' or 'working badly' in practice.[151]

In summarising the experiences reported by the profession, Ede wrote the following.

> These surveys of practitioners showed failures across the board:
>
> - Disclosure officer omissions
> - Lack of sufficient detail about unused material in schedules
> - Disclosure officers having an insufficient grasp of the nature of their role and the gravity of not performing it properly
> - CPS lawyers failing to ensure that they received sufficient schedules
> - CPS lawyers failing to apply the primary disclosure test properly
> - The police and the CPS failing to deal properly with secondary disclosure.[152]

The thematic review completed by the CPS Inspectorate confirmed many of these results, and concluded that many prosecutors, as well as disclosure officers, regard the duty of disclosure as a mechanical task.[153] However, it was concluded that the impact of the problem was important in only a small number of cases.[154] At the other extreme, the Inspectorate found that prosecutors in some

151 Ede, 1999, p 2.
152 *Ibid*, p 9.
153 CPS Inspectorate, 2000, paras 4.113 and 5.63.
154 *Ibid*, para 13.14.

areas frequently provided, on an informal basis, disclosure beyond the requirements of the CPIA 1996. These prosecutors adopted the failsafe position, or were responding to the approach taken in the local Crown Court.[155] The report of Plotnikoff and Woolf son is likely to demonstrate that the problems are more extensive than the CPS Inspectorate could have known.[156]

5.8.2.2 Prosecutors in police stations

The decision to locate prosecutors in police stations gives reasons for concern. This decision coincided with the new administrative alignment of CPS areas as co-terminous with police areas. While one can appreciate the administrative[157] and educational[158] advantages of having a qualified prosecutor readily available for advice to investigators, a real danger exists in the potential loss of independence.[159] The prosecutor, who works alone with a team of police, might be unduly influenced by them in the exercise of his discretion.[160] Isolation can lead to socialisation into the norms of the police team. Experience has demonstrated that the 'CPS are unable or unwilling to challenge' those police decisions that material is not disclosable.[161] If some police do not wish to comply with the CPIA 1996 and have the bravado to refuse to do so, they are likely to be willing to work hard at ensuring that the prosecutors that they work with are like-minded, or manipulated into a neutral situation.[162] The need for independence in prosecution decision making was a fundamental reason for the creation of the CPS by the Prosecution of Offences Act 1985.

5.9 REPLACEMENT OF THE *KEANE* MATERIALITY TEST

Not only is there clear evidence that certain of the police and prosecutors do not follow the spirit and letter of the CPIA 1996, but the situation is made worse for the defence by the fact that the scope of disclosure required under the CPIA 1996 is much narrower than existed at common law. The momentum towards

155 CPS Inspectorate, 2000, para 9.10.
156 Plotnikoff and Woolfson, 2001.
157 ACPO and CPS, 2001.
158 The educational advantages include the opportunity of the investigator and disclosure officer to gain an understanding of the impact on the prosecution of any errors or omission in the investigation and recording of the evidence. Similarly, the prosecutor may gain an understanding of the pressures of police work and the impact on the case of the limited formal training given to the police.
159 *Glidewell Report*, 1998, rec 14; *Morton*, 1998, p 825.
160 Bridges and Jacobs, 1999, pp 1–2.
161 Respondent to survey quoted in Ede, 1999, p 5.
162 McConville *et al*, 1991, p 147; Baldwin, 1997, p 551.

narrowing the *Keane* materiality test began with the recommendation of the Runciman Report that it be modified.

5.9.1 The Runciman Report recommendation

> We envisage, therefore, that the prosecution's initial duty should be to supply to the defence copies of all material relevant to the offence or to the offender or to the surrounding circumstances of the case, whether or not the prosecution intend to rely upon that material. Material relevant to the offender includes evidence which might not appear on the face of it to be relevant to the offence but which might be important to the defence because for example it raises question about the defendant's mental state, including his or her suggestibility or propensity to make false confessions (as happened in the Judith Ward case). In addition, the prosecution should inform the defence at this stage of the existence of any other material obtained during the course of the inquiry into the offence in question [excluding internal working documents such as police reports, etc].[163]

The recommended replacement test was narrowed further before the wording of the CPIA 1996 was enacted.

5.9.2 Primary disclosure test

The test for primary disclosure found in s 3–evidence which in the prosecutor's opinion might undermine the prosecution case—is narrow, subjective and imprecise. By contrast, the secondary prosecution disclosure obligation, found in s 7(2), is worded objectively, although its position in the scheme greatly reduces its effectiveness from the defence perspective. It has been observed by many critics that the phrase in s 3, 'might undermine the prosecution case', has the potential to be construed very narrowly. It appears to lead to the distinct possibility that information which falls under the second or third limbs of the *Keane* test will no longer fall within the prosecution disclosure obligation.[164] In committee, the Home Office minister said that a liberal approach in primary disclosure was to be expected. The primary test for disclosure 'is aimed at undisclosed material that might help the accused, notwithstanding the fact that there is enough evidence to provide a realistic prospect of conviction'.[165] The primary test provides that the prosecutor's opinion is the active criterion for disclosure of prosecution material. Simply stated, reasonable prosecutors can come to vastly conflicting decisions regarding the relevance of any one piece of unused evidence. Certain other members of this important public office

163 *Runciman Report*, 1993, para 6.51.
164 Sprack, 1997, p 310.
165 McLean, 1996, col 34.

have failed to exercise wisely unfettered discretion in the past.[166] Recent reports indicate that the CPS has not been functioning as it should and experience demonstrates that stress and racism and staff shortages can cause staff members not to perform duties to the required standard.[167] It is instructive to recognise that the tests for primary and secondary disclosure may overlap. In consequence, in some cases, it might be a fine art to decide whether certain information might undermine the prosecution case, or assist the defence case. For example, the prosecution may have a witness statement that suggests that the accused might have been acting in self-defence, but no mention of this line of defence was made by the accused, for example, in police interviews, before primary disclosure was to be made. It may be argued that the statement should be disclosed as primary disclosure on the basis that the prosecution must prove that the violence perpetrated by the accused was unlawful. On the other hand, it may be argued that the statement may be withheld until such time, if ever, that the accused raised self-defence in the defence statement.[168]

5.9.3 The survey result

The co-BAFS survey and the CPS Inspectorate confirmed that the narrowest view of the test had been taken by some prosecutors. For example, the CPS Inspectorate found that, in the situation mentioned in the last example, the witness statement was not included in primary disclosure in some cases.[169] The solicitors surveyed reported that they had been involved in cases where the following material had been incorrectly withheld:

- The statements of witnesses helpful to the defence
- A complainant's criminal record
- The first description of an offender which did not match the accused
- A 999 call from a member of the public supporting the accused's version of events
- The fact that the complainant had made similar allegations against other people in the past
- The fact that a person arrested but not charged had accused someone other than the defendant…[170]

Again, Ede, in reporting the general results, concluded that the results indicated that CPS lawyers had failed to apply the primary disclosure test

166 *Browning (Edward)* [1995] Crim LR 227 CA.
167 DPP, 1999a; CPS Inspectorate, 2000, paras 4.53 and 4.108; Studd, 2001.
168 CPS Inspectorate, 2000, para 4.117.
169 Paragraph 4.118.
170 Ede, 1999, p 4.

properly.[171] The conclusion of impropriety was supported by the list of 'undermining material' found in the code at para 7.3. For example, material casting doubt upon the reliability of a witness and information containing a description of the alleged offender which does not conform to the description of the person charged with an offence are to be supplied. Contrast can be made to the Government's own examples in the consultation paper. The paper stated 'if part of the prosecution case is a statement by a witness that he or she saw the accused near the scene of the crime shortly after it was committed, it will be necessary to disclose a statement by another witness that he saw a person of a different description from the accused at the same time and place'.[172]

It is appropriate to take notice of two developments. The Inspectorate recommended that the police supply to the CPS 'in all cases a copy of the crime report and log of messages'.[173] This would ensure that the prosecutor has important information before him.[174] Secondly, the CPS now provides, automatically, the previous convictions of all prosecution witnesses as part of primary disclosure,[175] if that information is provided by the police.[176]

5.9.4 The new guidance

In the *Attorney General's Guidelines* (2000) the meaning of the materiality phrase is explored again (para 36):

> Generally, material can be considered to potentially undermine the prosecution case if it has an adverse effect on the strength of the prosecution case. This will include anything that tends to show a fact inconsistent with the elements of the case that must be proved by the prosecution. Material can have an adverse effect on the strength of the prosecution case: (a) by the use made of it in cross-examination; and (b) by its capacity to suggest any potential submissions that could lead to: (i) the exclusion of evidence; (ii) a stay of proceedings; (iii) a court or tribunal finding that any public authority had acted incompatibly with the defendant's rights under the ECHR.

171 Ede, 1999, p 8.

172 Home Office, 1995a, para 42.

173 CPS Inspectorate, 2000, para 4.74.

174 The CPS London area and the Metropolitan Police have now agreed to a protocol whereby the police routinely send to the CPS copies of the crime report and any computer aided despatch (CAD) messages as soon as a not guilty plea has been entered or a case has been sent to the Crown Court (Heaton-Armstrong, 2001, p 13).

175 CPS (1999) Casework Bulletin, 8 September, quoted in CPS Inspectorate, 2000, para 4.132.

176 Only one-half of the police forces provide this information on a routine basis at the primary stage.

Clarification and examples are provided in para 37:

> In deciding what material might undermine the prosecution case, the prosecution should pay particular attention to material that has potential to weaken the prosecution case or is inconsistent with it. Examples are:
>
> i. Any material casting doubt upon the accuracy of any prosecution evidence.
> ii. Any material which may point to another person, whether charged or not (including a co-accused) having involvement in the commission of the offence.
> iii. Any material which may cast doubt upon the reliability of a confession,
> iv. Any material that might go to the credibility of a prosecution witness.
> v. Any material that might support a defence that is either raised by the defence or apparent from the prosecution papers. If the material might undermine the prosecution case it should be disclosed at this stage even though it suggests a defence inconsistent with or alternative to one already advanced by the accused or his solicitor.
> vi. Any material which may have a bearing on the admissibility of any prosecution evidence.
>
> It should also be borne in mind that while items of material viewed in isolation may not be considered to potentially undermine the prosecution case, several items together can have that effect.

These are important statements and represent a new resolve to move in the right direction. The question remains, however, whether the statements will have the desired impact. The Attorney General stated that the new guidelines are intended to provide interim guidance, 'pending changes to the Joint Operational Instructions to the police and the CPS, and the review of the disclosure arrangements by the Government in the light of the research commissioned by the Home Secretary'.[177] The DPP has said that one of the two principal causes of insufficient disclosure is that reviewing 'unused material is a bore and much less fun than the preparation and presentation of the case'. The second principal reason is that 'in spite of the extensive (and expensive) efforts to educate potential disclosure officers in their new roles not all of those undertaking the duty do so correctly'.[178]

This is a sad comment on the officers who have been chosen for the important post of disclosure officer. It seems as if the DPP is suggesting that some of these officers are unco-operative, if not uneducated in the rules governing disclosure. If the root of the problem of non-disclosure by the prosecution is a misunderstanding of the requirements placed on individual officers and the caseworkers, then the new guidelines will encourage some improvements. Of course, the majority of the lazy and uneducated will require more motivation. If

177 Attorney General, 2000a, p 1. The Joint Operational Instruction is a restricted document.
178 Calvert-Smith, 1999, p 20.

the root of the problem of non-disclosure by the prosecution truly is quiet disobedience by some officers towards an assigned duty, then disciplinary action must be taken. The concern is increased now that it is known that, often, investigators serve as disclosure officers also.[179] However, if the problem lies primarily in the police mindset and police decision making power, control over materials and influence over certain prosecutors, then a different approach must be taken. To a degree, the existence of the latter as a problem is recognised in the *Guidelines* (2000). Prosecutors 'must be alert to the possibility that material may exist which has not been revealed to them and which they are required to disclose'.[180] The Law Society suggests that 'the prosecutor must take responsibility for decisions about disclosure by being under a duty to make an informed independent judgment in every case about what should be disclosed'.[181] This suggestion has some merit if appropriate improvements could be achieved with respect to police adherence to the CPIA 1996. For example, the CPS Inspectorate recommended that the definition of 'prosecution material' be expanded, thereby increasing the amount of material that comes to the prosecutor for consideration.[182] This suggestion was thought to be premature by the Attorney General.[183] However, it must be recalled that some prosecutors may choose not to adopt the role of ministers of justice and may overlook the new guidelines, as they had done with the key instruction phrases found in s 3 of the CPIA 1996. Other prosecutors have reacted differently. Apparently frustration with the current system has led certain CPS offices to throw open their doors and invite ('trusted') defence advocates to look at the prosecution files, save material which is clearly protected by PII.[184] It is reported that the Serious Fraud Office (SFO), which also operates under a reciprocal disclosure regime, took similar steps in 1998.[185]

5.9.5 Assistance in secondary disclosure

The jurisprudence from the European Court of Human Rights will encourage the English court to consider the whole trial and appeal system in deciding

179 CPS Inspectorate, 2000, para 4.7.

180 Paragraph 14. One of many revisions to the *Manual of Guidance* seeks to assist investigators to disclose information to the prosecutor by adding to the MG6 form the reminder to comment on 'the strengths and weaknesses of evidence and/or witnesses/ and by providing the guidance note directing the investigator to give "details of any evidence that the officer has excluded from the file Because of doubt as to its admissibility or relevance,' as it might be disclosable under the CPIA 1996.

181 Law Society, 2000, para 8.4.

182 CPS Inspectorate, 2000, para 13.5.

183 Attorney General, 2000a, 'Commentary', pp 4–5.

184 Bennathan, 2000; Heaton-Armstrong, 2000, p 3.

185 Corker, 1999, p 38.

whether the prosecution disclosure provisions are compatible with Art 6.[186] It is appropriate to consider whether the problems found in primary disclosure are solved by secondary disclosure. The correction of these problems by other remedies at trial and appeal is discussed in Chapter 10.

The CPIA 1996 requires the prosecution to reconsider what is to be provided to the accused in the light of his defence statement. For recognition of this provision in the analysis of the fair trial provision, the court must be convinced that secondary disclosure actually occurs. It is submitted that there is no degree of certainty that the information on the prosecution files will be reviewed in most cases. The CPS Inspectorate concluded regarding secondary disclosure: 'We consider that there is scope for considerable improvement in the standards to which the prosecution carries out its duties in practice.'[187] If a review is completed, the test for secondary disclosure may be construed too narrowly.[188] Further, the defence cannot easily enforce the practical steps that must be completed by the prosecutor in this stage.[189] It appears then, that the process to access further materials through secondary disclosure is restricted by the information uncovered by the diligent and fortunate defence lawyer. He, then, must hope that the information requested is diligently searched for and found by the prosecution. In the event that the information is not forthcoming, he must succeed in convincing the court to order the disclosure. This task is made all the more difficult by the fact that the defence no longer receives the prosecution schedule of sensitive unused material.[190] Consequently, the addition of the secondary disclosure regime does not appear adequately to protect the rights of the defendant

Assuming that the diligent defender is interacting with a diligent prosecutor, the prosecutor will ask the assistance of the disclosure officer or investigator to revisit all the materials gathered. In many cases, the new approach will lead to an additional waste of resources for both the diligent defence lawyer and the disclosure officer and prosecutor, to say nothing of the increased risk of incomplete disclosure by those who are not diligent.[191] A waste of time and resources will result from the second trawl through the materials. Had the *Keane* test been retained, or had a broader view been taken of the primary disclosure obligation initially, a second review of the materials might not have

186 *Edwards v UK* (1992) 15 EHRR 417; *Craven* (2001) *The Times,* 2 February, CA

187 CPS Inspectorate, 2000, para 5.88.

188 *Ibid,* 2000, para 5.64.

189 The Attorney General (2000a, para 40) encourages prosecutors to consider disclosing various items that experience has shown to be appropriate for disclosure if the defence statement filed is clear, does not contain inconsistent defences and contains a specific request linking the item to the defence. Eg, details of reward payments made to prosecution witnesses and plans of crime scenes made by the investigator.

190 Section 4 requires only the disclosure of the list of non-sensitive unused material.

191 The Inspectorate found that a second trawl through the file is generally ineffective (CPS Inspectorate, 2000, para 5.52).

been necessary, save in the most exceptional cases. Greater disclosure can be given at an early stage without great expense through the use of information technologies.

5.9.6 Primary disclosure and defence discovery by the prosecution

The primary disclosure provisions seem even more inappropriate when viewed within the context of the addition of provisions mandating the defence disclosure to the prosecution in s 5 of the CPIA 1996. Simply stated, s 5 requires more disclosure from the defence in many situations (in the Crown Court) than is required from the prosecution under s 3, or at least from what has been given by some prosecutors. For an analysis of defence disclosure see Pt 12.5.

5.10 THE UNREPRESENTED AND PROSECUTION DISCLOSURE

The right of the accused to a fair trial remains, even if he is unrepresented. The prosecution must provide disclosure before trial. However, since the prosecution provides information directly to the accused, and not to a solicitor, special care must be taken. As the Attorney General stated in the *Guidelines* (2000): 'Fairness does, however, recognise that there are other interests that need to be protected, including those of victims and witnesses who might otherwise be exposed to harm'.[192]

In England, the previous statutory regime, that required the provision of advance information to the defence about the evidence to be used by the prosecution, includes unrepresented accused persons, except in summary matters.[193] Usually, disclosure of the evidence upon which the prosecution will rely is facilitated in the committal or sending process by the provision of copies of witness depositions. In the event that the accused was committed on the papers, while represented, and then proceeded to trial unrepresented, the prosecution had to provide the accused with copies of the statements of the prosecution witnesses. This had to occur in advance of the day of trial.[194] It will be recalled that the Magistrates' Courts (Advance Information) Rules 1985 include unrepresented persons.[195] The prosecutor in all situations retained a large measure of discretion.

192 Paragraph 3.
193 *Runciman Report*, 1993, para 8.15. However, the prosecutor should disclose his case (Attorney General, 2000a, para 43).
194 *Rowley* [1968] Crim LR 630.
195 Discussed in Pt 3.5.

Earlier, the *Attorney General's Guidelines* (1981) pertaining to unused material and matters to be tried on indictment stated that, if the information had some bearing on the offence, then even the unrepresented accused should get disclosure except for sensitive material and subject to the prosecutor's discretion.[196]

Now the CPIA 1996 prescribes primary disclosure to the accused.[197] In an effort to bolster the protection against improper circulation or use of information gained by the accused, the CPIA 1996 prohibits the accused from using the material disclosed for any other purpose than that of the instant case.[198] Also, the court will allow the prosecution to make restrictive arrangements. For example, in *Ex p J*, even though the accused was represented, the prosecution was allowed to restrict the circumstances of inspection, and to refuse a copy, of audio and videotapes which were to be relied on at trial.[199] The discussion in Chapter 6 provides further useful points common to those with or without advocates.

In Canada, since disclosure is triggered by the request of the defence, the prosecutor should advise the unrepresented accused that pre-trial disclosure is available.[200]

The trial judge should not receive the plea until he is satisfied that the accused is aware of the right to request disclosure. This obligation may be excused where the accused insists on entering a guilty plea at the first appearance, and no miscarriage of justice results.[201]

The Newfoundland Court of Appeal has stated that it might be dangerous to provide an unrepresented accused with actual copies of witness statements, even in summary conviction proceedings.[202] Therefore, the prosecutor must balance the various interests in providing disclosure.

196 Paragraph 14, discussed in Pt 3.5.
197 Section 3. Also, s 2 defines the 'accused' as the person who is charged (s 1).
198 Sections 17 and 18.
199 *X Justices ex p J* [2000] 1 All ER 183 DC.
200 *Stinchcombe* [1991] 3 SCR 326, p 343.
201 *T(R)* (1992) 10 OR (3d) 514 CA.
202 *Luff* (1992) 11 CRR (2d) 356.

PUBLIC INTEREST AND DISCLOSURE

6.1 INTRODUCTION

While the ability of the court to come to a just verdict is enhanced when it has access to all relevant information, it is recognised that other interests place limits on the amount of information that can reasonably be disclosed.[1] Among these interests are national security, protection of informants and police investigation techniques, and legal professional privilege. The resolution of conflicts among public interests has a prominent role in fair trials and disclosure.

6.2 SENSITIVE MATERIAL, PII AND DISCLOSURE

The *Keane* materiality test, if applied literally, would require the police and prosecutor to disclose a wide range of information. Some of the information might be embarrassing to a citizen or a police officer and yet be only marginally relevant to a particular criminal proceeding. Other information of marginal relevance might have been received on the basis that it was to be held in confidence. At the other end of the scale, a portion of the information might, if revealed, damage national security. It may or may not be material to the proceeding. Consequently, the public interest dictates that the prosecution's duty of disclosure be limited in certain circumstances. The issues for discussion here include the nature of the information that is protected by public interest immunity (PIT) in contrast to information that is simply sensitive, and which sensitive information, if any, can be withheld from the defence. Also, one must be cognisant of the effects of the demarcation as between the public interest in the 'fight against crime', and the public interest in privacy and fair trials. Legal professional privilege is described in Pt 6.11.

The boundaries of PII are not absolute. The jurisprudence confirms that the categories of PII are not closed.[2] It also reveals inconsistent approaches to the issue of whether PII attaches to a 'class' of documents or only the 'contents' of

1 *Rowe and Davis v UK* (2000) 30 EHRR 1 (ECtHR).

2 *D v NSPCC* [1978] AC 171 HL, p 230, cited in *Chief Constable of the West Midlands Police Force ex p Wiley* [1995] 1 Cr App R 342 HL, p 371.

certain documents, or both.[3] The categories of PII that have been recognised include State interests, the prevention, detection and investigation of crime, persons who house police observation posts and police manuals and techniques. Other categories are police reports in complaint procedures, or letters seeking the advice of the Crown Prosecution Service (CPS) in prosecutions,[4] together with various categories of records and information relating to children held by the Department of Social Services, or related agencies.[5]

The Criminal Procedure and Investigations Act (CPIA) 1996 does not vary the common law relating to the ambit of PII,[6] but it does codify the procedure in relation to the claim of PII by the prosecution and create some practical difficulties for the defence. The CPIA 1996 relieves the prosecution of the duty to provide the defence with a copy of the schedule of sensitive material that was created by the police for the prosecutor[7] and broadens the definition of 'sensitive' for the purpose of scheduling.[8] It also affects third parties holding confidential (sensitive) information by adding to their rights to be heard in applications by the prosecution to withhold information on the basis of the public interest[9] and to challenge summonses to give evidence.[10] Third parties are discussed in Pt 7.6.

6.3 POLICE CONCERNS AND THE RUNCIMAN REPORT

The police, in their evidence to the Runciman Commission, expressed grave concern with respect to the impact of the common law disclosure obligation on the release of sensitive information and information that should attract PII. Of particular concern was the impact on the 'fight against crime'. Fear was expressed that disclosure obligations would undermine two of the recognised classes of PII (those being informants and investigation techniques) and lead to the eventual demise of critical sources of information.[11]

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3 *O'Sullivan v Comr of Police of the Metropolis* (1995) *The Times*, 3 July; *Taylor v Anderton (Police Complaints Authority Intervening)* [1995] 1 WLR 447 CA; *Chief Constable of the West Midlands Police Force ex p Wiley* [1995] 1 Cr App R 342 HL; *Clowes* (1992) 95 Cr App R 440; *In Re Barlow Clowes Gilt Managers Ltd* [1992] Ch 208; *Carey v Ontario* [1986] 2 SCR 637.

4 *Taylor v Anderton (Police Complaints Authority Intervening)* [1995] 1 WLR 447 CA.

5 *D v NSPCC* [1978] AC 171 HL.

6 Section 21(2).

7 Section 4.

8 The code, para 6.12.

9 CPIA 1996, s 16.

10 *Ibid*, s 66 amending the Criminal Procedure (Attendance of Witnesses) Act 1965.

11 *Runciman Report*, 1993, paras 6.41–43.

The Runciman Report agreed that the situation was 'exacerbated by the Court of Appeal's judgment in the case of *Ward*', but took the view[12] that the law pertaining to PII was properly refined and that a 'satisfactory balance' had been reached in the decision in *Davis, Johnson and Rowe*.[13]

However, the Runciman Report felt that the prosecution should be allowed to seek protection from disclosure of certain sensitive material that did not meet the criteria of PII. This could be achieved by allowing applications for an order to be excused from disclosing matter on the basis of either PII or sensitivity. This modification would assist in protecting some confidential and sensitive information from disclosure. The prosecution was to continue to provide to the defence the schedule of sensitive (including PII) materials so that the defence could make submissions about the appropriateness of the prosecution's desire to withhold a document.[14] This would serve as a safety check. Further, to assist in the need to keep certain information confidential, the Runciman Report proposed a two stage disclosure regime. By requiring a defence statement before secondary disclosure, the issues would be focused and the defence would not be able to 'trawl through all the matter on file'.[15]

In 1996[16] and 1999, Chief Constable Sir David Phillips argued afresh the need for more protection for sensitive information. Phillips stated that if 'common sense' was not applied in the scope of the disclosure obligation, that is, to the investigation only, then peregrinations into police records would expose police methods and intelligence. As a consequence, the police would be able only successfully to detect and prosecute the 'feckless and the obvious'. There would not be a credible response to organised and serious crime. He also raised privacy concerns, arguing that witnesses for either side will be even less willing to get involved unless the rule requiring their criminal records to be disclosed is reversed.[17]

6.4 COMMON LAW RULES, SENSITIVE AND PII

In both countries, appellate courts have found that it is for the court, and not the prosecution, to decide whether information may be properly described as subject to PII and, therefore, withheld from the defence.[18] The appellate courts continue

12 *Runciman Report*, 1993, paras 6.44–47.
13 (1993) 97 Cr App R 110 CA.
14 *Runciman Report*, 1993, paras 6.47–51.
15 *Ibid*, paras 6.51–52.
16 Phillips, 1996, p 15.
17 Phillips, 1999, pp 15–16.
18 *Ward* (1993) 96 Cr App R 1 CA, p 27; *Rowe and Davis v UK* (2000) 30 EHRR 1 (ECtHR); *Stinchcombe* [1991] 3 SCR 326, pp 335–36.

to warn that special care must be taken in considering the question of the disclosure of the identity of informers.[19] Where the prosecution is of the view that it does not wish to provide the information to the court for the purposes of determining the question of the validity of a claim to PII, then the likely result will be the abandonment of the prosecution.[20]

6.4.1 English and Welsh procedure

The procedure to be followed in claiming PII, and resolving disputes regarding PII, was settled by the Court of Appeal in *Davis, Johnson and Rowe*[21] and confirmed by the European Court of Human Rights (ECtHR) in *Rowe and Davis, Jasper and Fitt*.[22] Recently, the procedure has passed the scrutiny of the Court of Appeal in the light of the Human Rights Act (HRA) 1998.[23] Where the prosecution wishes[24] to be excused from disclosure on the basis of the public interest, three possible procedural routes are available. The choice of application is related to the nature of the material being considered. In the standard situation, the prosecution must provide notice to the defence of its intended application to the court, along with sufficient particulars of the category of the materials that the court will be examining, so as to facilitate representations by the defence.[25] In extraordinary circumstances, where notice to the defence would defeat the purpose of the application (by revealing that which the prosecution contended should not be revealed), then the court may hear the matter *ex parte*.[26] The defence should be notified that the application is to take place. If exceptional circumstances arise, for example, where to reveal even the fact that an *ex parte* application was to be made would, in effect, be to reveal the nature of the evidence in question, the court may hear the matter *ex parte* without any indication to the defence. The trial judge must strike a proper balance and ensure that the defence has 'as much protection as can be given without pre-empting the issue'. Once the

19 *Turner* [1995] 2 Cr App R 94 CA; *Menga and Marshalleck* [1998] Crim LR 58 CA; *Chaplin* [1995] 1 SCR 727; *Khela* [1995] 4 SCR 201; *Leipert* [1997] 1 SCR 281 (crimestoppers, no disclosure required).

20 *Ward* (1993) 96 Cr App R1 CA, p 57; *Meuckon* (1990) 78 CR (3d) 196 BCCA.

21 *Davis, Johnson and Rowe* (1993) 97 Cr App R 110 CA.

22 *Rowe and Davis v UK* (2000) 30 EHRR 1 (ECtHR); *Jasper v UK* (2000) 30 EHRR 441 (ECtHR); *Fitt v UK* (2000) 30 EHRR 480 (ECtHR).

23 *Smith (Joe)* [2001] 1WLR 1031 CA.

24 The *Attorney General's Guidelines* (2000a, para 41) state: 'Before making an application to the court to withhold material which would otnerwise fall to be disclosed, on the basis that to disclose would not be in the public interest, a prosecutor should aim to disclose as much of the material as he properly can (by giving the defence redacted or edited copies of summaries).'

25 *Davis, Johnson and Rowe* (1993) 97 Cr App R 110 CA, p 114.

26 The prosecution has a duty to present accurate information to the judge: *Jackson* [2000] Crim LR 377 CA.

decision has been made against revelation of the material, the trial judge must remain alive to the possibility that the withheld material, in whole or in part, may have to be revealed during the trial if justice so demands. Consequently, it is important that the judge who decides the application is the one to preside at the trial.[27]

In *Keane,* Lord Taylor CJ explained how the balancing exercise inherent in the decision whether or not to order disclosure is to be reconciled with a defendant's fundamental right to a fair trial: 'If the disputed material may prove the defendant's innocence or avoid a miscarriage of justice, then the balance comes down resoundingly in favour of disclosing it.'[28]

6.4.2 Canadian procedure

A similar approach to PII is found in the common law of Canada, although certain issues are addressed in legislation at both the federal and provincial level.[29] Some pre-*Stinchcombe* background information may be instructive. Prosecutions conducted under the authority of the Federal government are subject to the Canada Evidence Act which contains the relevant provisions.[30] The provisions have the effect of restricting the breadth of the privilege of the State, excepting s 39, which provides an absolute privilege for confidential cabinet papers. There is special provision for objections on the basis of 'international relations or national defence or security', requiring the application to take place before the Chief Justice of the Federal Court (or his designate) and authorising the use of *in camera* and *ex parte* applications.[31] Otherwise, the procedure to be followed in PII claims by a Minister of the Crown or his representative, and challenges thereto, are outlined in s 37. The trial judge is provided with a large measure of discretion, but he must balance the public interest favouring disclosure against the other aspects of the public interest.[32] For example, in *Meuckon,* a case addressing disclosure and police practices, the court said: 'If an objection is made and the public interest is specified, then the trial judge may examine or hear the information in circumstances which he considers appropriate, including the absence of the parties, their counsel and the public. Whether the trial judge does hear or examine the information, or whether he does not, the trial judge may then either uphold the claim of the

27 For summary trials, discussed in Chapter 9, see CPIA 1996, s 14 and *Stipendary Magistrate for Norfolk ex p Taylor* (1997) 161 JP 773 DC.

28 *Keane* (1994) 99 Cr App R 1 CA, p 6.

29 Beach, 1994, p 77.

30 Revised Statutes of Canada (RSC) 1985, ss 37–39.

31 Eg, Canada Evidence Act, s 38(1)(5). Where critical evidence is being justifiably withheld, the court may enter a stay after the Crown declines to do so, *Kevork* (1986) 27 CCC (3d) 523 (Ont HC).

32 Section 37(2).

Crown privilege or order the disclosure of the information either with conditions or unconditionally.'[33]

In prosecutions conducted by a provincial government, including prosecutions under the *Criminal Code of Canada* and in respect of provincial offences, the common law governs. Therefore, issues of State interest are not subject to the provisions of the Federal Act,[34] except in Quebec where the *Code of Penal Procedure* applies the Federal Act in matters prosecuted in Quebec.[35] Consequently, the more comprehensive protection given to the State in the common law[36] was applied in criminal prosecutions until the more recent modifications that occurred in the 1990s.

In *Stinchcombe,* the Supreme Court of Canada recognised 'the overriding concern that failure to disclose impedes the ability of the accused to make full answer and defence'.[37] Later, the court re-emphasised the fact that the burden remains on the Crown to justify non-disclosure on the basis of privilege at this period of time when there is a new emphasis on disclosure of unused materials.[38] Therefore, if the defence sought a review of the prosecution decision not to disclose, the onus was on the Crown to justify its refusal.[39] The common law of Canada, therefore, was basically the same as the common law of England.

6.5 INFORMATION SUPPORTING WARRANTS

The disclosure of information given in support of an application for a search warrant, and a warrant for the interception of private communications by wiretap and similar technologies raises additional issues and procedures.

In England, the accused is denied access to the information given in support of an application for a search or intrusive surveillance warrant. Evidence gained from a search under warrant is admissible, subject to violations of the Police and Criminal Evidence Act (PACE) 1984.[40] Disclosure would assist the accused in attempting to challenge the use of evidence gained from a search. In *Smith (Joe),* the court found as correct the long held view that documents or information used to obtain a search warrant were protected by PII.[41]

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33 *Meuckon* (1990) 78 CR (3d) 196 BCCA, p 203.
34 *Carey v Ontario* [1986] 2 SCR 637.
35 Revised Statutes of Quebec (RSQ) 1977, s 61.
36 Beach, 1994, p 354. This is subject to the duty to reveal exculpatory evidence, *Stewart* (1984) 13 CCC (3d) 278 (BCSC).
37 *Stinchcombe* [1991] 3 SCR 326, p 336.
38 *Egger* [1993] 2 SCR 451, p 453.
39 *Stinchcombe* [1991] 3 SCR 326, p 340.
40 PACE 1984, ss 15, 78 and Code B.
41 [2001] 1 WLR 1031CA.

Information gained from intrusive surveillance under a warrant cannot be used in evidence and is protected from disclosure.[42] However, the police can use the information obtained to gather other evidence against a suspect. The restriction has the effect of placing beyond the reach of the defence an objective record of conversations (potentially) misconstrued by witnesses for the prosecution,[43] or records of exculpatory evidence.[44] The issue as to whether the fact that there had been an interception of communication can be disclosed was not addressed in the Regulation of Investigatory Powers Act (RIPA) 2000.[45] There is no duty to reveal that an intercept had occurred.[46]

For the purpose of certainty, the CPIA 1996 addresses the disclosure of intercepted private communications. In ss 2, 3(7), 7(6) and 8(6), the prosecution is directed not to disclose information intercepted in obedience to a warrant issued under the Interception of Communications Act (ICA) 1985, or its successor, the RIPA 2000. However, other unused information gathered via intrusive surveillance under the Police Act (PA) 1997 must be taken into account.[47]

Disclosure to the defence of the information given in support of an application for a search or intrusive surveillance warrant is required in Canada because evidence from a search or a wiretap is admissible, subject to a Charter breach.[48] The information filed in support of a warrant for search[49] or interception of communication,[50] is to be disclosed to the accused under certain restrictions, including those relating to editing by the court.[51] Citizens are entitled to be informed after the conclusion of a wiretap that their private communications had been intercepted.

42 RIPA 2000, ss 17 and 18. Exceptions exist where material was gathered in accordance to the exceptions to the warranty regime, s 18(4), ie, ss 1(5)(c), 3 or 4. RIPA 2000 repealed, and replaced with similar provisions, the ICA 1985, s 9. Parallel provisions exist in the PA 1997, Pt III.

43 Mirfield, 2001, p 91.

44 *Preston* (1994) 98 Cr App R 405 HL. (Counsel for the prosecution was advised by the Attorney General that counsel was under no obligation to examine intercepted communications as it would not and could not be called in evidence.)

45 If it is discovered, the citizen can ask a tribunal to review whether it was legal (RIPA 2000, s 65 (formerly, ICA 1985, s 7)).

46 Akdeniz *et al*, 2001, p 79.

47 PA 1997, s 101; Intrusive Surveillance Code of Practice, 1999, para 2.34.

48 Criminal Code, Pt XV, s 487 (search) and Pt VI, s 189 (intercept).

49 *Hunter* (1987) 34 CCC (3d) 14 Ont CA.

50 *Rowbotham* (1988) 41 CCC (3d) 1 Ont CA.

51 *Dersch and Others v AG of Canada* [1990] 2 SCR 1505; *Garofoli* (1990) 60 CCC (3d) 161.

6.6 COMMON LAW RULES, SENSITIVE BUT NOT PII

Sensitive information that does not reach the threshold of PII is treated differently at common law from information that may be protected. For current purposes, it is appropriate to begin with the *Attorney General's Guidelines on Disclosure of Unused Material* (1981). The guidelines addressed the issue of disclosure of unused material, prosecutorial discretion and sensitive matters. It failed, however, to discriminate clearly between the issues of PII and sensitivity. It stated that the duty to disclose was subject to a discretionary power in the prosecutor to withhold relevant evidence if it was 'sensitive' and it would not be in the public interest to disclose. Sensitive material was defined very broadly and included matters that are properly recognised as protected by PII and other matter not so protected. The latter category included matters of private delicacy, revelation of accusations, or of the criminal record of a person not involved, and materials received unofficially from sources, for example, bank officials, pending the provision of a subpoena.[52] The decision of the prosecutor was to be made as follows: 'In deciding whether or not statements containing sensitive material should be disclosed, a balance should be struck between the degree of sensitivity and the extent to which the information might assist the defence.'[53]

Unfortunately, the protection offered against disclosure of sensitive material was subject to misuse from time to time. For example, 'sensitivity' was used as a justification for refusal to disclose constables' notes that were inflammatory or revealed error in process. Also, it was used to withhold the fact that a prosecution witness whose evidence was challenged had applied for or received a reward for giving information.[54] It is to be recalled that the Court of Appeal, in 1992, stated that it was for the court to determine whether information should be withheld[55] and, if the refusal was founded on PII, the court had to view for itself the information in question.[56] Later, the Court of Appeal, in *Brown (Winston),* clearly stated that 'sensitivity' was not in itself a valid reason for refusal to disclose.[57] Where information does not meet criteria for PII, and it is material, it must be disclosed.

52 Paragraph 6(v).
53 Paragraphs.
54 *Rasheed* (1994) *The Times,* 20 May CA.
55 *Ward* (1993) 96 Cr App R 1 CA.
56 *Trevor Douglas K* (1993) 97 Crim AppR 342 CA.
57 *Brown (Winston)* [1995] 1 Cr App R 191 CA, p 198.

The Supreme Court of Canada had occasion to reach the same conclusion regarding sensitive material in addressing the disclosure of confidential therapist notes in the possession of the crown.[58]

In summary, there are six settled propositions regarding the determination of disputes pertaining to PII and sensitivity in England. First, it is for the court to rule on the question of immunity. Secondly, to complete this task the court must view the material for which immunity is claimed. Thirdly, the judge must always perform a balancing exercise, taking into account the public interest and the interests of the defendant. Fourthly, if the disputed material may prove the defendant's innocence or avoid a miscarriage of justice, then it must be disclosed, or the proceedings must be stayed or modified. Fifthly, if the trial judge initially decided against disclosure, he is under a continuous duty to keep that decision under review. Finally, 'sensitivity' alone is not a valid reason for refusal to disclose.[59]

6.7 CPIA 1996 AND PII

The CPIA 1996 addresses PII in relation to primary[60] and secondary disclosure[61] and also contemplates discontinuance of the proceedings as a possible result.[62] The prosecutor may apply to the court for an order excusing him from the disclosure rules on the basis of PII. The court is required to weigh the competing public interests. Rules of court made pursuant to s 19 of the CPIA 1996 set out the procedure for making application. These are the Crown Court (CPIA 1996) (Disclosure) (Rules) 1997[63] and the Magistrates' Courts (CPIA 1996) (Disclosure) (Rules) 1997.[64] These rules were modelled on the procedure set out in *Davis, Johnson and Rowe*.[65]

The principles of the common law as to whether disclosure is in the public interest are retained under s 21(2) of the CPIA 1996. Therefore, the court will remain the final arbiter of disclosure disputes relating to the non-disclosure of allegedly PII material. The CPIA 1996 codifies the common law duty of continuous review of non-disclosed material by the Crown Court[66]

58 *O'Connor* [1995] 4 SCR 411, p 432. Legislation is now in force in Canada pertaining to confidential information held by the therapist of a victim of a sexual crime (Criminal Code, s 278).
59 Approved in *Brown (Winston)* [1995] 1 Cr App R 191 CA, p 200.
60 Section 3(6).
61 Section 7(5).
62 Sections 14(2) and 15(2).
63 SI 1997/698.
64 SI 1997/703.
65 (1993) 97 Cr App R 11CA.
66 Section 15(3).

and, therefore, satisfies the criteria of the European Convention on Human Rights (ECHR).[67]

The *Attorney General's Guidelines* (2000) make only brief reference to PII. At para 41: 'Before making an application to the court to withhold material which would otherwise fall to be disclosed, on the basis that to disclose would not be in the public interest, a prosecutor should aim to disclose as much of the material as he properly can (by giving the defence redacted or edited copies of summaries).'

6.8 SENSITIVE MATTERS, INTEREST IN PRIVACY AND THE CPIA 1996

Protection afforded to information under PII does not extend to information that is sensitive but not within the confines of the PII criteria. Nonetheless, the importance of protecting from disclosure sensitive material that was not relevant to the defence was an issue pressed by the police and recognised afresh in the CPIA 1996. Steps towards greater protection for privacy were achieved through a combination of changes. These include narrowing the *Keane* materiality test, redefining 'prosecution material', placing the decision as to primary disclosure on the prosecutor[68] and controlling the content and distribution of the schedules cataloguing information. It will be recalled that the disclosure officer prepares the schedules of unused material. The schedules are to contain a record of sensitive and non-sensitive material. In exceptional circumstances the disclosure officer may orally communicate the sensitive material to the prosecutor.[69] The schedule of unused sensitive material is no longer provided to the defence.[70]

The categorisation of a document as sensitive does not grant automatic protection from disclosure. However, if PII does not clearly apply, it is possible that an application pertaining to sensitive matters may be made with a view to attempting to extend the boundaries of PII.[71] There are still many grey areas in the law of PII. The debate between class or contents based PII will allow for far reaching claims of PII for years to come. It is important to notice that s 16 affords an opportunity for input by affected third parties. Some third parties may have

67 *Rowe and Davis v UK* (2000) 30 EHRR1 (ECtHR); *Smith (Joe)* [2001] 1 WLR 1031 CA.

68 Section 3. The court is not to assist the prosecutor in determining whether sensitive material that falls short of the PII standard should be disclosed; *B* [2000] Crim LR 50 CA.

69 Paragraph 6.9.

70 CPIA 1996, s 4.

71 Eg, ss 3(6) and 7(5). The *Runciman Report*, 1993, para 6.47, recommended that the prosecution should be able to withhold information on the basis that it was 'sensitive'.

such stature that the court might be inclined to extend the privacy interest to cover things that might arguably be only 'sensitive'.

At a more practical level, it is the police who are required to draw the schedules. The natural consequence of requiring the police to make the decision—on the basis of the public interest (as they understand it)—may mean that more information may be placed on the sensitive schedule (as opposed to the non-sensitive schedule) than otherwise is appropriate. If prosecutors are not vigilant in reviewing the schedules, incorrect listing will not be detected. Survey results indicate that the schedules are not always accurate[72] and that there is no evidence that prosecutors review the validity of the claim that the material is sensitive.[73] The combined effect of not allowing the defence to have access to the schedule of sensitive material and the restricted definition of the concept of materiality for the purposes of disclosure has dramatically reduced the ability of the defence to consider unused material.[74] This may have the effect of reducing the compliance with the right in the accused to, and the public interest in, a fair trial. However, it is likely to assist greatly in protecting the public interest in privacy.[75]

The police continue to press for greater restrictions on the amount and type of information to be disclosed.[76] The ECtHR continues to make the point mat a fair trial requires fair disclosure. If information is withheld on the basis of the public interest, it may lead to difficulties for the defence. Any difficulties arising from the withholding of disclosure in the public interest must be counterbalanced by a procedure supervised by the court.[77] This might be achieved through providing to the court, or the defence, an independent counsel to argue the points for the defence in *ex parte* applications.[78] The suggestion of a special independent counsel had attracted a good deal of discussion in the last year, including the endorsement of Professor Ashworth[79] and Tim Owen QC.[80] Special counsel is provided for in immigration matters, building on the procedure enacted in Canada, and in sexual assault cases where the accused is not represented and is desirous of cross-examining the victim.[81]

72 CPS Inspectorate (2000, paras 6.7 and 6.11) found that the schedule of unused sensitive material was almost always completed, but was defective in 21.5% of the sample.
73 *Ibid,* para 622.
74 Padfield, 1997, p 8.
75 Anecdotal evidence indicated that the number of applications to withhold sensitive information had not increased under the CPIA 1996.
76 Phillips, 1999, p 15.
77 *Dovis and Rowe v UK* (2000) 30 EHRR 1 (ECtHR).
78 *Jasper v UK* (2000) 30 EHRR 441 (ECtHR); *Fitt v UK* (2000) 30 EHRR 480 (ECtHR).
79 Ashworth, 1999b, p 412.
80 Owen, 2000, p 25.
81 Youth Justice and Criminal Evidence Act 1999.

6.9 AULD REPORT

It is predicted that the Auld Committee will recommend that no change be made with respect to the amount of information that can be withheld from the defence. However, it is hoped that the committee will recommend that more information be made available to the court during *ex parte* PII applications, including requiring the prosecution to give sworn evidence by affidavit.[82] Further, as suggested earlier in the Butler Report,[83] the prosecution should provide a schedule identifying the documentation in respect of which PII is sought and the reasons why it is sought. Also, in complex or lengthy cases, the court should be provided with the assistance of a suitably qualified assistant to aid in monitoring PII issues during the trial, akin to a counsel to a commission of inquiry.[84] This may be preferred over the equally important, but fiscally untenable suggestion received by the Auld Committee, that special counsel be appointed for the defence where the prosecution seeks to withhold information and seeks to do so in an ex *parte* application. Hopefully, it will also be recommended that a shorthand reporter be present to make a record during *ex parte* applications, a matter raised in the decision in *Smith (David)*.[85]

6.10 RESTRICTION OF USE AND PRIVACY

The purposes for which disclosed material may be used is limited under common law and statute. In *Taylor v Director SFO,*[86] the Lords first affirmed the broad approach to disclosure at common law and then reaffirmed the restrictions on the use that can be made of disclosed material in any collateral endeavour, for example, defamation actions. The prohibition is repeated in ss 17 and 18 of the CPIA 1996. It is a criminal offence to misuse or disseminate information received under the disclosure regime. It is not dependent on the information being sensitive. This provision assisted in addressing the public interest in the privacy of complainants and witnesses.[87] Subsequent legislation addressed the more complex topic of access by the defendant to photographs of and statements made by the victim in sexual offences.[88] In addition, confidential information in

82 *Auld Report,* 2001.
83 *Butler Report*, 2000, rec 12.
84 The *Butler Report* (2000, rec 29) raised this concern. See Corker, 1999, p 43.
85 *Smith (David)* [1998] 2 Cr App R 1 CA.
86 *Taylor v Director SFO* [1999] 2 AC 177 HL.
87 Additional protection is found in the CPIA 1996, s 58, which provides the court with authority to ban from publication derogatory assertions made in speeches of mitigation.
88 Sexual Offences (Protected Material) Act 1997. The defendant is prevented from keeping a copy of the protected material, although he is given full access to it under supervision.

the hands of third parties need not be given automatically to the defence. Attempts to access that information is subject to the 'materiality and admissibility' criteria in the issuance of witness summonses.[89] This is discussed in Pt 7.6.

6.11 LEGAL PROFESSIONAL PRIVILEGE AND THE PROSECUTION

In addition to the limits imposed on prosecution disclosure arising from the public interest in protecting the ability of the police to detect and fight crime discussed above, a further limit on disclosure is found in legal professional privilege. The prosecutor and the investigator may be in the relationship of solicitor and client in certain situations. For example, when advice is sought as to whether a planned drug 'sting' operation is legal.[90]

Legal professional privilege includes the 'work product' of the prosecutor, for example, the opinions, theories or approach to the case and counsel's notes.[91] Also, it may be argued that counsel's papers are simply immaterial. It will be recalled that PII may be used to prevent the disclosure of police reports to the DPP[92] and summaries of the case for the CPS with comments of police on the truthfulness of potential witnesses.[93]

89 The Criminal Procedure (Attendance of Witnesses) Act 1965 as amended by the CPIA 1996, s 66; *Reading Justices ex p Berkshire* CC [1996] Cr App R 239 DC.

90 *Goodridge v Chief Constable of Hampshire* [1999] 1 WLR 1558 HL; *Campbell and Shirose* [1999] 1SCR 565.

91 *O'Connor* [1995] 4 SCR 411, pp 470–71; *Dixon* [1998] 1 SCR 244, pp 256–57; *Campbell and Shirose* [1999] 1 SCR 565.

92 *Evans v Chief Constable of Surrey* [1988] QB 588; *Brennan Paving and Construction Ltd* [1998] 115 OAC 255 Ont CA (memo from Ministry of Labour about whether charges should be laid was privileged).

93 *O'Sullivan v Comr of Police of the Metropolis (*1995) *The Times*, 3 July (action for wrongful arrest); *V(WJ)* (1992) 72 CCC (3d) 97 Nlfd CA (police comments).

PRACTICAL ISSUES IN DISCLOSURE

7.1 INTRODUCTION

A few topics remain to be considered now that the applicable principles, and some of the evidence of recent practice found in the studies and judgments, have been discussed. These topics can be usefully grouped under the heading of practical issues in disclosure. The topics to be examined include whether the police actually have a central case file in which to gather information, continuing resource issues and how much information regarding the occupational history of a police officer must be released when he is expected to testify. Other topics include the amount of information that must be disclosed to the defence about the credibility of a defence witness who is expected to testify, infallibility of the DNA databank and Victim Impact Statements, and the obligation on the prosecution to note formally and pass on to the defence confidential material in the hands of third parties that may assist the defence. Finally, the approach to be taken when evidence has been lost or destroyed by the prosecution will be discussed.

7.2 CENTRAL CASE FILE

In defining the practice and procedure relating to disclosure by the prosecution of its case and unused material, it is helpful to consider the method used to store information gathered in the course of an investigation. The Code of Practice (the code) requires that the police record and maintain the information.[1] Investigators have gathered and stored information in a variety of ways over the years and they continue to use traditional methods.[2] For example, some information will be kept in the officer's notebook, or sent to the lab for analysis, or recorded on various forms prescribed by individual forces.[3] Some information is retained in its original form, such as audio or videotapes. On occasion, tapes are left in the investigator's desk. They may be transcribed, with various degrees of accuracy.[4] Other information may be part of a larger

1 Paragraphs 4 and 5.
2 Eg, *Langley* [2001] All ER(D) 240 CA, where a police officer produced undisclosed documents while in the witness box. The conviction was found to be unsafe.
3 HMI Constabulary, 1997, Appendix C
4 Baldwin, 1993, p 4.

intelligence gathering program, or emergency response system (999).[5] Consequently, the information that should be considered, and perhaps disclosed, rarely exists in a central file folder.[6]

Efforts have been made to improve the standardisation in the collection and preservation of evidence. In addition to the code, one motivating factor has been the desire to gain efficiency in preparation of the prosecution file and another has been to reduce the administrative burden on the police.[7] However, as conceded by Sir David Phillips, 'prosecution disclosure is not always done as well as it should be.'[8] and it is necessary to take steps to improve. He stated that: 'I am drawn to the provisional view that we need to create an investigative regime which records the progress of the case in a routine fashion…so as to create a contemporaneous schedule. In more serious cases the dossier would be both a "policy file" and a record of investigative transactions. We are intending to trial this possibility and if it is viable it may at least provide a clearer starting point for the consideration of disclosure—in many cases it might be sufficient of itself.'[9] It is submitted that his suggestion is the way forward.

In a similar vein, the Crown Prosecution Service (CPS) Inspectorate recommended that the CPS better manage materials forwarded to them and better organise the approach taken to, and the recording of the details of, primary and secondary disclosure.[10] The *Attorney General's Guidelines* (2000) provide some specific guidance in this regard. For example, the prosecutor is to review thoroughly the schedules and to take action immediately to seek properly completed schedules in the event of a deficiency (para 14) and to record in writing all actions and decisions made (para 19).

7.3 RESOURCE ISSUES

The Court of Appeal in *Davis, Johnson and Rowe* restated the general rule that the prosecution is duty bound voluntarily, and without request, to make all unused evidence or materials available to the defence advisor.[11] The Criminal Procedure

5 The code contains an extensive list of material that should be retained (para 5.4).
6 Law Society, 1991, p 33.
7 Mackie *et al*, 1999, p 460. The *Manual of Guidance* was revised to provide for two (expedited and full) rather than three prosecution files (Home Office, 2000a, para 3.1).
8 Phillips, 1999, p 18.
9 *Ibid*, p 19. The Law Society (1991, para 3.10) had earlier made the suggestion of creating a contemporaneous schedule styled an investigation log.
10 CPS Inspectorate, 2000, para 10.7.
11 *Davis, Johnson and Rowe* (1993) 97 Cr App R 110 CA, p 114; *Stinchcombe* [1991] 3 SCR 326, p 338.

and Investigations Act (CPIA) 1996 modified the duty into a two stage regime. However, some resource issues remain outstanding.

7.3.1 Fee for copies

Taking into account the full range of issues that can form part of the debate on whether general or restricted prosecution disclosure is appropriate, it is submitted that it is improper to place too much significance on the simple question of the cost of the photocopies or audiotape copies, or the facilities for inspection of material.[12] Nonetheless, a great deal of energy continues to be expended on this point.

In England committal papers are given to the defence without fee. The police are required to provide a copy of the tape-recording of the interview of the accused.[13] Pursuant to the *Attorney General's Guidelines on Unused Material* (1981) 50 copied pages were provided without fee. Unused material is now disclosed in summary matters pursuant to the CPIA 1996. *The Attorney General's Guidelines* (2000) do not address the issue of fees so no change in practice is expected. In contrast, there is no right to the disclosure of evidence upon which the prosecution will rely in summary trials, although the new guidelines state it should be given (para 43). In support of this position, Collins J expressed the view that the cost of providing disclosure by way of copies (or disks) could be offset by charging a fee.[14]

It is helpful to remember that the purpose of disclosure is to facilitate a fair trial. Therefore, it appears incorrect in principle to attempt to charge a fee.[15] In any event, it is unlikely that imposing a fee would generate any net revenue. Most defendants are legally aided or impecunious. This may lead to further budget concerns or conflicts between prosecution offices and the Legal Service Commission.[16] With the advancement of technology, the question of charging a fee for disclosure must be put aside as irrelevant.

12 See Pt 4.5.1.

13 PACE 1984, Code of Practice E, para 4.16.

14 *Stratford Justices ex p Imbert* [1999] 2 Cr App R 276 DC, p 283; LCCSA, 1995, para 5.32.

15 Justice Watt of Ontario, stated that it was wrong to require the accused to pay for advance disclosure of the Crown's case because disclosure was a part of the accused's right to prepare a defence and have a fair trial (Owen, 1992, p 10). In Ontario, the accused is provided with a detailed summary of the case against him at his first court appearance, (letter from Mr John Pearson, Senior Crown Prosecutor, Hamilton Ontario, 27 February 2001), as per the recommendation of the *Martin Report*, 1993 (reproduced in Appendix 3).

16 Owen, 1993, p 11.

7.3.2 Division of responsibility and delay

The division of responsibility between the police and prosecutor prescribed in the CPIA 1996 creates some practical difficulties in relation to the transfer of schedules and materials between offices. It is predicted that these problems may be resolved with the use of information and communication technology and, therefore, only a brief comment will be made.

The CPIA 1996 and the code require the disclosure officer to decide which information and material is to be included in the 'prosecution material' and to create schedules of unused material, to provide annotations and to forward material for the prosecution case.[17] The Joint Operational Instructions for the disclosure of unused material developed by the police and CPS provide that the responsibility for correcting any errors or omissions and updating the schedules, is placed on the disclosure officer.[18] The CPS Inspectorate observed that the schedules often contained errors and omissions and that delay is caused when the prosecutor returns the schedules for correction.[19] In some cases, prosecutors have added to the schedule non-sensitive unused items that were created as a matter of routine and deleted items that were apparently sensitive. However, this was said to be a dangerous practice because the prosecutors would not have seen the items. If all the relevant information was stored electronically, as now planned for by the Government,[20] the prosecutor could instantly access it and liaise with the disclosure officer and decisions could be made about amendments to the schedules. Electronic storage also would eliminate the delay which occurs whilst a prosecutor awaits the arrival of a document when the situation demands he read it.

Often the document that is requested by the prosecutor is the crime report, because it tends to be relevant to issues often raised by the defence. To reduce delay and to encourage prosecutors to read this document, the CPS Inspectorate recommended that the instructions be revised to direct that a copy of the crime report be provided by the disclosure officer at the same time the schedules are provided.[21] This suggestion was criticised by the Association of Chief Police Officers (ACPO) on the basis that it would be a drain on resources and might lead to the revelation of sensitive information. A generalised editing process would demand further resources.[22] It is submitted that the technologies allow certain parts of an electronic document, such as a crime report, to be safeguarded

17 Paragraph 7.
18 The Joint Operational Instruction is an internal document referenced in CPS Inspectorate, 2000 (para 4.20).
19 *Ibid*, para 4.28.
20 Home Office, 2001, pp 67–68.
21 CPS Inspectorate, 2000, para 11.9.
22 Attorney General, 2000a, 'Commentary', p 5.

and automatically redacted by word processing functions. In consequence, the suggestion of the CPS Inspectorate should be adopted nationally.[23]

7.3.3 Atypical cases and voluminous materials

The ACPO suggested that special rules should be created in relation to atypical cases where large amounts of material are seized as precautionary measure, but because of their volume and doubtful relevance, it was impractical to examine them. For example, the contents of a computer, or videotape, covering an area much wider than the immediate area of the crime may take days to view. Eventually it may become known that these items contain relevant material and, therefore, were correctly preserved.[24] The *Attorney General's Guidelines* (2000) state that, if the investigator considers that it is not an appropriate use of resources to examine large volumes of material seized on a precautionary basis, then he be excused from so doing. However, 'its existence should be made known to the accused in general terms at the primary stage and permission granted for its inspection by him or his legal advisers'.[25] A description of the material by general category must be provided along with a statement providing the justification for the decision not to examine the material.

It is submitted that this is a reasonable approach. The accused can view the video or data in controlled circumstances and draw to the attention of the police any relevant segments. It will assist in reducing the problem faced by the accused in otherwise accessing the information. However, this provision will not assist the accused to access confidential information held by third parties.

7.4 CREDIBILITY OF POLICE OFFICERS AS PROSECUTION WITNESSES

Lord Steyn stated in a summary form the common law relevant to the disclosure of information relating to the credibility of prosecution witnesses.[26] The Crown is obliged to disclose any previous inconsistent statement,[27]

23 Heaton-Armstrong, 2001, pp 12–13 discusses the CPS pan-London agreement which states that a copy of the crime report (and CAD message log) be provided by the disclosure officer at the same time the schedules are provided.

24 Attorney General, 2000a, 'Commentary', p 7. The problem of CCTV videotapes was also raised in the CPS Inspectorate, 2000 (para 8.4).

25 Attorney General, 2000a, para 9.

26 *Brown (Winston)* [1995] 1 Cr App R 191 CA, p 199, approved in *Brown (Winston)* [1998] 1 Cr App R 66 HL, p 73.

27 *Baksh* [1958] AC 167 PC; *Romain* (1992) 75 CCC (3d) 379 (Ont Gen Div).

request for reward,[28] or previous conviction of a prosecution witness,[29] to facilitate the assessing of the reliability of that witness. The CPIA 1996 does not change the law in this regard and the *Attorney General's Guidelines* (2000) provide the necessary guidance as to at which stage this material is to be disclosed.[30]

In many cases, the main prosecution witness is a police officer. Investigators are accustomed to testifying and to having their credibility tested. Inevitably, they have accumulated a history of testimony before the local court. The court would not ignore evidence revealing a course of misconduct by police officers.[31] Also, police officers will have a service record. To what extent do the above principles apply to police officers as prosecution witnesses?

Police officers are not to be given any special concessions, but there are limits as to the breadth of the information that must be disclosed.[32] The Court of Appeal stated, in *Guney*,[33] that the defence, with justification in seeking to test credibility, had sought to be informed of any convictions and (relevant) disciplinary findings against any police officers involved in the case. It also encouraged the Crown to provide to the defence transcripts of any relevant decisions of the Court of Appeal. These were to include transcripts in which convictions were 'quashed on the express basis of misconduct or lack of veracity of identified police officers as well as with cases which have been stopped by the trial judge or have been discontinued on the same basis'.[34] The court suggested that a central information base be created to ensure the availability of this material and to reduce the frequency of false allegations being brought forward.[35]

However, the Court of Appeal has rejected the submission that 'the defence was entitled to be informed of every occasion when any officer had given evidence "unsuccessfully" or whenever any allegations had been made against him'.[36] To impose such an obligation would overload the

28 *Taylor (Michelle)* (1994) 98 Cr App R 361 CA, p 368; *MacKay* (1992) 16 CR (4th) 351 BCCA.

29 *Collister and Warhurst* (1955) 39 Cr App R 100 CCA; *Taylor (Nicholas)* [1999] 2 Cr App R 163 CA (co-accused).

30 Attorney General, 2000a, paras 36–40.

31 *Edwards* (1991) 93 Cr App R 48 CA, pp 56–57 and *Edwards (Maxine)* [1996] 2 Cr App R 345 CA; *Twitchell* [2000] Crim LR 468 CA. There is no distinction made in this issue between subornation of witness and fabrication of evidence, *Malik (Waseem)* [2000] 2 Cr AppR 8 CA.

32 *Edwards* (1991) 93 Cr App R 48 CA, pp 56–57.

33 *Guney* [1998] 2 Cr App R 242 CA, p 257.

34 *Ibid*, p 258, *per* Judge LJ.

35 Anecdotal evidence suggested that few CPS areas kept a record of adverse judicial comments relating to police officers.

36 *Guney* [1998] 2 Cr App R 242 CA, p 257, *per* Judge LJ.

investigation and trial process.[37] It may violate the rights of the officer in unconcluded disciplinary proceedings, or it may circumvent the claim of PII in respect of certain material gathered in a complaint investigation.[38] The CPS *Instructions For Prosecuting Advocates* state that the prosecutor has a discretion to disclose relevant 'criminal cautions, disciplinary finding of guilt and pending criminal or disciplinary matters, or disciplinary matters which have not resulted in charges'.[39] The instructions may leave the wrong impression with respect to disciplinary finding of guilt, which, in view of *Guney*, must be disclosed if relevant.

The instructions address another useful point. The defence is to be advised of those officers who are suspended, but whose evidence is still relied on. Any other relevant information may be disclosed in the interests of justice.[40] This advice accords with the current approach of the Court of Appeal toward potentially tainted police evidence.[41] Of course, it is difficult for the prosecutor to disclose that which he does not know. The CPS Inspectorate found that some details of disciplinary findings against police officers were not revealed appropriately to the CPS.[42]

Further, the defence must continue to press for undisclosed evidence post-conviction in the event that an appeal based on fresh evidence may become possible. The European Court of Human Rights (ECtHR), in *Edwards v UK*, and the Court of Appeal, in *Craven*,[43] confirmed that consideration of whether the accused had a fair trial will include the proceedings in the Court of Appeal. The ECtHR also noted in its judgment, as a potential failing on the part of the defence, that the defence had not sought to convince the Court of Appeal to call the impugned police officers to give evidence. Similarly, it criticised the defence for failing to continue to press for the disclosure of the Carmichael Report (pertaining to the result of the internal investigation into the conduct of the

37 It was stated in the *Runciman Report*, 1993, para 6.56, that the rule in *Edwards* (1991) 93 Cr App R 48 CA went too far in requiring the disclosure of information about any earlier trial in which a jury had rejected their evidence in circumstances which indicated that they were not believed.

38 *Chief Constable of the West Midlands Police Force ex p Wiley* [1995] 1 Cr App R 342 HL.

39 CPS, 2000b, para 5.

40 *Ibid*, para 5.

41 *Zomparelli (No 2)*, unreported, 23 March 2000, CA, 99 04971 Z5, Bingham LCJ and *Martin, Taylor and Brown*, unreported, 12 July 2000, CA, 99 05979 S3, 99 05982 S3 and 99 05983 S3, Henry LJ. These cases are discussed in Dein, 2000, p 801.

42 CPS Inspectorate, 2000, para 4.153.

43 *Craven* (2001) *The Times*, 2 February, CA.

officers), even though its production was likely to have been resisted on the basis of PII.[44]

7.5 CREDIT OF DNA DATABANK AND VICTIMS

The Government announced that, by October 2001, Victim Personal Statements (VPS) will be used in determining bail applications, charge screening and to respond to statements made in mitigation, and in parole hearings.[45] In the light of the many ways in which the VPS may impact many important decisions in the criminal process, the need to ensure the credibility of the VPSs cannot be overlooked. Human nature, being as it is, may allow some victims to exaggerate greatly certain details, including the severity of the crime. Additional factors may influence the victim's decision to exaggerate, such as the possibility of receiving funds under private insurance contracts. It is submitted that the person assigned the task of recording the statement should be required to add a certificate disclosing the steps taken to verify the information contained in the statement. This may assist those using the statement to determine the weight to be attached to it. It is submitted that the VPS should then be sent to the disclosure officer: first, to consider whether it contains sensitive material such as the name of an informant; secondly, to include it in the appropriate schedule; and, finally, to forward it to the CPS for disclosure to the defence in accordance with the rule in *Ex p Lee*.[46] Despite the *Attorney General's Guidelines* (2000) statement that, if justice requires, information affecting the bail application ought to be given at an early date,[47] the *Manual of Guidance for the Preparation, Processing and Submission of Files*, unfortunately, fails to state that the VPS should be included in the file sent to the CPS for the bail hearing, even though the use of VPSs was anticipated.[48] Where the VPS is taken shortly before trial, special care will need to be taken to ensure the disclosure officer considers the VPS.[49]

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44 *Edwards v UK* (1992) 15 EHRR 417, paras 37–38. This criticism of the defence must now be read in the light of the renewed emphasis on the duty of the prosecutor to continue to keep under review decisions regarding disclosure (CPIA 1996, s 9) and the new guidelines (Attorney General, 2000a, para 24).

45 Home Office, 2001, para 3.114.

46 [1999] 2 Cr App R 304 DC. See, also, *Wildman v DPP* (2001) *The Times*, 8 February, [2001] EWHC Admin 14, a custody time limits case where Lord Woolf CJ made the point that sufficient disclosure must be given to the prisoner to allow him to test any aspect of the application.

47 Paragraph 27.

48 Home Office 2000a, para 3.2.12.

49 In the event the victim declines to give a VPS during the early stages of the proceedings, there will be another opportunity to give a statement shortly before trial (Home Office, 2000a, para 7.8.18).

The creation of a DNA[50] databank brings with it a unique set of problems, not the least of which is the reinforcement of the credibility of DNA evidence, given that juries tend to rely on scientific results as infallible evidence.[50a] Commentators have argued that it is wrong to accept the proposition that 'DNA fingerprinting' is the 'gold standard' of identification on the basis of concerns arising from the evolution of science and technology and the absence of, or lack of adherence to, appropriate standards governing the collection, storage and analysis of DNA.[51] With respect to the evolution of science, emerging scientific evidence suggests that a person's DNA fingerprint can be changed through the injection of genes into the body. The evidence suggests that the injected genes are taken up by some of the body's cells, which themselves contain chromosomes (a long chain of DNA made up of genes). Then the modified DNA replicates in the normal course.[52] The evolution of technology creates other issues. What was a sound basis for identifying or mapping DNA yesterday may be of questionable value tomorrow. For example, the current practice of comparing one known sample against one unknown sample is akin to a one man identification parade.[53]Variance in standards for the collection and analysis of DNA is also troubling,[54] as are documented instances of human error and substandard laboratory conditions which might result in sample contamination.[55] Current forensic tests look at only a small subset of the subject's DNA map, even though it is recognised that a portion of any given subset might be one shared by a distinct racial group.[56] The proficiency in analysis of certain laboratories gives ground for concern. 'In a 1993 study, 45 laboratories [in America] were asked whether particular DNA samples matched. The labs were presumably using their best techniques, since they knew they were being studied. Yet in the 223 tests, matches were identified in 18 cases where they did not exist.'[57] English laboratories are not immune from such errors. For an example from a related field, one can take notice of the recent report of 'smear test' errors which led to many cancer deaths.[58] With respect to laboratory conditions, 60% of the laboratories tested in the USA failed to meet the

50 Kelly *et al*, 1987, wrote a brief guide to DNA for the non-scientist

50a Doran and Jackson, 1997, p 60.

51 Andrews and Nelkin, 2001, pp 115–120; McLeod, 1991, p 590.

52 Travis, 1999. See Mahendra, 2001, p 778 regarding the Human Genome Project. For a discussion of natural errors in DNA replication within the body's cells and the error correction process (DNA polymerase 1) see Loewenstein, 1999, pp122–123.

53 Andrews and Nelkin, 2001, p 119. See further, Postscript, p 158.

54 *Ibid*, 2001, p 120. The DNA Advisory Board, 2000, p 2, published recently recommended standards for forensic laboratories performing DNA analysis.

55 As in all forensic laboratories, some scientists are simply too eager to assist the prosecution. In addition to the examples discussed in Pt 5.2.2. consider the errors of Dr Fred Zain in West Virginia (Andrews and Nelkin, 2001, p 119) and Dr Joyce Gilchrist in Oklahoma (Hewitt, 2001, p 58).

56 Andrews and Nelkin, 2001, p 118.

57 *Ibid*, p 118, stating in lay terminology Koehler *et al*, 1995, p 209.

58 *PA News*, 2001.

accreditation standards of the American Society of Crime Lab Directors.[59] The potential for unreliable results being put forward as credible evidence is increased by the fact that many DNA samples were collected before any quality assurance issues were addressed. DNA, in the form of blood samples, has been collected for many decades from all newborns in most American States[60] and exists in England as a result of various diverse initiatives, such as the DNA testing of immigrants (to prove blood relation) which began under the Thatcher Government in 1989.[61] There is a possibility that some of these results may be used in criminal investigations.[62] Assuming that the data are correctly collected and analysed and the donor of the sample was correctly identified, human fallibility in the recording and processing of the information must be considered. Software programmes written to produce statistical data for use in presenting a reported match have been known to produce misleading data. Errors have been discovered in programmes used by the Metropolitan Police Force on at least one occasion in the past five years.

It is submitted that this (shotgun) wedding of science and law must be well planned in advance. With regard to disclosure, it is suggested that a log is created when a DNA sample is taken, and that each step of the process is recorded, along with the name of the person completing each step.[63] The log should be disclosed to the defence when a sample is relevant. This will allow the defence to analyse the appropriateness of the steps taken, and to cross-refer the names of the persons involved against the record of those personnel who are known by previous experience to be unreliable in gathering, recording or analysing DNA samples.[64] Similarly, the defence must be provided with the resources to investigate the possibility, to the extent it is reasonable in the context

59 Andrews and Nelkin, 2001, p 118. The discussion is informed by the description of the unsanitary conditions found in a leading laboratory in New York and unethical scientist manipulation of DNA evidence (Scheck *et al*, 2000, Chapter 5). Koehler *et al* (1995, p 217) argue that 'scientists should not be permitted to describe the significance of a reported DNA match…using vague comments about the improbability of laboratory error. Instead they should carefully explain the difference between a reported match and a true match'.

60 Andrews and Nelkin, 2001, p 84.

61 *Ibid*, 2001, p 115. See, also, PACE 1984, s 64. In England and Wales, there are now approximately 1 m suspects on the DNA database; Redmayne, 2001, p 205.

62 Ormerod (2001, p 395) in commenting on the House of Lords' speech, in *AG's Ref* (No 3 of 1999) [2001] 2 WLR 56 HL(E), stated: 'There is little disincentive for samples of acquitted individuals to be destroyed…[and] there is no disincentive for the police to refrain from engaging in prohibited investigations based on unlawfully held DNA.' The Criminal Justice and Public Order Bill 2001, cl 81(2), will remove the obligation to destroy collected DNA samples found in PACE 1984, s 64.

63 Wade, 1999, chapter on DNA.

64 Stephen Silber QC, as the Law Commissioner with responsibility for the Criminal Law, argued that the rules governing advance notice of expert evidence are not extensive enough (The Crown Court (Advance Notice of Expert Evidence) Rules 1987 and the Crown Court (Advance Notice of Expert Evidence)(Amendment) Rules 1997 SI 1997/700 and the Magistrates' Courts (Advance Notice of Expert Evidence) Rules 1997 SI 1997/705). He suggested that the rules in Crown Court and magistrates' courts should require, 'advance notice of the names of any person who has prepared a statement on which it is proposed an expert witness should base any opinion [contd]

of scientific advances, that the DNA sample taken from the accused, while accurate, was the result of an injection which altered the current state of his DNA so as to provide the result of a match to the DNA collected months before at the crime scene.

7.6 CREDIT OF DEFENCE WITNESSES

In the event that the defence is fortunate enough to have the benefit of a favourable witness, the CPIA 1996 requires that matters to be put in issue arising from his evidence be disclosed in the defence statement under threat of adverse inference.[65] It might be thought that, in the light of the resources of the prosecution, it would be appropriate to forewarn the defence of any defects in the credibility of the potential defence witness, if known. This obligation exists in Canada, even though there is no requirement on the defence to provide a statement.

The House of Lords stated that the investigation of defence witnesses is the responsibility of the defence. Lord Hope for the court explained that it would be too much of a burden to expect the prosecution to find and disclose (usually required on short notice) evidence that might affect the credibility of potential defence witnesses. Where alibi notice is given in a timely manner, there is no duty on the prosecution to disclose evidence which undermines the credibility of the alibi witness.[66] Section 7 of the CPIA 1996 will not change the result, as the court found that this information was not material which would 'assist the defence's case'.

The limitation arises from the division of responsibility inherent in an adversarial system. Lord Hope said: 'A defendant is entitled to a fair trial, but fairness does not require that his witnesses should be immune from challenge as to their credibility. Nor does it require that he be provided with assistance from the Crown in the investigation of the defence case or the selection, on grounds of credibility, of the defence witnesses.'[67] This can be contrasted to the view of the Supreme Court of Canada. Sopinka J stated, 'all information in the possession of the prosecution relating to any relevant evidence that the [witness] could give should be supplied'. 'A trap [should] not be laid' for a witness. The

64 [contd] or inference and the nature of the matter stated they provided'. Opinions offered on *the* basis of second hand results are more susceptible to error (Silber, 1997, p 12). See *Runciman Report,* 1993, para 9.78.

65 Section 5(6).

66 *Brown (Winston)* [1998] 1 Cr App R 66 HL, p 77; *Seymour* [1996] Crim LR 512 CA.

67 *Brown (Winston)* [1998] 1 Cr App R 66 HL, p 75.

Attorney General has indicated that he expects this issue to be tested under the Human Rights Act 1998 on the basis of the *Jespers v Belgium*[68] opinion.[69]

7.7 KNOWLEDGE AND INFORMATION HELD BY THIRD PARTIES

7.7.1 Introduction

Confidential information held by third parties may be important to the defence. Of course, there is no general obligation on a third party to give notice of the existence of information that might be relevant evidence,[70] or to preserve it.[71] It is useful to examine the issue of the obligation on the prosecution to gather and pass on to the defence such information. It will be recalled that the ECtHR Commission expressed the view, in *Jespers v Belgium*,[72] that the investigators should provide the defence with access to a broad spectrum of information. This included information, '…in their possession, or which they could gain access [to] which may assist the accused in exonerating himself.[73]

According to English authorities, the prosecution is not obligated to gather and disclose information that it has no knowledge of,[74] or that is beyond its control. For example, it is not required to seek access to records held by the Department of Social Services, and then contest the inevitable claim of PII or privilege.[75] Therefore, it is for the defence to attempt to collect this information through witness summonses. However, the investigator might have had unofficial access to all or part of a file, say through joint casework with the Department of Social Services, and not have recorded the information in his file. It is instructive to review the difficulties that the defence face when attempting to secure a witness summons, and the imbalance in the situation where the investigator reads but does not note confidential information. The *Attorney General's Guidelines* (2000), discussed in Pt 7.7.4, provide guidance which may assist in solving the latter problem.

68 Jespers v Belgium (1981) 27 DR 61 (ECtHR Com).
69 Attorney General, 2000a, 'Commentary', p 15.
70 *In Re Barlow Clowes Gilt Managers Ltd* [1992] Ch 208; *O'Connor* [1995] 4 SCR 411, pp 434–35.
71 *Carosella* [1997] 1 SCR 80, p 155.
72 *Jespers v Belgium* (1981) 27 DR 61 (ECtHR Com).
73 Emmerson, 1999, p 53.
74 *Maguire and Others* (1992) 94 Cr App R 133 CA, p 147; *Chaplin* [1995] 1 SCR 727.
75 Niblett, 1997, p 89; *Lenny* (1994) 155 AR 225 CA.

Those in favour of restricting access to confidential information held by third parties point to the public interest in privacy. This can be very persuasive in the context of victims' interests, especially victims of sexual offences. The victim needs to have confidence in the ability of her health professionals to keep very personal thoughts and information from public view. Bearing in mind the restricted scope of the disclosure obligations, under the tests in the CPIA 1996 and protection found in other legislation,[76] it is submitted that the privacy interests of the victim are reasonably well protected. The interest of the victim must not override the need of the accused to have sufficient disclosure so that a full answer and defence can be made. It is submitted that the progressive approach found in Canada provides a good model for English reform advocates.

7.7.2 Witness summonses in England and Wales and Canada

One of the methods by which the privacy of the victim has been enhanced in England and Wales is through the new restrictions on the issuance of witness summonses found in s 66 of the CPIA 1996. It never has been easy for the defence to access confidential records in the possession of third parties[77] and research indicates that applications for production were, and continue to be, rare.[78] The defence must show, as before, that the evidence sought is both 'relevant and admissible'.[79] Now, an affidavit must be filed with the application demonstrating this point, and the third party may seek to challenge the application for a summons.[80] It is most difficult for the defence to demonstrate the manner in which a document will be relevant and admissible without first having sight of it. The wrongful prosecution of Dr Robin Reeves provides a recent example of the problem.[81] The interests of privacy and the

76 Sexual Offences (Amendment) Act (SO(A)A) 1976 s 2(1), as amended by the Criminal Justice and Public Order Act (CRIMPO) 1994, Sched 10, para 35; SO(A)A 1956 to 1992, ss 1–4, as amended by CRIMPO 1994, Sched 10, para 13; Children and Young Persons Act 1933, ss 37 and 39; Sexual Offences (Protected Material) Act 1997 (to be put in force shortly); CPIA 1996, s 16 (mandating notice to third parties regarding prosecution PII applications).

77 Magistrates' Courts Act 1980, s 97, as amended by the CPIA 1996, s 47, Sched 1, para 8; Criminal Procedure (Attendance of Witnesses) Act 1965 s 2(2), as amended by me CPIA 1996, s 66.

78 Mackie and Burrows, 2000, p 2.

79 *Reading Justices ex p Berkshire* CC [1996] 1 Cr App R 239 DC.

80 Crown Court Rules, r 23. Rr 23–23ZC were made by the Crown Court (Miscellaneous Amendments) Rules 1999 SI 1999/598.

81 Woffinden, 2000, p 1025. Even though Dr Reeves had been in control of some the sensitive and confidential medical records of the child complainants before the investigation of the allegations against him began, he still had great difficulty in getting access to medical records created thereafter. After the court ordered production of the records, the prosecution dropped many of the charges. The trial judge instructed the jury to acquit on me remaining charges.

accused, and the administration of justice could be better served with a less onerous test.[82]

It is interesting to contrast the progressive position in Canada. The issue of production and disclosure of confidential documents held by a third party is governed by the rule in O'Connor,[83] except when it is a sexual offence, which is governed by a slightly more complex process.[84] Each adopts a two stage process, with greater emphasis placed on privacy in sexual offence proceedings. In addressing the production of confidential third party records via summons in standard cases, the first issue is whether the impugned document is 'likely to be relevant'. Relevant information is defined, for the purpose of this stage, as information that may be useful to the defence, either directly or indirectly. Admissibility is an issue for trial. The threshold test is not to be construed too strictly, so as to avoid placing the defendant in the 'Catch 22' situation. It is designed to prevent speculative or frivolous applications only.[85] In the second stage, the court must balance the public interests on what might be viewed as a triangular plane—societal, privacy and due administration of justice. Therefore, the defence is able to gain access to evidence which may assist the defence. The problems that might occur from the investigator's selection decisions are avoided. This process is used even when confidential material has come into the hands of the prosecution without the express consent of the person whose privacy is affected.

7.7.3 Confidential information not 'received'

Another concern that has emerged in England is that arising from an apparent grey area in the law wherein the police are unofficially allowed access to information and do not 'receive' the information. For example, in some cases police investigators examine British Telecom telephone logs, but do not note the contents when the contents do not assist in strengthening the prosecution case.[86] Also, a police officer may have sight of a confidential file, but only make note of some of its contents. In either case, the information or documents that are not noted have been treated as not within the knowledge or control of the prosecution

82 The Court of Appeal may be ready to re-examine the test in *Reading Justices ex p Berkshire CC* [1996] 1 Cr App R 239 DC in the light of its approval of the decision of the trial judge in *Brushett* [2000] All ER(D) 2432 CA. There, the trial judge ordered the disclosure of some documents from a third party for the purposes of cross-examination on the basis of the fair trial principle. The documents indicated that the witness had made false allegations in the past or had had sexual activity with another adult. See Plowden and Kerrigan, 2001, p 736.

83 *O'Connor* [1995] 4 SCR 411, pp 434–35.

84 *Criminal Code of Canada*, s 278.5.

85 *O'Connor* [1995] 4 SCR 411, pp 434–43.

86 Further similar mischief is reported by the LCCSA (1995, para 6.15.7).

by some investigators. This is of particular concern in complex prosecutions,[87] but it may apply to situations where, for example, police and other third parties are working towards the common goal of child protection.[88] When material is noted from a larger body of third party documents, it is difficult for the defence to measure its significance without having had broader access to establish the context from which the material came. Further, it is difficult to determine what the investigator had discounted.[89]

Under the code, if the investigating officer 'receives' relevant information, he must record it. If the information is confidential or sensitive, he should list it on the sensitive material schedule for consideration by the CPS. It might be appropriate for the CPS to apply for relief from the disclosure obligation on the basis of the public interest, for example, the interest in the privacy of victims' health or therapy records. If the application is not granted, the material should be disclosed or the prosecution ended. If the material is excused from disclosure at the primary stage, the issue must be considered again after the defence statement is provided. However, where the investigator has not taken possession of the material, the code states only that he should 'invite' the third party to retain the material in case it receives a request for its disclosure. The investigator should also, through the disclosure officer, make known to the prosecutor the existence of this material.[90] The secondary disclosure obligation in the CPIA 1996 does not require the prosecution to obtain possession of that material or arrange for defence examination of that material. The obligation is only to reveal its existence if it was inspected by the prosecution.[91]

7.7.4 *Attorney General's Guidelines* (2000)

Some of the concerns expressed above have been addressed by the *Attorney General's Guidelines* (2000) paras 30–33. Paragraph 30 states:

> There may be cases where the investigator, disclosure officer or prosecutor suspects that a non-government agency or other third party (for example, a local authority, a social services department, a hospital, a doctor, a school, providers of forensic services) has material or information which might be disclosable if it were in the possession of the prosecution. In such cases, consideration should be given as to whether it is appropriate to seek access to the material or information and, if so, steps should be taken by the prosecution

87 JUSTICE, 1995, p 38.

88 Another area of concern is the production of medical notes used by police surgeons and hospital doctors to make witness statements. CPS Inspectorate (2000) recommended that these notes be disclosed to the prosecutor for consideration regarding disclosure (para 8.21).

89 *JUSTICE*, 1995, p 38.

90 Paragraph 3.5.

91 Section 7(3).

> to obtain such material or information. It will be important to do so if the material or information is likely to undermine the prosecution case, or assist a known defence.

The guidelines continue and state that if the third party declines to provide the information sought without good reason, then the prosecution should apply for a witness summons causing the material to be produced to the court (para 31). Further, para 32 states: 'Information which might be disclosable if it were in the possession of the prosecution which comes to the knowledge of investigators or prosecutors as a result of liaison with third parties should be recorded by the investigator or prosecutor in a durable or retrievable form (for example, potentially relevant information revealed in discussions at a child protection conference attended by police officers).' Before information is disclosed to the defence, the third party must be consulted as to whether withholding the information on the basis of PII is appropriate.[92]

It is submitted that the new guideline is a positive step forward. A reasonable investigator and prosecutor could minimise many of the difficulties faced by the defence in relation to obtaining information likely to undermine the prosecution case, or assist a known defence, from confidential files. It is important that confidential information seen by the prosecution be formally included in the CPIA 1996 disclosure regime. If it is not to be disclosed on the advice of the CPS, the defence may seek secondary disclosure and ask that the court consider the information.[93] Unfortunately, guidance will not change the approach of those on the prosecution team who choose to undermine, or lack enthusiasm for, the disclosure regime.

7.8 LOST OR DESTROYED EVIDENCE

7.8.1 Introduction

It is useful to consider the approach to be taken where the prosecution has lost or destroyed evidence that it is under a duty to obtain or retain. At common law and under paras 3.4 and 5.1 of the code, the prosecution has a duty to preserve evidence. This obligation is rooted in fair trial principles and, alternatively, the need to preserve the integrity of the judicial process.[94] The CPIA 1996 does not displace the abuse of process doctrine. One characteristic of a fair trial is the opportunity for the accused to make full answer and defence. This includes the

92 Attorney General, 2000b, para 33.
93 CPIA 1996, s 8.
94 *Beckford* [1996] 1 Cr App R 94 CA; *Egger* [1993] 2 SCR 451, p 472; *La* [1997] 2 SCR 680, p 693.

opportunity for the defence to investigate witnesses and potential evidence and to present evidence.[95] It is submitted that compliance with the duties in the code is of the utmost importance. The defence may never learn of lost or destroyed evidence, unless the investigator is conscientious in exercising his discretion as to what may be relevant to the case and in recording evidence and unless the disclosure officer is careful when creating the schedules.

7.8.2 Lost evidence

In the case of lost evidence, English and Welsh law requires that actual prejudice to the preparation or conduct of the defence must be demonstrated by the accused before remedial inquiries begin (with 'serious prejudice' being the test for the remedy of a stay).[96] In consequence, lost evidence is to be considered in the context of a fair trial as opposed to whether it is fair to try the accused. For example, in *Beckford*,[97] the defendant was charged with causing death by careless driving when under the influence of alcohol. The defence argued that a mechanical failure caused the accident. One policeman who had attended the scene adopted this view, though many others did not, including the prosecution expert. Before the defence expert could examine the car, the towing company that had been storing the vehicle disposed of it in the ordinary course. The police had (negligently) failed to tell them that the car was to be preserved. The defence applied for a stay on the basis of abuse of process, or alternatively to exclude the whole of the prosecution's expert evidence. The Court of Appeal confirmed that either remedy was available, but affirmed the trial judge[98] in the view that the absence of the car did not affect the fairness of the trial. The applications were, therefore, correctly refused.

It is respectfully submitted that the prosecution benefited from a very generous decision in the *Beckford* case.[99] Simply providing a careful account of the defence evidence, or even a sympathetic direction, to the jury is of little value to the accused.[100] Had the facts in *Beckford* been considered with a principled view

95 *Brown (Winston)* [1998] 1 Cr App R 66 HL, pp 75, 77; *Stinchcombe* [1991] 3 SCR 326, p 336.

96 *Derby Crown Court ex p Brooks* (1985) 80 Cr App R 164, p 169. The use of stays is discussed in more detail in Pt 10.2.

97 *Beckford* [1996] 1 Cr App R 94 CA.

98 The trial judge did not even caution the jury regarding the defence's disability. He did, however, deal carefully and at length with the evidence of the defence expert, thereby satisfying the Court of Appeal (*ibid*, p 101).

99 Contrast the Nova Scotia case of *Desmond* (1988) 46 CCC (3d) 37 (TD) where the shell of burnt car was disposed of by police and a stay was granted.

100 Professor Choo analysed the data gathered by the LSE (1973, p 208) regarding corroboration warnings and their questionable effect and perhaps counter-productiveness. He concluded that the effect of jury warnings was very questionable and, therefore, he cast doubt on warnings as a remedy (Choo, 1995, pp 868–69).

similar to that taken by the Supreme Court of Canada in *La*,[101] it is likely that the court would have found a breach of the right to disclosure (and preservation) and, at least, excluded the evidence of the prosecution's expert. In Canada, the greater the probative value of the evidence, the greater the care that must be taken in preserving it. Had the court in *La* heard this case the result would probably have been different. Even using the English approach, surely the inability to examine the car where a policemen offered the view that there was a mechanical problem would amount to 'actual' prejudice which, in the whole circumstance, was 'serious' prejudice and incurable and, therefore, best addressed with a stay?

7.8.3 Destroyed evidence

The issue of preservation of the integrity of the judicial process tends to be more prominent in cases of 'evidence' destroyed by the prosecution, although the issue may be resolved by reference to the fair trial issue in most instances. Recently Brooke LJ said: 'A useful test was that there had to be either an element of bad faith or at the very least some serious fault on the part of the police or the prosecution authorities', for a stay to be granted on the basis that it was not fair that the accused should be tried.[102] In *Birmingham and Others,* the Crown Court

101 *La* [1997] 2 SCR 680. In *La*, a 13 year old runaway girl was found by police in the company of a known pimp A police officer audio recorded an interview with the minor that lasted 45 minutes. The conversation focused on issues relating to an anticipated secure accommodation application, but it raised concerns of sexual assault and prostitution. It also revealed that the minor was not always truthful when questioned. Since the officer had recorded the conversation, he made only a basic notebook entry regarding the meeting. A few days later he obtained a written statement from the girt and other victims. After the application was made, the officer turned over his report and the written statements to detectives in the Vice Unit. However, he forgot to turn over the audiotape. The detectives investigated the complaints of sexual assault involving the minor and charges followed. Prior to the trial the tape was negligently lost by the officer and, at trial, the judge ordered a stay. On appeal, a new trial was ordered. Sopinka J reasoned that, even though the police officer was negligent, there was no improper motive or unacceptable degree of negligent conduct. The officer was not involved in the criminal investigation and he was available to testify to the issue of the minor's questionable credibility.

102 *Feltham Magistrates Court ex p Ebrahim, Mouat v DPP* (2001) *The Times*, 27 February, DC In the latter case, Mouat successfully appealed his conviction by the magistrates to the Crown Court. He relied on the non-availability of a videotape (having been reused in the ordinary course) which the police had shown him after he had been stopped, and served a fixed penalty notice, for speeding. The tape allegedly showed the police speed register reading of 90 mph and Mouat' s car in front of the police car. The code required the tape to be preserved at least until the end of the suspended enforcement period. In the former case, Ebrahim unsuccessfully applied for judicial review of the magistrates' refusal to stay the prosecution of an alleged assault in a store. A police officer attended the store, viewed the videotape that might have captured the event, but satisfied himself that it showed nothing at all of any relevance and, therefore, it was not necessary to take steps to preserve it. All videotapes taken by the store security cameras were reused in the ordinary course before the defence requested that the tapes be preserved. Since the accused could put forward his account of events, it was possible for the accused to receive a fair trial.

was notified that a video film taken by a nightclub security camera may have captured a portion of the events that were in issue arising from the violent disorder prosecution against the defendants.[103] A police officer who had viewed the video gave evidence that, since the video was of no value to the prosecution case, it was not forwarded to the CPS and that it was since lost. The defendants argued that the film might have confirmed the defence of alibi for a number of those accused, in that it may have shown that some of them were in a location apart from the violence alleged. A stay was ordered on the basis that a fair trial was impossible.

By contrast, in *Medway*,[104] the police had a closed circuit television camera operating in the area of the robbery in question. The video film, when viewed by the police, was determined to be of no relevance to the investigation and it was destroyed. Pursuant to the code (para 5.1) the investigator was obligated to retain the material, only if it may have been relevant to the investigation. The Court of Appeal affirmed the decision of the trial judge to refuse the accused's application for a stay, stating that there was no evidence of malice, or prejudice to the accused. JC Smith commented: 'Even if the police officer who viewed the tape acted in perfect good faith, he may have been mistaken.'[105]

It is important for evidence to be preserved so that the defence may have a fair trial and that confidence in the administration of justice is not undermined. It is also important for the defence to be given access to the schedules of material created by the disclosure officer, rather than simply the non-sensitive schedule, so that missing evidence can be identified. It is hoped that the court will be more vigilant in demonstrating concern over lost evidence. Reason for hope is found in the growing body of case law on abuse of process generated by the House of Lords,[106] and recent judicial stays granted by the Crown Court in cases of non-disclosure.[107]

One may argue that it is time to consider moving the burden of demonstrating the relevance of lost evidence from the defence to the prosecution given the duty under the code and the imbalance in resources between the parties. This may be viewed as a branch of the existing burden on the prosecution to justify departure from the standard practice of providing the defence with the opportunity to inspect and copy witness statements and the exhibits thereto.[108]

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103 *Birmingham and Others* [1992] Crim LR 117 (CC).

104 [2000] Crim LR 415 CA.

105 Smith, 2000, p 416.

106 Lord Lowry stated that a stay was available if the continuation of the proceedings 'offends the court's sense of justice and propriety to be asked to try the accused in me circumstances of a particular case', *Horseferry Road Magistrates' Court ex p Bennett* (1994) 98 Cr App R 114 HL, p 135. See, also, *Latif* [l996] 2 Cr App R 92 HL, p 101.

107 This is discussed in Pt 102.

108 *X Justices ex p J* [2000] 1 All ER 183 DC, p 188.

In Canada, the Supreme Court has taken a strong stance against the destruction of evidence by the prosecution or State actors.[109]

7.9 POSTSCRIPT

Further to the point raised in fn 52, see Gene Therapy Advisory Committee (2000, pp 3–5) for a report on the results of trials to alleviate various forms of cancer by using genes to enhance the response to the immune system or to make the body more susceptible to certain drugs.

Further to the point raised in fn 54, see *The Hunt* (2001 a), which reported that the number of comparison points needed to establish a DNA 'match' was increased from six 'loci' to 10 'loci' in Britain in 1998. The catalyst for the change appears to have been the unjustified burglary charges brought on the basis of the six 'loci' test against Raymond Easton of Swinden. According to Dr David Werrett of the FSS, a 16 'loci' test in now available in the marketplace, but it is not used by the FSS.

Further to the point raised in fn 55, see Ford (1996) for a report revealing that the equipment in the government laboratory at Fort Halstead was found to be contaminated.

Also, for more information on the investigation of Dr Joyce Gilchrist, see Scheck and Neufeld, 2001 or Yardley, 2001.

Further to the discussion in Pt 7.5, see *Massachusetts v Dirk Greineder,* wherein Dr Greineder was convicted of the murder of his wife, after putting forward a defence on the basis of the theory of an unknown assailant, in spite of the fact that his DNA was found on the murder weapon. Defence expert Marc Scott Taylor gave evidence to advance a theory of the transfer of DNA. 'He explained that he thought the defense's transfer theory—that the doctor's DNA got on the towel, onto his wife's face when she had a nosebleed, then onto the glove and knife of the unknown assailant during the attack—was valid because he had performed a series of experiments that replicated such a transfer, though with only one "transfer" episode'. Bean, 2001, p 3.

109 Eg, *Carosella* [1997] 1 SCR 80. In *Carosella,* the victim attended a rape counselling centre for assistance. The centre was a non-governmental agency under the general direction of the Ontario Government. The director destroyed the notes once the police began their investigation with a view to ensuring that they would not be disclosed. It was likely that the notes were useless, however, the prosecution was stayed by the court. Also, *Macleod* (1994) 34 CR (4th) 69 NBCA (leave to appeal to SCC refused) a stay was granted when a court reporter destroyed a deposition.

COMMITTAL TO CROWN COURT AND DISCLOSURE

8.1 INTRODUCTION TO THE PROCESSES: COMMITTAL, TRANSFER AND SENDING

The process by which a person is committed to stand trial in the Crown Court is an important feature of criminal procedure in England and Wales. In its purest form, the committal process was designed to provide a safeguard against the unjustifiable trial of an accused person.[1] No person was required to stand trial on indictment unless the prosecution could demonstrate a *prima facie* case.[2] Historically, this process culminated in a hearing before a panel of examining justices, wherein the prosecution presented its case.[3] It became known as the 'long form' committal. The accused was entitled to cross-examine witnesses and call evidence. Consequently, the evidence for the prosecution was discovered by the accused and, on occasion, some unused information was revealed. The committal also facilitated the resolution of many trial management issues.[4] By way of contrast, if the offence could not be tried on indictment, or was an 'either way' offence, and the mode of trial selection was trial in a magistrates' court, the accused was not entitled to the benefits of this process.

The committal process has been revised incrementally over the last three decades. Revisions began with the introduction of an alternate short form committal[5] ('on the papers') and evolved to an administrative transfer process in the special cases of serious and complex fraud[6] and cases involving child victims or witnesses in certain offences of violence or cruelty.[7] Most recently, further modification of the process occurred in the Criminal Procedure and Investigations Act (CPIA) 1996[8] and the Crime and Disorder Act (CDA) 1998.

1 Magistrates' Courts Act (MCA) 1980, ss 6 and 102, replacing MCA 1952, s 7.
2 *Bidwell* (1937) 1 KB 314: this, subject to the voluntary bill of indictment process. *Practice Direction* [1990].
3 While it was the practice norm in most areas for the prosecutor to call all significant witnesses, it was not mandated in law: *Epping and Harlow Justices ex. p Massaro* (1973) 57 Cr App R 499 DC, p 501.
4 Napley, 1983, p 38.
5 CJA 1967, s 1.
6 CJA 1987.
7 CJA 1991.
8 The committal scheme found in the Criminal Justice and Public Order Act 1994, s 44, was not put in force. It was repealed by the CPIA 1996, s 44.

The CPIA 1996 made provision in the situation of 'either way' cases for a super short form committal featuring no oral evidence, the elimination of defence evidence and the repeal of the long and short form committal provisions. The CDA 1998 adopted an administrative committal process, the 'sending' process, for cases triable on indictment only, which allows the judge to give leave to hear oral evidence from either side. Therefore, the different processes of placing a case before the Crown Court now bear little resemblance to the original committal process.

In Canada, the long form committal process (referred to as the preliminary inquiry) continues to be a feature of Canadian procedure,[9] although it has a few unique features[10] and some modifications have been suggested.[11] Discovery and disclosure became, and remain, an acknowledged collateral purpose of the committal process.[12]

8.2 LONG AND SHORT FORM COMMITTALS AND DISCLOSURE

Returning to England and Wales, it is instructive to consider the evolution of the committal process in more detail because of the role the committal process once played in allowing the defence to hear the prosecution evidence before the trial and, on occasion, to gain information that might not have been disclosed. In the long form committal hearing, the prosecution presented to the examining magistrates the evidence for the prosecution against the accused in the presence

9 Criminal Code of Canada, Pt XVIII.

10 The hearing is before a provincial court judge and, by custom, the accused can waive the committal stage. Ontario lawyers reported that defendants waived the committal in 45% of the cases for a number of reasons including reasonable pre-committal discovery of the prosecution evidence (Baar, 1993, p 262). See, generally, Pomerant and Gilmour, 1993, Chapter 2.

11 Planned modifications to the scope of the committal process and the accused's right of re-election as to mode of trial can be found in House of Commons of Canada, Bill C-15, 1st Session, 37th Parliament, 49–50 Elizabeth II, 2001. Goetz and Lafrenière (2001, para G.5.b) describe the modifications as follows: 'Clauses 34 and 36 make the holding of a preliminary inquiry in criminal cases dependent on an express request by the defence or the prosecution. A number of other provisions of the bill are largely incidental to this proposed change… Where preliminary inquiries were requesteo, cll 37, 38(1) and 40 permit their scope to be limited in accordance with agreements between the defence and the prosecution. However, this narrowing of preliminary inquiries appears to be optional. Although the party which requested an inquiry (which would almost always be the defence) is required to identify the issues on which it wished evidence to be given, and the witnesses that it would like to hear, nothing in the bill forces the requesting party to do so in a manner which actually limits the scope of the inquiry from what it would otherwise be. However, in order to encourage such agreement, a pre-inquiry hearing before the preliminary inquiry judge can be held, on the application of either side on the judge's own motion.'

12 *Skogman* [1984] 2 SCR 93. Magistrates have been reluctant to allow the discovery function of the hearing to be substantially reduced (Ferguson, 1991, pp XIII-80 and XIII-91).

of the accused. The process provided an opportunity to discover in full all of the evidence of a witness who was called and find out whether there were other witnesses or information that had not been previously mentioned.[13] It provided the defence with an opportunity to consider the resolve and apparent credibility of the witnesses. Also, it is considered that skilled counsel could uncover defects in evidence garnered through manipulative interviewing techniques used by investigators.[14] Cross-examination of the investigator could provide important information. The process also assisted in gleaning the prosecution's theory regarding how the alleged criminal activity, and the crime, unfolded. If required, the court was able to subpoena and hear third party witnesses.[15] Consequently, the committal process afforded the defence with the opportunity to become better informed about the case to be met at trial in the Crown Court.[16] However, the usefulness of the long form committal was reduced by the fact that the prosecution only had to deploy sufficient evidence to show a *prima facie* case (and so did not have to bring all their witnesses to the committal)[17] and the defence may not have wished to cross-examine prosecution witnesses at length for fear of revealing too much about the defence case or giving the prosecution witnesses a dress rehearsal for the trial.[18]

The 'paper' committal alternative was enacted in the Criminal Justice Act (CJA) 1967. It allowed committal on the basis that a *prima facie* case against the accused was found in the witness statements submitted in the committal bundle.[19] Within a short period of time, the vast majority of committals were completed in this manner.[20] Oral evidence was required in short form committals in less than 196 of the committals.[21] Unfortunately, the process was not used as originally intended. The James Report stated that a significant number of cases were committed for trial on the papers on evidence that did not support a committal. The experience indicated a lack of proper consideration of the materials by prosecutors (policemen or police solicitors) and the defence, and that the parties and the court were too quick to use the short form committal. In some cases, it was apparent that no one had considered the papers before

13 Devlin, 1958, p 112.
14 Napley, 1983, pp 36–5.
15 The magistrates' court was allowed to issue a subpoena administratively before the changes found in the CPIA 1996, s 66.
16 The accused was committed to trial in all but 12% of the cases (Jones *et al,* 1985, p 358).
17 *Epping and Harlow Justices ex p Massaro* (1973) 57 Cr App R 499 DC.
18 Napley, 1983, pp 36–45.
19 Gardner and Carlisle, 1966, p 500.
20 A study concluded that 92% of the committals were achieved through the short form (Jones *et al,* 1985, p 355).
21 Philips Commission, 1981b, p 70.

committal was conceded and that it was treated by some defence lawyers as simply an opportunity to increase their fees.[22]

In the 1980s, disclosure was specifically provided for in guidelines and rules, thereby suggesting a further reduction in the need for the defence to hear the evidence against the accused. In matters triable on indictment, advance disclosure of the evidence to be used in the Crown's case was supplied in the committal bundle, while unused material was to be disclosed pursuant to the *Attorney General's Guidelines on the Disclosure of Used Material* (1981).[23] In matters that could be tried either way, advance notice of the prosecution evidence occurred pursuant to the Magistrates' Courts (Advance Information) Rules 1985 before the mode of trial selection.[24] Of course, in many ordinary cases, no further disclosure was felt necessary.

However, the point remains that, in certain difficult or unusual cases, the long form committal provided an important opportunity to consider the investigation and the information gathered. It will be explained below that the opportunity to probe the Crown's case is greatly reduced now. This may be a point of concern given the emerging evidence of malpractice by some investigators and prosecutors and the restructuring of the disclosure regime.

8.3 TRANSFER COMMITTALS IN SPECIAL CASES AND DISCLOSURE

To address specific concerns in a relatively limited number of cases, the Parliament of England and Wales legislated a special committal process in serious and complex fraud offences and cases involving child victims or witnesses in certain cases of violence or cruelty.[25] This allowed a designated officer, rather than the court, to cause the proceeding to be transferred to the Crown Court and removed from a small group of defendants their right to the established committal processes.[26]

A system of 'transfer for trial' in serious and complex fraud was implemented in 1987.[27] If, in the opinion of the Director of Public Prosecutions (DPP), or other

22 *James Report*, 1975, paras 232–33.

23 (1982) 74 Cr App R 302.

24 SI 1985/601.

25 It was found that consent to committal was not forthcoming in fraud cases, requiring long form committal hearings. Lay justices had neither the expertise nor the time to examine complex prosecutions (*Roskill Report*, 1986, Chapter 1). Child witnesses were traumatised by giving evidence at committal and trial (*Runciman Report*, 1993, para 8.31).

26 Over the past 10 years, the Serious Fraud Office has had in progress an average of 63 cases annually. In 1998–99, the prosecutions completed resulted in 27 convictions (Serious Fraud Office, 1999).

27 CJA 1987, ss 4 and 5.

designated authority,[28] the evidence was sufficient for the person charged to be committed by an examining magistrate and that it was appropriate for the Crown Court to assume management of the case, then the DPP (or regional Crown Prosecution Service (CPS) Chief Prosecutor) could 'transfer' the case to the Crown Court for trial on indictment. This procedure allowed the prosecution and the State to avoid the expense and delay involved in a lengthy committal and facilitated early case management by the superior court. The system remains in force.

When using this power the prosecution must supply copies of the evidence to the defence.[29] This is designed to facilitate the preparation by the accused of his defence and to provide an immediate opportunity to challenge the transfer. Under challenge provisions, the accused can apply to the Crown Court to have the case dismissed on the grounds that evidence sufficient for a jury properly to convict does not exist. A judge of that court can hear oral and written argument and, if the court gives leave, oral evidence, on the alleged defect in the transfer committal. In the event that the application is successful, the judge can dismiss the charge.[30]

The concept of transfer committal was applied to another category of offence in 1991. If a person was charged with a sexual offence or offences involving violence or cruelty wherein a child under the age of 14 (and, in some cases, 17) years was the victim, or was a witness to be called at trial, then it became possible for the DPP to transfer the matter to the Crown Court for trial without a committal before examining justices. The DPP is authorised to use this power only when there is sufficient evidence to satisfy the usual committal test and the 'transfer' is necessary to avoid prejudice to the welfare of the child.[31] This scheme includes discovery and challenge[32] provisions similar to the complex fraud procedure in the CJA 1987. One distinction is seen in the judge's discretion to hear evidence during the challenge application under the CJA 1991. The judge is not allowed to hear evidence from the child victim or witness.[33]

It is evident from the foregoing that the transfer provisions restrict the protection offered to the accused in terms of disclosure issues. The challenge provisions are restricted to committal issues. The *Attorney General's Guidelines* (1981) were to address this concern in that they directed that 'unused' material

28 CJA 1987, s 4(2).

29 *Ibid*, s 5(9)(a), directs promulgation of regulations on the discovery of prosecution evidence with the notice to transfer. The judge can order further disclosure at a preparatory hearing (s 9(4)).

30 *Ibid*, s 6(3).

31 CJA 1991, s 53.

32 *Ibid*, Sched 6, paras 4 and 5.

33 *Ibid*, Sched 6, para 5(5).

was to be provided to the defence.[34] Additional assistance was provided to the defence, at a high price, in exchange for detailed case statements in the pre-trial process.

8.4 COMMITTAL PROCESSES FOR STANDARD PROSECUTIONS AND DISCLOSURE

The modification of the committal process was continued by the CPIA 1996[35] and the CDA 1998.[36] The CPIA 1996 provides for a committal by examining justices in matters triable either way.[37] The CPIA 1996 also contains the current rules pertaining to prosecution disclosure of unused material post-committal and reciprocal defence disclosure. Early disclosure of relevant information held by the prosecution continues to be available where the interests of justice demand.[38] The CDA 1998 prescribes another administrative process (sending the case to the Crown Court) in respect of matters triable on indictment only.[39]

It is instructive to begin with the CDA 1998.[40] In matters triable on indictment only, the proceedings will be sent from the magistrates' court to the Crown Court without a committal process after the magistrate has dealt with any preliminary issues.[41] The matters sent will include any related either way offence and any connected serious summary only matters, for example, those that might lead to imprisonment or disqualification.[42] The prosecution is required to provide the defence with the prosecution evidence and, at a later date, primary disclosure of unused material.[43] The defence will consider the materials and, if it is believed

34 *Sounders and Others,* unreported, 29 September 1989, London CCC T881630, Henry J.
35 MCA 1980, s 6(1) as amended by the CPIA 1996, Sched 1, para 4.
36 CDA 1998, ss 51, 52 and Sched 3.
37 The CPIA 1996 provided for committal in matters to be tried on indictment only as well, except for pilot areas, until national implementation of the CDA 1998 procedure on 15 January 2001.
38 *DPP ex p Lee* [1999] 2 Cr App R 304 DC.
39 Edwards, 1999, p 29.
40 The new procedure was proposed in the *Narey Report* (1997) and evaluated by Ernst and
41 CDA 1998, s 52(5). These issues may include bail or legal aid representation, if these issues were not finalised at the early Administrative Hearings after the accused was charged with an offence at a police station (s 50(2)(3)).
42 CDA 1998, s 51, Sched 3, provides the details regarding mode of trial selection, return to magistrate and sentencing, in varied types of trial proceeding.
43 The prosecution must serve its case on the defence within 42 days from the date of first hearing in the Crown Court (SI 2000/3305). CDA 1998, Sched 3, para 1, as amended by Access to Justice Act (AJA) 1999, s 67, allows a judge to extend the period. The provision of 'unused' material is governed by the reasonable time period in the CPIA 1996, s 13, which begins after the service of the prosecution case.

that there is no case to answer, an application may be made for an order discharging the defendant.[44] The court may, if the interests of justice require, hear live evidence on the issue of committal.[45] The standard that must be satisfied is more robust, that is, the evidence must be sufficient for a jury properly to convict. The defence will be able to raise issues of admissibility (not an issue open to challenge in the CPIA 1996 committal process).[46] It is not designed to assist in the process of the disclosure of 'unused' material as that is a matter for the CPIA 1996 regime post-committal.

As a result of the sending procedure, investigators and disclosure officers are under pressure to provide information promptly to the CPS lawyers, who, in turn, must pass it to the defence and the Crown Court The results from the indictable only pilots identified the need for increased awareness of communicating promptly information on issues such as medical evidence, identification parades and forensic evidence.[47] To assist in satisfying the need, the *Manual of Guidance for the Preparation, Processing and Submission of files* was revised. Some of the revisions include the requirement that a 'full' prosecution file should be prepared for the prosecutor, and that the disclosure officer complete a new disclosure declaration on the Case Information Form (MG1 form—used material).[48] Also, the form is a 'proactive enquiring form', designed to draw out as much information about the aspects of the case as possible for the prosecutor and the Court. However, the commentary to the list of mandatory documents required for the file passed to the CPS is changed so as to make it clear that certain documents need be included only if they are 'available', so as to avoid delay or a breach of the 42 day deadline for service of the case papers.[49] While the result of the latter decision is not known, it is anticipated that it may interfere with the obligation on the prosecutor to be alert to the need of early disclosure in the interests of justice, as stated in *Ex p Lee*.[50]

The committal procedure in matters triable either way is governed by the CPIA 1996[51] and has been dubbed the 'super short form' or 'rubber stamp' committal.[52] Evidence is limited to documentary evidence tendered by the

44 CDA 1998, Sched 3, para 2.

45 *Ibid*, Sched 3, para 2(4). If the witness is not willing to attend, his written evidence is disregarded (para 2(5)).

46 CDA 1998, s 5A, states what is to be considered by the examining justice without reference to admissibility. Eg, *Wilkinson v DPP* [1998] Grim LR 743 DC.

47 Ernst and Young, 2000.

48 Home Office, 2000a, foreword and paras 3.1–3. For a list of the contents of an expedited and full file, see Chapter 5, fn 84.

49 Home Office, 2000a, para 3.3.7; Trial Issues Group, 2000, p 1.

50 *DPP ex p Lee* [1999] 2 Cr App R 304 DC

51 The Indictment (Procedure) (Amendment) Rules 1997 SI 1997/711 take into account the CPIA 1996 committal process by deleting reference to depositions and replacing them with the words 'committal documents'.

52 Richardson, 1997, p vii.

prosecution.[53] The examining justices are precluded from hearing oral evidence from either party or receiving any evidence whatsoever from the defence. In contested committals, or where the accused is unrepresented, the examining justice must consider the evidence, and the parties will be allowed to make oral submissions.[54] Where the committal is uncontested and the accused (who must still attend) is represented, the committal will take place without the court considering the evidence.[55]

8.5 CONCLUSION

The rubber stamp committal, transfer and sending processes, have formalised the termination of the role of the original committal in the disclosure process. Lost, now, is the opportunity to hear and cross-examine prosecution witnesses and to gain a greater insight into the theory of the prosecution case or probe for information that might have been withheld. The committal, transfer and sending processes serve more as a milestone in the discovery and disclosure regime now found in the common law (for example, *Ex p Lee*) and the CPIA 1996. Disclosure of most of the prosecution evidence is to be completed at or about the time of committal, transfer or sending, while the departure of the case from the magistrates' court serves as the trigger for primary disclosure of unused material to the defence.[56]

On one level, the various functions of the early committal processes are adequately replaced by the combination of the current processes and other collateral procedures. These include charge screening and formalised advance disclosure by the CPS, early advance disclosure in pressing circumstances, the opportunity to make 'no case' submissions and pre-trial conferences to address issue resolution or trial management. The protection of the accused, it is said, will be enhanced by a new commitment to quality defence representation through the Criminal Defence Service.[57] Although it is hoped that the Government's goals in this regard will come to fruition, there are some commentators who doubt the sincerity of the Government's commitment,[58] especially on the issue

53 CPIA 1996, s 5A(2)(a)(b).

54 *Ibid*, Sched 1, para 5F(4), inserted a new s 6(2)(b) into the MCA 1980. The Magistrates' Courts (Amendment) Rules 1997 SI 1997/706 replaced r 7 applications by defence on the ground that there is insufficient evidence to put the accused on trial by jury or where accused is not represented.

55 CPIA 1996, Sched 1, para 5F(4), inserted a new s 6(2) into me MCA 1980.

56 CPIA 1996, s 3; CDA 1998, s 51, Sched 3.

57 AJA 1999, ss 12–18. Professors Bridges and Sherr have been appointed to complete quality audits (Bach, 2001).

of appropriate funding.[59] Nonetheless, efforts to improve defence services are welcomed.[60]

However, at a deeper level, in the context of disturbing evidence of non-compliance with the CPIA 1996 investigation and disclosure regime,[61] the final elimination of the process of receiving oral evidence in a committal hearing does not further the public interest in the proper administration of criminal justice. It is submitted that it is very important to provide a forum for the defence to hear oral evidence and cross-examine witnesses before the accused is required to stand trial.[62]

Therefore, it appears that, on this front, the continued use of the long form committal procedure in Canada must be recognised as a better way to encourage more complete disclosure and a fair trial.

In a later chapter, the topic of remedies in the trial process, and beyond, will be addressed. It is prudent to consider whether sufficient safeguards and remedies are already available to the accused within the trial and appeal system to counteract any problems that may arise due to the limited ambit of the new committal process. As it will be concluded, an aggrieved accused can seek various remedies in relation to abuse of process and non-disclosure from the trial judge, the appellate courts or the European Court of Human Rights. The discussion will demonstrate that the current remedies are not adequate to address the critical problem of non-compliance with the CPIA 1996 by some investigators and prosecutors.

58 See the negative comments of the Home Secretary (Gibb and Ford, 2001a).

59 Young and Wall, 1996, p 11; Gibbons, 2001, p 858. The Law Society recommended that practitioners not sign the proposed criminal defence contract offer by the Legal Services Commission due to inadequate remuneration (Napier, 2001) before concessions were made for continued review of the terms of the contract (LSC, 2001a, p 1).

60 Improvement through mandatory accreditation is possible (Bridges and Choongh, 1998). Expertise and time can lead to better quality legal services; LSC, 2001e.

61 This is discussed in Pt 5.9.

62 The CPS reports that: 'Cases which could not proceed have risen over recent years, from 7.7% in 1997–98 to 11.1% in 1999–2000. This is believed to be because the abolition of "live" committals in April 1997 removed the opportunity of testing witnesses before a case reaches the Crown Court.' (CPS, 2000, Chapter 3, Chart 8,'Commentary').

DISCLOSURE IN SUMMARY ONLY PROCEEDINGS

9.1 INTRODUCTION

It has been well argued by Professor Darbyshire that it is unwise to limit the consideration of procedural safeguards to proceedings in the Crown Court.[1] A large number of cases are dealt with by way of summary proceedings before stipendiary[2] and lay justices.[3] Indeed, a great majority of criminal offences can only be dealt with by way of summary proceedings in the magistrates' courts. Consequently, for many people the magistrates' courts provide their only experience of the criminal justice system. In spite of the generally lower penalties imposed in the magistrates' courts, many summary only offences can be punished by imprisonment.

It will be recalled that the disclosure obligation on the prosecution in either way cases is defined in the Magistrates' Courts (Advance Information) Rules 1985.[4] The rules require the provision of statements (or summaries) of the prosecution witnesses to the defence, unless issues of sensitivity or security arise, even if the defence had intimated that it intended to seek trial in a magistrates' court.[5] However, the rules do not extend to offences that can only be tried summarily.

Nonetheless, the arguments in favour of pre-trial disclosure are equally valid in respect of proceedings involving summary only offences. Advance disclosure allows the defence better to prepare its case.[6] The advantage of the greater resources available to the prosecution demands that, in the interest of securing a fair trial, information gathered by it which undermines the prosecution case should be disclosed. Further, it is now recognised that pre-trial disclosure assists in caseflow management, especially in reducing the requests for adjournments. While it is recognised that in the past some solicitors did not feel the need to have information in advance[7] and that the cost of photocopying statements is

1 Darbyshire, 1997, p 627.
2 Now referred to as District Judges (Magistrates' Courts); (Access to Justice Act 1999, s 78).
3 Summary courts handle over 95% of the proceedings in England and Wales (CPS, 2000a, p 33).
4 SI 1985/601.
5 Discussed in Ede and Shepherd, 1997, p 156; and Sprack, 2000, p 108.
6 Philips Commission, 1981a, para 8.13.
7 McConville *et al* (1994, pp 271–81) reported that some defence solicitors did not seek advance information for various reasons including the fact that it was known that the local prosecution would not provide it, or that there was no legal aid fee payable for pre-trial work and the case was routine.

significant, these no longer provide good reasons for ignoring this aspect of the fair trial principle.[8]

9.2 PRE-TRIAL DISCLOSURE OF PROSECUTION EVIDENCE AT COMMON LAW AND THE CPIA 1996

Advance disclosure by the prosecution of its case came to be provided on a consistent basis by some offices of the Crown Prosecution Service (CPS) in the 1990s. The CPS informed the Law Society that requests for advance disclosure of witness statements would be treated sympathetically, as long as the request was seen as reasonable.[9] This development has been further supported by the *Attorney General's Guidelines* (2000). Paragraph 43 states: 'The prosecutor should…provide to the defence all evidence upon which the Crown proposes to rely in a summary trial.' This is to be done sufficiently in advance of trial to allow the accused or his legal adviser time to consider the evidence before it is called.[10] Although the prosecutor retains a discretion, if the accused is taken by surprise by the evidence previously undiscovered, the defence may seek an adjournment of the trial.[11] Additional remedies available at trial and on appeal are discussed in Pt 10.8.

The issue of mandatory advance disclosure of the prosecution case was raised at the committee stage in the discussion of the Criminal Procedure and Investigations Act (CPIA) 1996. Baroness Mallalieu suggested that it would be appropriate to mandate such disclosure.[12] Unfortunately, this suggestion was not accepted, although provision was made for advance disclosure of expert evidence.

Subsequently, but during the period before the Human Rights Act (HRA) 1998 came into effect, the court, in *Ex p Imbert*,[13] considered an argument that advance disclosure of witness statements was required under the CPIA 1996. However, the court found that the wording of the act did not support such an interpretation. Essentially, the argument made by the defence in *Ex p Imbert* was that certain provisions of the CPIA 1996 did not accord with common sense

8 Many members of the High Court made comment in favour of the provision of witness statements by the prosecution to the defence upon request, ie, Bingham LJ, in *Kingston-upon-Hull JJ ex p McCann* (1991) 155 JP 569 DC, p 573, quoted with approval by Coffins J with the agreement of Buxton LJ, in *Stratford Justices ex p Imbert* [1999] 2 CR App R 276 DC, p 283, and Stuart-Smith LJ, in *Haringey Justices ex p DPP* [1996] 2 Cr App R 119 DC, p 123.

9 Ede and Shepherd, 1997, p 157.

10 An expedited prosecution file prepared by the police will be upgraded by the police to a full file at the request of the prosecutor (Home Office, 2000a, para 3.2.19).

11 *Kingston-upon-Hull JJ ex p McCann* (1991) 155 JP 569 DC, p 573; *DPP v Ara* (2001) *The Times*, 16 July DC (a suspect who may be processed by way of caution is entitled to disclose the case against Him).

12 Mallalieu, 1995, cols 1448–9.

13 *Stratford Justices ex p Imbert* [1999] 2 Cr App R 276 DC, p 279.

unless those provisions were read with the assumption that advance disclosure was to be given and, in consequence, the act should have been interpreted accordingly. Specifically, the defence pointed to the provisions that invited defence disclosure in summary proceedings and that required the prosecution to provide secondary disclosure in the event that a defence statement was given. It also pointed to the potential vulnerability of the accused to adverse inferences, if the defence departed at trial from the defence statement. The defence argued that, if they had not read the statements of the prosecution witnesses, then it was unrealistic to expect the defence to file a defence statement as prescribed in s 5 (and ss 6–9), effectively, barring the defence from the promised secondary disclosure. Collins J suggested that the defence could provide a statement nonetheless, even though it might be of low quality and, thereby, get secondary disclosure and disclosure of the witness statements.[14] It is interesting to notice that Collins J was not impressed with the argument made on behalf of the CPS which suggested that resource implications such as photocopying costs should be taken into account in deciding the issue of the duty of prosecution to provide advance disclosure. He stated that the rapid changes in information technology would solve the problems, if any, of resources.

In the light of the mandate of the court under the HRA 1998 to consider the compatibility of legislation with the provisions of the European Convention on Human Rights, it is likely that the issue of advance disclosure of the prosecution case is not closed. If it is determined by the court that prosecutors cannot be relied on to exercise their discretion appropriately in disclosure matters, a successful application based on Art 6(3)(a)(b) and *Jespers v Belgium*[15] has been predicted.[16]

The CPIA 1996, in s 20(3)(4), provides authority for rules to be made regarding the disclosure of expert evidence in magistrates' courts. Advance disclosure of expert evidence is provided for in the Magistrates' Courts (Advance Notice of Expert Evidence) Rules 1997.[17] Rule 3 requires the party tendering the evidence to give notice as soon as practicable after plea of the evidence to be called. If a party does not give notice, then he will require leave to call that expert evidence (r 5).

14 *Stratford Justices ex p Imbert* [1999] 2 Cr App R 276 DC, p 280.
15 (1981) 27 DR 61 (ECtHR Com).
16 Sprack, 2000, p 108.
17 SI 1997/705.

9.3 PRE-TRIAL DISCLOSURE OF UNUSED MATERIAL AT COMMON LAW AND THE CPIA 1996

Before the CPIA 1996 was enacted, the common law of prosecution disclosure in summary proceedings was beginning to follow the expansive approach seen in cases tried on indictment. For example, Simon Brown LJ addressed the issue in 1994. He stated that magistrates presiding over a summary trial, where an issue of disclosure arises 'should be advised as to the legal principles now established [in the Crown Court]—principles which, of course substantially supersede the *Attorney General's Guidelines* of December 1981– and should then decide the issue in conformity with those principles'.[18]

He did caution, however, that summary trials before magistrates 'should retain their essentially speedy and summary character and not become complicated and delayed by ill judged applications for needless further disclosure of documents. There may be occasions…when the court will wish to consider its powers of making wasted costs orders'.[19]

The CPIA 1996, however, halted the expansion of the prosecution's obligation in relation to unused information. Thus it remains, as it was before 1990, a duty to provide evidence that undermines the case for the prosecution, now called primary disclosure.[20] For example, it is settled law that a defendant is entitled to be informed pre-trial of witnesses known to the prosecution, but not called at trial.[21] A duty exists to disclose a previous inconsistent statement by a prosecution witness[22] and to reveal a previous conviction of the Crown witness when credibility is in issue (for example, the word of a Crown witness against that of the accused, a police officer).[23] Disclosure can be excused by the court when it is in the public interest to do so.[24]

The CPIA 1996 does not distinguish between those who are represented and those who are not. The Act prescribes primary disclosure to the accused and s 2 defines 'accused' as the person who is charged. The accused is prohibited from using the material disclosed for any purpose apart from the instant case. The penalty is a contempt of court proceeding.[25]

18 *Bromley Justices ex p Smith and Wilkins* [1995] 2 Cr App R 285 DC, p 289. Rose LJ approved of this comment in *South Worcestershire Magistrates ex p Lilley* [1996] 2 Cr App R 420 DC, p 423.

19 *Bromley Justices ex p Smith and Wilkins* [1995] 2 Cr App R 285 DC, p 292.

20 Section 1(1)(a).

21 *Leyland Justices ex p Hawthorn* (1979) 68 Cr App R 269 DC.

22 *Liverpool Crown Court ex p Roberts* [1986] Crim LR 622 DC.

23 *Knightsbridge Crown Court ex p Goonatilleke* (1985) 81 Cr App R 31 DC, p 39.

24 Section 14. *Stipendary Magistrate for Norfolk ex p Taylor* (1997) 161 JP 773 DC.

25 Sections 17 and 18.

The problems identified arising from the failings of disclosure officers and prosecutors identified by the co-BAFS (British Academy of Forensic Sciences joint studies) and CPS Inspectorate, and discussed above in relation to matters tried on indictment, impact equally those accused persons who are tried summarily. It is hoped that disclosure officers and prosecutors will be made to follow closely the spirit of the Act so that material that might undermine the prosecution case will be disclosed. It is submitted that a right to fair trial is no less important in summary proceedings and that the right is undermined without the provision of primary and secondary disclosure.

9.4 VOLUNTARY DEFENCE DISCLOSURE IN SUMMARY PROCEEDINGS AND THE CPIA 1996

While the CPIA 1996 does not require the accused to file a defence statement, it invites him to do so, thereby, triggering the prosecution's obligation to provide secondary disclosure.[26] If a defence statement is filed, however, the accused is vulnerable to risk of adverse comment or inference being drawn against him, if his defence statement is late, defective or inconsistent.[27] While this provision is patterned after those applying to matters to be tried on indictment, its application can be further distinguished. In matters tried on indictment, the accused is entitled to receive advance disclosure of the prosecution case. Disclosure is not mandatory in summary only matters. In consequence, the defence statement will be prepared, if at all, in summary only matters without the benefit of advance disclosure.[28] Of course, primary disclosure, such as it is, will be given. It is predicted, therefore, that few advocates will advise in favour of the filing of a defence statement, as the risk is said to outweigh the potential benefits of secondary disclosure, in its defective state.[29] The risk involved in providing a defence statement is that the defence stated might turn out to be one that is not advantageous when the prosecution evidence is revealed.[30] Further, some

26 Section 6; Leng and Taylor, 1996, p 12. The Magistrates' Courts (Advance Notice of Expert Evidence) Rules 1997 SI 1997/705 apply to the defence as well.

27 Section 11(2).

28 The *Attorney General's Guidelines* (2000a, para 43) state that prosecutors 'should' disclose to the defence evidence upon which they intend to rely at trial.

29 The CPS Inspectorate (2000, para 5.6) reported that a defence statement was provided in 11 of the 251 summary trial cases in the sample. It suggested that the reason for this finding may have been that the defence prefer not to dispose any aspect of their case, or that filing a defence statement is fruitless because so little material is disclosed at the secondary stage (paras 5.9–13).

30 Sprack, 2000, p 132.

prosecutors voluntarily provide secondary disclosure in the interests of justice.[31] It is submitted that it is inappropriate, in the light of the reports of the improper actions of other members of the prosecution, to require in law that the defence must provide a defence statement as a condition precedent to the receipt of secondary disclosure.

9.5 CONTRAST IN CANADA

By way of contrast, Sopinka J, in *Stinchcombe*, expressed the view, *obiter,* that disclosure of used and unused material by the prosecution in summary proceedings was an important practice and that it should be continued.[32] Two appellate courts have since addressed the issue. In *Kutynec*[33] and *Petten,*[34] it was decided that the basic principles and practice of disclosure as stated by the Supreme Court of Canada applied to summary proceedings. In *Petten,* the court said that disclosure principles did not require that copies were to be provided in every case. The court, as opposed to the prosecutor, had the power to decide the manner and timing of disclosure within the context of the case. It is instructive to note that the Ontario Prosecution Service provides to the accused at his first appearance a discovery packet, summarising the case against him and providing an indication of the usual sentence in the event of a guilty plea.[35] However, the Locke Report (Ontario) stated that regional variations in prosecution disclosure continue to cause concern and that a series of recommendations should be adopted to encourage uniform practices in respect of disclosure.[36]

31 The CPS Inspectorate (2000, para 5.9) reported that one defence solicitor participating in the study stated that a reasonable request for further disclosure usually obtained the desired material even when no defence statement was made.

32 [1991] 3 SCR 326, p 342.

33 (1992) 7 OR (3d) 277 Ont CA.

34 (1993) 21 CR (4th) 81 Nfld CA.

35 Letter from John Pearson, Senior Crown Prosecutor, Hamilton Ontario, 27 February 2001.

36 *Locke Report,* 1999, Chapter 5. An extract from the *Locke Report,* 1999, 'Model Disclosure Index/Checklist' is found in Appendix 4.

REMEDIES AVAILABLE TO THE ACCUSED

10.1 INTRODUCTION

The police and the prosecution have extensive resources, and the advantage of being the first to be informed of an alleged crime. This allows the police to speak to potential witnesses, decide what evidence is available and which potential investigative 'leads' to pursue or disregard. Recent changes in legislation have increased the State's advantage in investigation and prosecution. The changes include the modification of the use of the right of silence, in the face of police questioning and at trial,[1] and the requirement of detailed defence disclosure in indictable proceedings combined with restrictions on prosecution disclosure.[2]

The defence will face many additional problems. While detained, the accused is unable to assist in making inquiries. Arguments based on incomplete information may lead to the refusal of bail, although additional material may be contained in the prosecution file. Other important information may not be disclosed for many weeks. Therefore, instructions to defence experts may be delayed or incomplete. Defence requests to speak with witnesses are communicated through the police, and witnesses may refuse the release of their contact information.

Consequently, it may be of the utmost importance to the accused, in pursuit of his right to put forward a full answer and defence in a fair trial, that the court should be willing to order the prosecution to provide, as early as possible, information which may support lines of defence.[3]

In this chapter, the remedies available to the accused within the criminal process will be addressed. The primary source of redress is found in the common law of abuse of process. Neill LJ referred to the power in the court to ensure the integrity of the criminal process as having a constitutional footing.[4] This is confirmed in the Human Rights Act (HRA) 1998.[5] Only a few details of the common law remedies in England and Wales have been modified by the Criminal Procedure and Investigations Act (CPIA) 1996. In Canada, the common law

1 Criminal Justice and Public Order Act 1994, ss 34–38.
2 CPIA 1996.
3 Eg, *DPP ex p Lee* [1999] 2 Cr App R 304 DC
4 *Beckford* [1996] 1 Cr App R 94 CA, p 100.
5 Section 6(3)(a). Section 8(1) allows the court to grant any remedy that is within it normal powers and is appropriate.

doctrine of abuse of process is preserved and subsumed under the remedies section (s 24) of the Charter.[6]

Limited potential for civil remedies against investigators and prosecutors exists where the investigation or prosecution is conducted maliciously, or perversely.[7] However, civil actions are not efficient in compensating the wrongfully accused[8] nor effective in changing police conduct. Similarly, the State may prosecute dishonest police and prosecutors, but this is rarely done. These topics will be canvassed in Chapter 11.

10.2 REMEDIES IN THE COURSE OF THE CRIMINAL PROCEEDINGS

10.2.1 Introduction

The integrity of the criminal justice system must be preserved to maintain public confidence in the rule of law.[9] Integrity flows from the proper administration of justice, which, in turn, requires adherence to the rules of natural justice.[10] Natural justice includes the right to a fair trial, part of which is the right to put forward a full answer and defence. The right to a fair trial also gives rise to the duty imposed on the prosecutor to provide pre-trial disclosure to the accused, subject to the competing public interests.[11] Failure by the prosecution to adhere to the rules of investigation and disclosure can undermine the right to a fair trial and, therefore, the administration of justice. Consequently, the duty of a court, in addressing a breach of the rights of the accused, is to provide a remedy that ensures that justice is done while ensuring the integrity of the judicial process. In the rarest of cases, only staying the proceedings can preserve the integrity of the process.[12]

In the remainder of this chapter, the remedies available to the accused when aggrieved by the actions of the prosecution in relation to disclosure are discussed. The discussion will begin with a description of the conditions

6 *O'Connor* [1995] 4 SCR 411, p 462.

7 *Darker (Docker dec) and Others v Chief Constable of the West Midlands Police* [2000] 3 WLR 747 HL (no police immunity to conspiracy claim).

8 *Kuddus v Chief Constable of Leicestershire* [2001] UKHL 29 (the question of exemplary damages for misfeasance in public office and the vicarious liability of a chief constable for exemplary damages is unresolved).

9 *Horseferry Road Magistrates' Court ex p Bennett* (1994) 98 Cr App R 114 HL.

10 *Leyland Justices ex p Hawthorn* (1979) 68 Cr App R 269 DC, p 271.

11 *Brown (Winston)* [1998] 1 Cr App R 66 HL, p 70.

12 *Horseferry Road Magistrates' Court ex p Bennett* (1994) 98 Cr App R 114 HL, p 135; *O'Connor* [1995] 4 SCR 411, p 468.

pertaining to an application by the accused, including the varying standards of proof required in seeking certain of the remedies. Then, a description of the remedies is provided. The remedies range from adjournment to a judicial stay of proceedings. Special consideration is given to this remedy. Subsequently, the question of when the remedies are available, and from which court, is addressed. While the remedies are available in all trial courts, in certain situations some of the remedies are available early in the process, well before the matter is set down for trial. Conversely, certain remedies are still available late in the process, even when sought first on appeal, although they are subject to many restrictions. However, before the remedies on appeal are considered, the impact of the CPIA 1996 on the availability of remedies before and at trial is considered. Also, comment is made on the effectiveness of the remedies and it is, therefore, deemed necessary to continue to explore supplemental remedies in the appeal process.

In addition to the range of remedies mentioned above, other remedies, designed to correct decisions of the trial judge that were incorrect, contribute to the process of assisting an aggrieved person. Therefore, the powers of the appellate court to consider the decisions of a trial judge are addressed, as are the features of how appeal court powers are exercised in practice. Special consideration is given to the question of the admissibility of fresh evidence, and the circumstances under which the appeal court may remedy a wrongful conviction arising from prosecution non-disclosure. It is open to question whether or not a remedy given on appeal, for example, a new trial, should be properly considered as an 'efficient' remedy in the sense that the time and resources expended to secure it, and the strain on the accused, may be too great. Since interlocutory appeals are not permitted,[13] all appeals involve the lapse of a large amount of time when viewed from the standpoint of the wrongly convicted.

The passage of time, and the potential of loss of evidence, and the expenditure of resources lead to the conclusion that, for current purposes, the discussion of the remedies on appeal need go no further than the Criminal Division of the Court of Appeal. This is not to underestimate the importance of higher courts. Certainly, the House of Lords has an important role to play in the correction of errors and the decision that the law has evolved,[14] as does the European Court

13 *In Re Smalley* (1985) 80 Cr App 205 HL, p 216 (with reference to Supreme Court Act (SCA) 1981, s 29(3)) and *DPP ex p Kebilene* [1999] 3 WLR 972 HL, pp 983–85(regarding the common law); in canada: *Mills* [1986] SCR 863 and *Meltzer* [1989] 1 SCR 1764 interpreting Criminal Code of Canada, s 674.

14 The House of Lords may consider a question of law (CAA 1968, s 35). On the issue of unsafe convictions, Lord Mustill stated 'the matter is far better left to the up-to-date practical experience of the judges who sit in the Criminal Division of the Court of Appeal': *Preston* (1994) 98 Cr App R 405 HL, p 536. Even where a Law Lord decided to consider the issue of the safety of the conviction, ie, Lord Hutton, he is left inevitably to concede the superior position of the Court of Appeal: *Mills and Poole* [1998] 1 Cr App R 43 HL, p 65.

of Human Rights (ECtHR). This is evidenced by the number of references to cases decided by these courts in this work. However, it is not necessary to discuss the role of these courts within the context of efficient remedies for non-disclosure.

It is on the same basis that discussion of the Criminal Cases Review Commission (CCRC) has been omitted.[15] It, too, has, however, a vital role to play in the justice system by providing an effective method of addressing, post-appeal, miscarriages of justice.

10.2.2 Conditions pertaining to the granting of remedies

The remedies discussed in the next part are available in all cases in any trial court, subject to conditions, when the prosecution fails in its duty to be fair by not providing appropriate disclosure.[16] The conditions are procedural and substantive in nature. The procedural conditions relate to the stage of the proceedings, the timing of the application and the level of court where the application is to be made. They are stated in terms of preferences by the authorities as noted below. The substantive conditions include the stipulation that the least intrusive satisfactory remedy will be granted and that the accused must demonstrate actual prejudice to the preparation or conduct of his defence before remedial inquires can begin.[17] One exception to the latter condition is the existence of a burden on the prosecution to justify departure from the standard practice of providing the defence with the opportunity to inspect and copy witness statements and the exhibits thereto.[18] This will usually occur in relation to public interest issues.

Generally, the trial court at least should hear all of the Crown's case before addressing the question of abuse of process, unless it can be addressed by refusing to admit certain evidence. Where actual prejudice has been shown, the trial judge will consider a range of discretionary remedies.[19] The imbalance in resources in favour of the State must be kept in mind when deciding the remedies to be given.[20] However, fairness must be accorded to both sides[21] and this may require, for example, protecting the identity of an undercover officer.[22] If an

15 CAA 1995. Provision was made for verdicts of guilty but insane in the Criminal Cases Review (Insanity) Act 1999.

16 Additional considerations apply in the Canadian context arising from a breach of the 'right of disclosure' declared in *La* [1997] 2 SCR 680. This is of practical consequence only in the issue of applications by the defence for a stay or a mistrial.

17 *Beckford* [1996] 1 Cr App R 94 CA, p 101; *Derby Crown Court ex p Brooks* (1985) 80 Cr App R 164 DC, p 169; O' *Connor* [1995] 4 SCR 411, pp 464–65.

18 *X Justices ex p J* [2000] 1 All ER 183 DC, p 188.

19 *Heston-Francois* (1984) 78 Cr App R 209 CA, pp 218–19; *O'Connor [1995]* 4 SCR 411, pp 472–73; *La* [1997] 2 SCR 680, p 695.

20 *Brown (Winston)* [1995] 1 Cr App R 191 CA.

21 *Medway* [2000] Crim LR 415 CA.

application is refused in the course of the proceedings and the trial continues through to conclusion, the point may be raised on appeal.[23]

The persuasive burden in demonstrating actual prejudice is modest for less dramatic remedies, and more substantial for the more dramatic remedies. The graduated approach is justified on the basis that the remedy sought is discretionary and the court is not required to make a finding of fact.[24] Therefore, where the applicant seeks an adjournment to consider newly disclosed evidence, it will be granted upon the reasonable explanation by counsel. Costs applications are more carefully considered; the judge will determine on which side of the line the case falls. Other remedies, such as asking the court to recall a witness, may require the defence to show that there is a likelihood that the missing evidence would, in a material, way assist the accused. In the context of an application for a new trial or stay, the court will seek a demonstration of the manner in which the accused was prejudiced, and that the prejudice was serious, and that other less intrusive remedies could not address the concern.[25] This approach is taken in Canada also.[26]

10.2.3 List of available remedies

The following remedies are available in all cases in any trial court, subject to the conditions set out above, when the prosecution fails in its duty to be fair by not providing appropriate disclosure.

In most cases, non-disclosure will be remedied by adjournment;[27] the court may choose to subpoena other witnesses, or to make a disclosure order.[28] Delays in compliance with a disclosure order tend not to attract any greater remedy initially, other than further adjournment, a comment from the judge and, perhaps, an order for costs.[29]

Where failure by the prosecution to comply with the disclosure process results in a delay in trial, it is open to the court to release the accused from

22 *X Justices ex p J* [2000] 1 All ER 183 DC.
23 *AG's Ref* (No 1 of 1990) (1992) 95 Cr App R 296 CA, pp 303.
24 Cory J addresses this point, in *Dixon* [1998] 1 SCR 244, p 263: 'The evidence required to meet this burden and the factors to be considered will differ according to the particular right at issue and the particular remedy sought.'
25 *AG's Ref* (No 1 of 1990) (1992) 95 Cr App R 296 CA, p 303.
26 *La* [1997] 2 SCR 680.
27 *Dunmow JJ ex p Nash* (1993) *The Times,* 17 May, DC; *Calderdale Magistrates' Court ex p Donahue and Cutler* [2001] Crim LR 141 DC; *Dixon* [1998] 1 SCR 244, p 262.
28 *Vincent* [1993] 1WLR 862 PC; *O'Connor* [1995] 4 SCR 411, p 465.
29 *Connolly v Dale* [1996] 1 Cr App R 200 DC.

custody.[30] There is authority for a temporary stay pending a satisfactory resolution of disclosure issues.[31]

An award of costs against the prosecution is another discretionary remedy. However, statistics are not available as to the extent to which this remedy is used in the context of non-disclosure by the prosecution.[32] The primary thrust of the provision appears to be compensation.[33]

In Canada, an order for costs is 'quite fashionable'.[34] There are precedents in the form of decided cases for the proposition that costs are not primarily designed to reimburse the accused, but rather to mark disapproval of non-compliance with rights. Consequently, orders should address actions beyond inadvertent or careless failure to discharge the disclosure obligation. An order for costs in Canada requires a finding of an unacceptable departure from the standards of reasonableness, or more egregious conduct, resulting in a denial of a right, accompanied by some compensatory need.[35] In some cases, the order for costs has involved substantial sums, for example £75,000 (Can$150,000),[36] although there is a tendency for courts normally to award more modest sums.[37] Inferior courts exercising trial jurisdiction also have the power to award costs for non-disclosure.[38]

In both countries, the trial judge is empowered to control the actual trial. This should ensure that all relevant factual issues arising from undisclosed evidence will be placed before the jury as part of the evidence for their consideration. Witnesses may be recalled to testify, or be cross-examined on the issues arising out of material disclosed during trial. In extreme circumstances, the court may call evidence,[39] even at the magistrates' court

30 *W* (1995) reported by Enright, 1995, p 859.

31 *Humphreys and Others,* unreported, 14 February 2000, Maidstone CC, T19990290, T19990344, Crush J.

32 Plotnikoff and Woolfson (2001) will address this issue.

33 The Prosecution of Offences Act (POA) 1985, ss 16–20, Costs in Criminal Cases (General) Regulations 1986 SI 1986/1335, as amended by SI 1999/2096. Section 16(6) states 'reasonably sufficient to compensate him for any expenses properly incurred by him in the proceedings'. See reg 3 and *R (on the Application of the Comissioners of Customs and Excise) v Crown Court at Leicester* [2001] All ER (D) 163 (DC).

34 Lawyer Donald Bayne, quoted in Harper (1997, p 13).

35 *Jedynack* (1994) 16 OR (3d) 612 (Ont Gen Div); *Robinson* [2000] 3 WWR 125 Alta CA. The court must find more than an 'unequivocal failure to discharge a clearly established constitutional duty to disclose'.

36 *Pawloske* (1993) 79CCC (3d) 353 Ont CA.

37 Harper, 1997, p 13.

38 *Jedynack* (1994) 16 OR (3d) 612 (Ont Gen Div).

39 *Harris* (1927) 20 Cr App R 86 KB, p 89; *Cleghorn* [1967] 2 QB 584 CA, p 587; *AG's Ref (No 1 of 1990)* (1992) 95 Cr App R 296 CA, p & 303; *Finta* [1994] 1 SCR 701, p 861.

level.[40] Additionally, the judge has the power to direct a verdict of not guilty (usually at the close of the prosecution case)[41] and give appropriate directions to the jury before they consider their verdict.[42] The court may declare a mis-trial in appropriate circumstances,[43] or add disclosure orders pending a new trial based on other grounds.[44]

The discretion in the trial judge also includes the power at common law, and under the Police and Criminal Evidence Act (PACE) 1984,[45] to regulate the admissibility of evidence.[46] Section 78(1) focuses on the improper acquisition or collection of evidence. It may be appropriate to exclude evidence that is misleading in the absence of full disclosure.[47] Excluding evidence on the basis of an abuse of process arising from non-disclosure may also be appropriate.[48] The House of Lords acknowledged an overriding duty to ensure a fair trial in *Sang*, even though it restated the traditional proposition that relevant evidence could not be excluded on the ground that it was obtained by improper or unfair means.[49] However, this has not reduced the importance of the fair trial principle, as seen in cases of destroyed evidence, such as *Birmingham and Others*,[50] and those below relating to disclosure or extradition.

By contrast, in Canada, the exclusion of evidence is authorised at common law and in the Charter.[51]

Finally, a judicial stay, based on an abuse of process, is available in the clearest of cases in each country. However, in this application the accused must demonstrate 'serious' prejudice and that no other remedy will suffice.[52]

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40 *Haringey Justices ex p DPP* [1996] 2 Cr App R 119 DC.

41 *Heston-Francois* (1984) 78 Cr App R 209 CA, pp 218–91. Baldwin (1997, p 539) studied 104 judge directed acquittals and concluded that directed acquittals occurred as a result of a 'legal problem or doubt concerning the conduct of the police investigation' in 31% of the cases studied.

42 *AG's Ref (No 1 of 1990)* (1992) 95 Cr App R 296 CA, p 303; *Rose* [1998] 3 SCR 262.

43 *O'Connor* [1995] 4 SCR 411, p 465.

44 In *Campbell and Shirose* [1999] 1 SCR 565, a new trial was ordered and limited to the narrow issue of whether the prosecution should be stayed.

45 Section 78(1). See, also, s 76 for exclusion of confessions and s 82(3) for exclusion of otherwise admissible prosecution evidence.

46 *AG's Ref (No 1 of 1990)* (1992) 95 Cr App R 296 CA, p 303.

47 Edwards, 1997, p 327.

48 PACE 1984, s 82(3), is also available, but apparently it is rarely used as a result of the trend to address all matters under s 78(1) (Grevling, 1997, p 672).

49 *Sang* (1979) 69 Cr App R 282 HL, p 291; *Sang* has been understood to limit the exclusion of evidence to that taken from the accused (Grevling, 1997, p 669).

50 *Birmingham and Others* [1992] Crim LR 117 CC, discussed in Pt 7.7.

51 *O'Connor* [1995] 4 SCR 411, p 461. For exclusion of evidence on the basis of an abuse of process, see s 24(1), and for exclusion of evidence on the basis of improper collection of evidence, see s 24(2).

52 *AG's Ref (No 1 of 1990)* (1992) 95 Cr App R 296 CA, p 303; *O'Connor* [1995] 4 SCR 411, pp 461, 468; *La* [1997] 2 SCR 680, p 692.

The remedy of the judicial stay is not limited to whether the trial (or retrial) can be fair.

10.2.4 Scope of the remedy of judicial stay

Lord Lowry, in *Ex p Bennett*, explained the breadth of the court's supervisory jurisdiction in the context of illegal extradition by the police: 'A court has a discretion to stay any criminal proceeding on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case.'[53] These principles have been stated by the Supreme Court of Canada, also.[54]

While there is great weight attached to the public interest in convicting those guilty of serious crimes, it is more important that the rule of law governs.[55] Lord Steyn stated 'the judge must weigh in the balance the public interest in ensuring that those who are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means'. The test was stated as to whether the conduct of the authorities in causing the defendant to be deported to England and in prosecuting him to conviction was 'so unworthy or shameful that it was an affront to the public conscience to allow the prosecution to proceed?'.[56]

With respect to the duty on the prosecution in investigation and disclosure, some judges have expressed the same view in attempting to protect the rule of law. For example, according to Lord Bingham CJ, if police 'deliberately' refrain from collecting from a witness certain details with the purpose of frustrating the defence, a stay would be granted.[57] A stay was granted by Grigson J, in *Woodruff and Hickson* (after the Court of Appeal ordered a retrial), on the basis that to retry them in context of the evidence suggesting corrupt practice involving the investigators would be an abuse of process.[58] Examples exist wherein English judges have granted stays on the basis that it was not fair to try the accused because proper disclosure had not been made.[59] It appears that the judges were convinced that the prosecution's actions were 'so unworthy or

53 *Horseferry Road Magistrates' Court ex p Bennett* (1994) 98 Cr App R 114 HL, p 135.
54 *L(WK)* [1991] 1SCR 1091, pp 1099–103; *Simpson* [1995] 1 SCR 171.
55 *Mullen* [1999] 2 Cr App R 143 CA, p 156.
56 *Latif* [1996] 2 Cr App R 92 HL, p 101, *per* Lord Steyn.
57 *Roberts* [1998] Crim LR 682, p 683.
58 Unreported, 2 November 1999, CA 99 00240 Y3 and 99 00242 Y3. The stay is discussed in Dein (2000, p 801).
59 Plotnikoff and Woolfson (2001); the results are forthcoming. The CPS does not include stays in its statistics on adverse findings.

shameful' that is was not fair to try the accused. However, the brevity of the reports of the reasons make a precise analysis of some of these decisions impossible. For the purpose of analysis, the key issue is whether it is correct to order a stay simply due to prosecution non-disclosure even though the undisclosed material still exists. It is submitted that a fair trial can occur after appropriate disclosure is made. The example cases from England and Wales include *Docker (dec) and Others*, *Humphreys and Others*, and *Doran, Togher and Dobbels*.

In *Docker (dec) and Others*,[60] a stay was granted after the judge 'had ruled that the police had been significantly at fault in the disclosure process'. There the police had fabricated statements and other evidence and had not revealed this fact and the prosecution had not obeyed the pre-trial disclosure order. It is apparent that a fair trial could have been conducted subsequently had adequate disclosure been made and, therefore, it is likely that disapproval of the actions of the prosecution was the basis of the stay.

In *Humphreys and Others*, Crush J ordered a stay after 11 weeks of opening arguments and motions in the trial of a Detective Sergeant in the National Crime Squad, when it became apparent that the Crown Prosecution Service (CPS) had failed to comply with its duty of disclosure. The judge made his decision on the basis that non-disclosure of material evidence, and the handling of Mr Price, a co-conspirator who agreed to give evidence in return for a reward, had created a real danger that the defendants would not have a fair trial.[61] Crush J also found that it was 'not fair' to try the accused. In his opinion, the repeated and continuing breaches of the CPIA 1996 undermined the confidence in and the respect for the rule of law.[62] While one can sympathise with the frustration of the court as expressed in the reasons, it is respectfully submitted that a fair trial could have occurred before a new jury as, by this stage, the defence had obtained extensive disclosure. It was of great importance that allegedly corrupt police officers should be tried.

In *Doran, Togher and Dobbels,* the first trial of these three accused was halted by the trial judge due to non-disclosure of identification evidence pertaining

60 *Docker (dec) and Others,* unreported, 28 September 1993, Wolverhampton CC, Judge Gibbs QC, described in *Darker (Docker dec) and Others v Chief Constable of the West Midlands Police* [2000] 3 WLR 747 HL.

61 *Humphreys and Others,* unreported, 14 February 2000, Maidstone CC, T19990290, T19990344, Crush J, transcript p 29, adopting reasons of Turner J (p 43), in *Doran, Togher and Dobbels (No 3),* unreported, 6 July 1999, Bristol CC, Turner J.

62 *Humphreys and Others,* unreported, 14 February 2000, Maidstone CC, T19990290, T19990344, Crush J, transcript p 41, adopting reasons of Turner J (p 56), in *Doran, Togher and Dobbels* (No 3) unreported, 6 July 1999, Bristol CC, Turner J.

to the accused Dobbels.[63] Their second trial ended in a conviction, but it was overturned on appeal due to a deficient summing up by the trial judge, and a new trial was ordered.[64] Before the third trial began, the prosecution disclosed for the first time some documents, with the sensitive information removed, regarding the eavesdropping of hotel rooms used by Doran. The proceedings were stayed on the basis that to continue would have been an abuse of process. It was found by Turner J that a fair trial could not be held, given the conduct of the prosecution, and also that it would be unfair to try the accused because the prosecution team was shown to have been guilty of abusing the process of the court.[65]

His Honour Gerald Butler QC conducted an inquiry into the circumstances surrounding the ruling of Turner J, at the request of the Attorney General, and he came to the conclusion that with appropriate disclosure, a fair trial could have occurred.[66] The Court of Appeal, in another proceeding against Doran and Togher, also expressed the view that the stay in the case before Turner J could not be justified on the basis that a fair trial could not have taken place.[67] It is instructive to note that the Law Commission proposed that the prosecution should have a right to appeal against a legal ruling by a judge that has the effect of ending the case and releasing the defendant[68] and that the Government plans legislation to effect this change.[69]

Therefore, in England and Wales, it appears that a judicial stay may be granted if the defence can demonstrate *mala fides* on the part of the prosecution, or genuine prejudice and unfairness to the accused that cannot be eradicated by full disclosure before commencing a new trial.[70] This position is supported by the jurisprudence of Canada.

The Supreme Court of Canada has addressed the question of whether a stay is appropriate in situations of non-disclosure on the basis of protecting the integrity of the process. In *O'Connor,* the pre-trial conduct of the prosecutors, in not providing material that was ordered to be disclosed, was outrageous and drew harsh criticism from the trial judge. He said the whole proceedings were so tainted and that his confidence in the prosecution was so undermined that a

63 *Doran, Togher and Dobbels (No 1)* unreported, 1996, Bristol CC; Foley J, discussed in the *Butler Report* (2000, para 1.14).

64 *Doran, Togher and Dobbels (No 2)* unreported, November 1998, CA stated in *Butler Report* (2000, para 1.18).

65 *Doran, Togher and Dobbels (No 3)* unreported, 6 July 1999, Bristol CC, Turner J. A transcript of the reasons for the stay is appended to the *Butler Report* (2000).

66 *Butler Report*, 2000, Chapter 11.

67 *Doran and Togher* (2000) *The Times,* 21 November, CA.

68 Law Commission, 2001, recs 25–29.

69 Home Office, 2001, para 3.53.

70 A similar test is used in cases of lost evidence: *Feltham Magistrates Court ex p Ebrahim, Mouat v DPP* (2001) *The Times,* 27 February, DC; *Beckford* [1996] 1 Cr App R 94 CA, p 101.

stay was the appropriate remedy. The Supreme Court of Canada eventually stated: 'A stay of proceedings is a *last resort*, to be taken when all other acceptable avenues of protecting the accused's right to full answer and defence are exhausted.' No stay is to be granted on the basis of the impossibility to have a fair trial, unless the remedy, including a subsequent trial, would perpetuate the Charter violation or abuse of process. In short, a new trial rather than a stay is the appropriate remedy for non-disclosure.[71]

10.3 EARLY (PRE-COMMITTAL) REMEDIES

10.3.1 Introduction

Applications by the defence for assistance from the court in gaining access to evidence or information held by the prosecution during the early stages of the proceeding raise important issues pertaining to remedies. One issue concerns the applicability of the CPIA 1996 in the period before the accused is committed to stand trial in the Crown Court. Another issue is the scope of early disclosure. Three recent High Court decisions provide much welcomed CPIA 1996 did not apply to issues of early (pre-committal) disclosure and that guidance on these issues. Briefly, the decision in *Ex p Lee*[72] found that the some early disclosure may be required at common law. The decision in *Ex p J*[73] re-emphasised the need for the prosecution to comply in the normal course with the common law duty to provide the statements of its witnesses and exhibits thereto. Both cases also addressed the scope of early disclosure and clarified the remedy process. The decision in *Ex p Imbert*[74] found that, while the CPIA 1996 did provide for primary disclosure in summary cases, it did not alter the common law rule that disclosure of the evidence upon which they rely in summary cases was at the discretion of the prosecution. The reasons given in *Ex p Lee* and *Ex p Imbert* contained strong words of encouragement to prosecutors to be fair.[75] The prosecutor is under a continuing duty to consider what, if any, immediate disclosure is required in the case in order to adhere to the principles of justice and fairness.[76]

71 *O'Connor* [1995] 4 SCR 411, pp 465–66; *Dixon* [1998] 1 SCR 244, p 264.
72 *DPP ex p Lee* [1999] 2 Cr App R 304 DC
73 *X Justices ex p J* [2000] 1 All ER 183 DC.
74 *Stratford Justices ex p Imbert* [1999] 2 Cr App R 276 DC.
75 *DPP ex p Lee* [1999] 2 Cr App R 304 DC; *Stratford Justices ex p Imbert* [1999] 2 Cr App R 276 DC, p 283.
76 *DPP ex p Lee* [1999] 2 Cr App R 304 DC, p 318.

10.3.2 Pre-committal remedies in either way or indictable matters

According to *Ex p Lee,* in the 'rare' situation where the prosecutor does not comply with his duty to provide disclosure, the defence may seek the assistance of the trial judge, or exceptionally the Divisional Court, even before the commencement of the committal.[77] As confirmed by *Ex p J,* examining magistrates have jurisdiction to order early disclosure of evidence to be used at trial, but where the relief sought is a stay of proceedings the magistrates must be mindful that they are to exercise their jurisdiction to stay proceedings most sparingly.[78]

10.3.2.1 The result in Ex p Lee

In *Ex p Lee,* the accused was arrested and detained on a charge of murder on 25 September 1998 arising from an altercation with the deceased on 12 September 1998 and his death two days later. Lee's solicitors wished to instruct an independent pathologist and interview potential witnesses, before the witnesses became untraceable, or their memories faded. The solicitors requested in writing from the CPS the names and addresses of any witnesses not to be used in the committal or trial, copies of prosecution witness statements, or at least summaries, and copies of the accused's statements, and previous convictions, if any. Also requested were the details of the previous convictions of the deceased or charges pending, the report of the Crown Pathologist and 'full unused material'.

Two weeks later the CPS provided copies of statements of three prosecution witnesses, the record of the interviews of the accused and the post-mortem report.

Renewed requests for greater disclosure were made in the following days, including a request for a copy of the neuro-pathological report which had been anticipated by the Crown Pathologist. The requested materials were not forthcoming before 19 October, the date set for the bail application. The prosecution witnesses refused to speak with the defence. Both the magistrates' court and High Court refused bail.

The committal papers were served on 19 November in anticipation of a committal on 30 November. The committal was twice postponed at the request of the CPS. Three months post-incident, the CPS was given notice of the accused's intention to seek judicial review of the disclosure decision.

The Divisional Court decided that the defence had asked for too much too soon, while the prosecution had not replied in a timely manner to the

77 *DPP ex p Lee* [1999] 2 Cr App R 304 DC, pp 318–19.

78 [2000] 1 All ER 183 DC, p 189, following *Horseferry Road Magistrates' Court ex p Bennett* (1994) 98 Cr App R 114 HL, p 126.

reasonable requests made (such as the request for details of the previous convictions of the deceased).[79] It affirmed the prosecution's decision to provide, weeks earlier, the balance of the material to complete primary disclosure (photographs, names of potential witnesses) and ordered that a date be fixed for the committal proceeding.

10.3.2.2 Applicability of the CPIA 1996

In Ex p Lee, the court found that Pt I of the CPIA 1996 addresses the disclosure of 'unused' material in the period post-committal, but not before.[80] The Code of Practice (the code) provides a regime for the gathering and control of information by investigators and the 'disclosure officer'[81] prior to the charge being laid and beyond. By contrast, the *Attorney General's Guidelines* (1981), para 3(a), state that disclosure should take place earlier, rather than later, especially if 'the material might have some influence on the course of the committal proceedings or the charges upon which the justices might decide to commit'.[82]

Counsel for the CPS argued that the CPIA 1996 directly, or by implication, applied to the case. He argued that, as the CPIA 1996 was designed to create a new disclosure regime, it should be interpreted independently of, and not simply as an adjustment to, the common law rules.[83] Therefore, the code, which can be viewed as comprehensive, had great significance in pre-committal disclosure decisions.[84] Specifically, the provisions governing the duties of the disclosure officer were designed to leave the materials gathered in the investigation under his *de facto* control through to committal.[85] The only exception concerns the contents of the prosecution case, which must be disclosed in time to facilitate the committal.[86] Thus, the two-stage disclosure process under Pt I was designed to complement, and was dependent upon, the process in the code. The conclusion sought, therefore, was that the disclosure rules and obligations at common law in respect of indictable matters were fully replaced by the CPIA 1996. Consequently, pre-committal prosecution disclosure was within the discretion of the prosecution. The disclosure of 'unused' material post-committal was

79 *DPP ex p Lee* [1999] 2 Cr App R 304 DC, p 319.
80 CPIA 1996, s 1(2)(a). Section 21(1) excludes the application of the rules of common law as to disclosure from the time of committal.
81 Code, para 2.1.
82 *Attorney General's Guidelines* (2000a), paras 34 and 35, take into account the decision in *DPP ex p Lee* [1999] 2 Cr App R 304.
83 *DPP ex p Lee* [1999] 2 Cr App R 304 DC, p 314.
84 Section 27(1) provides that the rules of the common law 'shall not apply in relation to the suspected or alleged offence'.
85 Code, paras 6.6, 6.9, 7.0, 8.0 and 10.
86 Section 3(1)(a).

governed by Pt I of the CPIA 1996, which also featured exclusive prosecutorial discretion in the primary disclosure stage. This was to be seen as consistent with the new restricted format for committal proceedings found in Sched 1 of the CPIA 1996.[87]

Counsel for the accused argued successfully that the CPIA 1996 did not exclusively address the period before committal and that the timing and extent of prosecution disclosure in that period was governed by the interests of justice, as determined in all the circumstances of the case. Arbitrary time periods, especially those as late in the process as the committal, detracted from the responsibility of the prosecutor to act in the character of a minister of justice. Arbitrary timelines ignored the need of the defence, in some cases, to take immediate action facilitated through early provision of information. As Lord Hope stated in the House of Lords in *Brown* (Winston): '…I would be inclined to attach less weight to the practical problems. If fairness demands disclosure, then a way of ensuring that disclosure will be made must be found.'[88]

Certainly, fairness and timeliness cannot be restricted to the period post-committal. The responsible prosecutor is under a continuing duty to consider what, if any, immediate disclosure justice and fairness require.[89] Therefore, the court held that disclosure by the prosecution to the defence must occur in the pre-committal stage where the interests of justice require. Pre-committal disclosure cannot exceed the disclosure obtainable after committal pursuant to the statute.[90] It is reasonable to suggest that the same principles will be applied to either way cases in the pre-committal stage, if an indication has been given that the matter is to be tried on indictment.

10.3.2.3 The result in Ex p J

In *Ex p J,* the accused brought an application to the examining magistrate seeking an order to require the CPS to provided unrestricted access to the audio and videotapes of an alleged drug transaction wherein the primary prosecution witness was an undercover police officer. In the event, the CPS refused and the defence sought a stay of proceedings. The CPS argued that its duty to provide advance witness statements did not include material exhibited to the witness statement, or alternatively that the exhibits, if to be used by the defence, should be disclosed in a restricted environment so as to protect the officer. The magistrate and the Divisional Court found that conditional access to the exhibited material was an appropriate way to deal with the interests of both parties.

87 The defence's role in committal proceedings in either way offences has been reduced by eliminating oral evidence, cross-examination and defence evidence (CPIA 1996, s 49). Administrative committals occur in indictable-only offences (CDA 1998, s 51).

88 [1998] 1 Cr App R 66 HL, p 76.

89 *DPP ex p Lee* [1999] 2 Cr App R 304 DC, p 318.

90 A list of examples is found in Pt 5.5.

10.3.2.4 The restrictions

Anticipating, as *Ex p Lee* did, a 'rare' need for the assistance of the court may have been too optimistic. The CPS claimed to be dealing with the disclosure request in the usual fashion.[91] As reported above, recent studies demonstrate that some prosecutors have consistently failed to meet disclosure obligations.

Dicta in *Ex p Lee,* which attempted to restrict defence applications to the trial judge, may be unfortunate.[92] In so doing, the court assumed a timely committal and assignment of a trial judge. However, the new provisions pertaining to automatic committals in offences triable only on indictment do not guarantee timeliness. Pursuant to the Crime and Disorder Act (CDA) 1998, an adult accused who is charged with an offence triable only on indictment remains under the jurisdiction of the magistrates' court for a period of time before the administrative committal to the Crown Court. The magistrate may determine issues pertaining to bail and as to whether the value involved supports a proceeding on indictment alone.[93] The CDA 1998 does not give the magistrate jurisdiction over early disclosure. The result might be that, in cases triable on indictment only, the magistrates' court may delay the sending, but consider itself without jurisdiction to hear issues relating to disclosure. Hopefully, this interpretation will be resisted and the court will maintain its supervisory powers to control its own process. In either-way offences, the examining magistrates do not have jurisdiction to consider (defence evidence,[94] but, as stated in *Ex p J,* applications relating to disclosure of the prosecution case will be allowed where the interests of justice demand. Applications for disclosure of 'unused' material will be resisted by examining magistrates,[95] but it is reasonable to argue that in the clearest of cases, where the interests of justice demand, they may order disclosure, or facilitate an early committal so that a trial judge may be appointed to address the issue. It is with these concerns in mind that the suggestion of the Auld Committee to create a unified criminal court has some attraction.[96]

In Canada, provincial court judges presiding over committal hearings are not 'courts of competent jurisdiction' to provide a Charter remedy.[97] Since the right to pre-trial disclosure has been elevated to the status of a Charter right, as opposed to being treated as one element of the right to a fair trial, only a trial

91 *DPP ex p Lee* [1995] 2 Cr App R 304 DC, p 307.
92 In *X Justices, ex p J* [2000] 1 All ER 183 DC, Auld LJ does not prohibit the examining magistrate from hearing disputes regarding discovery or disclosure. He simply reminds them that the power to stay proceedings for abuse is to be used most sparingly (p 189).
93 Sections 51 and 52.
94 The Magistrates' Courts Act 1980, as amended in CPIA 1996, s 5A(1)(2).
95 *CPS ex p Warby* (1993) 158 JPR 190 DC
96 Auld Review, Consultation Seminar, 31 May 2000, London.
97 *Mills* [1986] SCR 863.

judge (inferior or superior court) can address the issue of incomplete prosecution disclosure.[98] It has been decided that a pre-trial (superior court) judge, even before the committal, can address preliminary disclosure issues. This will occur only in the most exceptional circumstances.[99] However, the committal hearing itself is recognised as providing an opportunity to gain disclosure from the witnesses called.

10.4 POST-COMMITTAL

Ex p Lee suggested that issues of early disclosure could be addressed by the examining magistrate, or the High Court, but directed that it was preferable for the matter to be addressed by the trial judge. If the matter is addressed before the committal, the CPIA 1996 does not apply and the High Court can review the decision of the prosecutor. However, the appointment of a trial judge presupposes a committal. Post-committal, the CPIA 1996 would apply and the regime relating to primary disclosure would govern.[100] As stated earlier, this regime does not make provision for judicial supervision, in contrast to the regime addressing secondary prosecution disclosure.[101] No time restrictions have been set on the completion of primary disclosure. Therefore, there is an anomalous situation wherein the accused is more empowered pre-committal than post-committal. This is a strong argument for amendment to the primary disclosure provisions. Another forceful argument, based on the HRA 1998, was discussed in Pt 4.7.

Another point emerges from the *Ex p Lee* decision. If the accused is committed, but a delay occurs in the appointment of a trial judge, it is questionable whether the High Court would have jurisdiction to grant relief. The High Court may refuse to review the issue as being one in the Crown Court's 'jurisdiction in matters relating to trial on indictment'.[102]

There is a possibility that the phrase may be given a liberal interpretation. Hope can be found in the recent case of *SOS HO ex p Q*[103] and the earlier speech of Lord Bridge indicating that new questions regarding the meaning of the

98 *La* [1997] 2 SCR 680, interpreting Charter, s 7.

99 *Laporte* (1993) 84 CCC (3d) 343 Sask CA; *S(SS)* (1999) 136 CCC (3d) 477 (Ont SCJ); *Hallstone Products Ltd* (1999) 140 CCC (3d) 145 (Ont SCJ); *Blencowe* (1997) 118 CCC (3d) 529 (Ont Gen Div).

100 Section 3.

101 Section 8.

102 Supreme Court Act (SCA) 1981, s 29(3).

103 Richards J found that exceptionally it was appropriate for the High Court to entertain an application for judicial review on a fair trial issue, rather than leave the matter to be dealt with by the trial judge (*The Times*, 17 April 1999).

phrase will be made on 'a case by case basis'.[104] Also, early indications regarding the timing of the first appearance of the accused in the Crown Court under the CDA 1998 are promising.[105]

In any event, if a narrow view of jurisdiction is taken by the High Court, sufficient pressure may build to ensure that trial judges are appointed in a timely manner. It may also lead to the creation of solutions by local courts that compensate for the lack of formal judicial supervision of primary disclosure. For example, it may be that the tolerance of the practice noted in some Crown Courts of allowing the defence to delay filing its defence statement is related to issues of prosecution disclosure. In some locations, Plea and Direction Hearings are used to discuss and settle primary disclosure issues, and to press for the defence statement.[106] It appears that, as with the relaxed attitude toward alibi notices under the old scheme,[107] judges can be innovative in facilitating justice.

10.5 REMEDIES AVAILABLE TO BE APPLIED BY THE TRIAL JUDGE AND THE CPIA 1996

The CPIA 1996 does little to change or codify the remedies that may be used by the trial judge when the prosecution has failed to comply with the disclosure process. The CPIA 1996 codifies the continuing duty of disclosure on the prosecutor[108] and the requirement of the trial judge to keep under continuous review any material which has been exempted from disclosure on the basis of the public interest.[109] The review of secondary disclosure[110] is codified as well.[111]

Only two provisions in the CPIA 1996 modify the common law remedies. Section 10 provides that a failure on the part of the prosecutor to observe time

104 *Smalley v Chief Constable of Warwick* [1985] 1 All ER 769, p 780; see, also, *Manchester Crown Court ex p DPP* (1993) 96 Cr App R 210 DC; *In Re Ashton* (1993) 97 Cr App R 203 HL.

105 Magistrates' Courts (Modification) Rules 2000 SI 2000/3361, r 11 A, require the file to be sent to Crown Court within four days of sending a person to be tried there. The Crown Court (Amendment)(No 3) Rules 2000 SI 2000/3362, r 24ZA, require the first Crown Court appearance to be listed within eight days of receipt of the file where the accused is in custody, or 28 days where he is sent on bail.

106 CPS Inspectorate, 2000, paras 5.7 and 5.14.

107 Zander, 1992, p 276.

108 Section 9(2).

109 Section 15(3); *Rowe and Davis v UK* (2000) 30 EHRR 1 (ECtHR).

110 Section 7.

111 Section 8(1)(b).

limits is not, without more, an abuse of process. However, delay that denies the accused a fair trial may provide grounds for a stay.[112]

Section 5(1)(b) applies to the failure of primary disclosure by the prosecution and postpones the requirement that the accused make a written defence statement in proceedings on indictment.

Finally, the promulgation of a code of practice assists the court in deciding to grant certain remedies by providing a clear standard against which the court may evaluate an investigation. Section 26(4) provides that a failure to comply with, or have regard to, a provision in the code may be taken into account in deciding any relevant question arising in the proceedings. It will be a factor in considering an application under s 78 of PACE 1984 to exclude evidence which is misleading in the absence of full disclosure.[113]

10.6 REMEDIES AVAILABLE TO BE APPLIED BY THE TRIAL JUDGE UNDERMINED BY WAYWARD INVESTIGATORS AND PROSECUTORS

There is no easy way to ensure that the judge has all of the relevant information before him when he is asked to make a decision on an application for a remedy. The adversarial system relies on advocates bringing the material to the court's attention. The judge does not participate in or direct the investigation. While the profession has a duty to the court founded on law and professional ethics, some do not adhere to that duty in all cases.[114] In the context of the disclosure regime, particular concern surrounds applications to excuse disclosure on the basis of the public interest.[115] For example, certain applications can be made *ex parte*, with no provision for defence input via a special counsel system, such as the one used in sensitive immigration matters. The police are bound in law to obey the CPIA 1996, but it is apparent that some investigators do not heed the law.[116] Therefore, the system in use and the remedies available in criminal courts cannot ensure a fair trial where the investigator or prosecutor fail to follow proper procedures. It is for this reason that greater transparency is needed. The

112 Section 10(3). In *Bell v DPP of Jamaica* [1985] AC 937, a stay was granted. The accused was in proceedings through seven years, mainly due to shoddy docket administration prior to the re-trial. A stay of proceedings to prevent an unfair trial after delay will depend on the length of the delay, any justification offered, the vigilance of the defendant in pursuing his rights to a trial within a reasonable time and the prejudice caused to him (pp 951–52, *per* Lord Templeman).

113 Edwards, 1997, p 327.

114 Williams, 1999, para 57.

115 *Jackson* [2000] Crim LR 377 CA.

116 *Humphreys and Other*, unreported, 14 February 2000, Maidstone CC, T19990290, T19990344, Crush J, p 37.

materiality test of *Stinchcombe* (and *Keane*), judicial supervision of disclosure, and the right to a committal hearing wherein witnesses are required to answer the questions of the defence are but a few of the lessons to be reminded of in making reference to the Canadian justice system.

As the trial process cannot guarantee due process in all cases, it is appropriate to explore whether the defects at trial are overcome in the appeal process. The ECtHR, in *Edwards v UK*,[117] found that the full process, from pre-trial to appeal, is to be considered in determining whether the accused enjoyed a fair trial.[118] This includes the issue of post-conviction disclosure by the prosecution. In the next part, the appellate remedies are explored.

10.7 REMEDIES ON APPEAL TO THE COURT OF APPEAL (CRIMINAL DIVISION)

10.7.1 Introduction

In certain circumstances, the appellate courts will provide a remedy for the defendant after conviction where the defendant complains that he has not received a fair trial arising from, amongst other things, inadequate prosecution disclosure.[119] The remedies include quashing the conviction with or without directing a new trial.[120]

Three scenarios will encompass most of the disclosure issues likely to reach this stage. First, the trial judge may have erred in refusing to order disclosure of evidence. Secondly, the prosecution may have improperly failed to reveal the existence of admissible evidence until after the trial. Thirdly, information that came to the attention of the defence after the conviction may have led to a course of inquiry that exposed evidence that may have been admissible at trial. If the appellant can provide a reasonable explanation as to the reason that admissible and believable evidence that is relevant to the ground of appeal was not before the jury,[121] then the Court of Appeal may quash the conviction if it feels that it was unsafe. In a limited number of situations, evidence may be uncovered after

117 Paragraph 39.

118 *Craven* (2001) *The Times*, 2 February.

119 Leave to appeal must be brought within 28 days of conviction, unless extraordinary circumstances exist The court may grant leave to apply out of time (CAA 1995, s 18).

120 CAA 1995, s 2(3), provides that where no order is made regarding a retrial, it has the effect of requiring the trial court to enter an acquittal. In Canada, see Criminal Code, s 686(2)(a)(b); *Thomas* [1998] 3 SCR 535; and Criminal Code, s 695(1).

121 CAA 1968, s 23.

an unsuccessful appeal[122] and the assistance of the CCRC may be the avenue used to refer a matter to appeal.[123]

In the following pages, the mandate of the Court of Appeal is described, as well as the grounds for appeal, the ability to hear fresh evidence and the process and powers of the Court. The discussion will then turn to the limitations and problems in relying on the appellate court to provide the solution to violations of the fair trial principle arising from non-compliance with the disclosure rules. It will become clear that the appeal process is not well suited to providing remedies in a timely manner where the prosecution has failed in its duty of disclosure.[124]

10.7.2 Mandate and grounds of appeal, fresh evidence, process and powers

10.7.2.1 Mandate

The Court of Appeal reviewed the scope of its mandate in *McIlkenny*. It concluded that the Court is a creature of statute, limited by the powers therein and guided therein in the exercise of those powers. The task of the court is one of review and, therefore, it is limited to declaring whether the verdict of the jury can stand. The statute does not entitle the court to full appellate jurisdiction. It is not allowed to pass judgment on the guilt or innocence of the accused. That task is reserved for the jury. It does not have open ended investigatory powers, even where there is an allegation of a miscarriage of justice. Lloyd LJ recognised the role of the trial court and jury by stating 'trial by jury is the foundation of our criminal justice system. Under jury trial juries not only find the facts; they also apply the law. Since they are not experts in the law, they are directed on the relevant law by the judge'.[125]

Lord Hope recently confirmed that 'the court exercises its jurisdiction by examining the effect of the point raised in the appeal on the course of the trial. Defects or insufficiency in the evidence and errors of law and procedure at trial must be assessed in the context of the whole trial before the court can be satisfied that the conviction is unsafe'.[126]

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122 If the appellant was unsuccessful before the Court of Appeal, he cannot appeal again if additional fresh evidence is found, *McIlkenny and Others* (1991) 93 Cr App R 287 CA, p 293.

123 If the CCRC refers a case to the Court of Appeal, it is considered as if it were an appeal. The CCRC is not to refer a case unless it forms the view that there is a real possibility that the conviction would not be upheld (CAA 1995, s 13).

124 The appellate role of the House of Lords is too remote to be considered in detail.

125 *McIlkenny and Others* (1991) 93 Cr App R 287 CA, p 311.

126 *Mills and Poole* [1998] 1 Cr App R 43 HL.

The appellate courts in Canada are similarly restricted and serve the same function.[127]

10.7.2.2 Grounds of appeal

Many of the *causes celèbres* cases that were considered by the Court of Appeal of England and Wales were brought under the Criminal Appeal Act (CAA) 1968 on the basis of 'unsafe or unsatisfactory' conviction or 'material irregularity'.[128] In 1995, the position was modified by the replacement of the three grounds for appeal, and the 'proviso', with a single all encompassing ground. Now, the Court of Appeal is required to dismiss the appeal unless, 'they think that the conviction is unsafe'.[129] This provision was intended to allow the appellate court flexibility to consider all categories of appeal without the need to place it within a particular listed ground.[130] The Court of Appeal, in *Mullen,* was the first appellate court to decide the issue of the breadth of the new ground and it adopted the broad interpretation, reading 'unsafe' as 'unsafe or unsatisfactory'.[131] Therefore, a material procedural irregularity continues to be a basis for appeal. The safety of the conviction is to be judged against current practices, even if many years have lapsed.[132] It is important to recall that in most cases, the appeal court will not consider a point not raised at trial.[133]

The relevant Canadian appeal provisions[134] were drawn from the early English provisions.[135] The equivalent concepts are found in the grounds of 'the verdict is unreasonable or not supported by the evidence', or a '[substantial] miscarriage of justice' (s 686(1)(a)). While there is room for debate, it is submitted that taken at a general level the Canadian provisions do not place the appellant

127 *Dixon* [1998] 1SCR 244, pp 264–65.

128 The grounds for allowing an appeal included: (a) the verdict was unsafe or unsatisfactory; (b) a wrong decision on a question of law; or (c) a material irregularity in the course or the trial; all being subject to dismissal of the appeal on the proviso that, even though the ground was made out, no miscarriage of justice had actually occurred.

129 CAA 1995 repealing and replacing CAA 1968, s 2(1).

130 Scanlan, 1996, p 3–4.

131 *Mullen* [1999] 2 Cr App R 143 CA, p 161; *Davis, Johnson and Rowe* [2001] 1 Cr App R 115 CA; and *Doran and Togher* (2000) *The Times*, 21 November, CA.

132 *Johnson (Harold)* [2001] 1 Cr App R 401 CA.

133 *Mullen* [1999] 2 Cr App R 143 CA is an exception and it addressed a judicial stay.

134 The powers and role of the appellate courts of Canada are found in the Criminal Code, Pt XXI. Section 686(1)(a), the court may allow appeal if: (i) the verdict is unreasonable or not supported by the evidence; (ii) there was a wrong decision on question of law; (iii) there was a miscarriage of justice. The first and last ground are subject to the proviso in s 686(1)(b)(iv) that the appeal may be refused, 'notwithstanding any procedural irregularity at trial…the court of appeal is of the opinion that the appellant suffered no prejudice thereby'. Leave is also required, s 675(1)(4).

135 CAA 1907, s 4(1).

in any worse position than he would have been in had the new English provisions been adopted in Canada.

10.7.2.3 Fresh evidence

The appellate courts in both countries may consider fresh evidence, but prefer to do so in limited situations.[136] The public interest is best served when the prosecution and defence present their case at trial and not years later.[137] This is so because it is difficult for the appellate court to consider evidence and to give it appropriate weight without being able to hear or observe the witnesses. Also, the public interest is not served if the legal process is indefinitely prolonged.[138]

Fresh evidence is received where the court thinks it 'necessary or expedient in the interests of justice'.[139] It is almost always received by affidavit as opposed to live evidence. The appellate court will consider the factors prescribed in the statute[140] relating to the use of fresh evidence, but will not be limited by them where the interests of justice demand.[141]

When leave to appeal has been given on the basis of prosecution non-disclosure, the court has been asked to consider new witness testimony,[142] previously undisclosed witness statements,[143] police notes[144] and results gained from advances in science.[145] However, even when credible fresh evidence has been heard, the Court of Appeal[146] may still dismiss the appeal on the basis that the appellants would still have been convicted.[147] In other words, the conviction was not unsafe.

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136 Approximately, 4% of successful appeals are allowed on the basis of fresh evidence (Malleson, 1993).

137 *Sales* [2000] 2 Cr App R 431 CA

138 *Stafford and Luvaglio* (1969) 53 Cr App R 1 CA.

139 CAA 1968, s 23 as amended by to the CAA 1995, ss 4(1) and 29 and Sched 3; *Cairns (Robert Emmett)* [2000] Crim LR 473. In Canada, see Criminal Code, s 683; *C(MH)* [1991] 1SCR 763, applying *Palmer* [1980] 1 SCR 759.

140 CAA 1968 as amended by CAA 1995, s 4, requiring evidence 'capable of belief and s 23(2)(a-d).

141 *Sales* [2000] 2 Cr App R 431 CA; *Cairns (Robert Emmett)* [2000] Crim LR 473 (on later gathered expert evidence); *Warsing* [1998] 3 SCR 579.

142 *Callaghan and McIlkenny* (1989) 88 Cr App R 40 CA.

143 *Ward* (1993) 96 Cr App R 1 CA; *Mills and Poole* [1998] 1 Cr App R 43 CA, pp 63–65.

144 *Richardson, Conlon, Armstrong and Hill* (1989) *The Times,* 20 October, CA.

145 *Maguire and Others* (1993) 94 Cr App R 133 CA

146 *Stafford and Luvaglio v DPP* (1974) 58 Cr App R 256 HL confirmed that it was for the Court of Appeal 'to evaluate the fresh evidence, to endeavour to set it into the framework provided by the whole of the evidence called at the trial, and in the end to ask itself whether the verdict has become unsafe or unsatisfactory by the impact of fresh evidence'.

147 Eg, *Callaghan and McIlkenny* (1988) 88 Cr App R 40, p 47; and *Parsons (Brian),* unreported, December 1999, CA noted in CPS, 2000a, Chapter 2.

10.7.2.4 Process and powers

According to Lord Scarman, the appellant bears the 'burden of proof in an appeal.[148] The standard of proof, a demonstrative burden, is not easily stated, as it differs according to the circumstance. In some situations, the courts seems to indicate that once a *prima facie* case has been raised by the appellant, the burden appears to shift to the respondent.[149] Normally, the appellant must show actual prejudice by demonstrating the relevance of the error to his case. Once the ground of appeal has been established the issue of the appropriate remedy will arise.

The case of *Saunders and Others* provides an example of the process and burden in an appeal in the context of a disclosure issue.[150] In *Saunders,* a vast amount of material was disclosed pre-trial by the prosecution to the defence. Other documents that should have been disclosed were not disclosed until post-trial. The breach of duty was found to constitute a 'material irregularity' (as the ground then was). The next issue decided was whether the appellants suffered prejudice as a result The burden to be met was to satisfy the court (in argument) of actual prejudice. In other words demonstrations which lend substance to the assertion of prejudice. In this case it was contended that the impairment of counsels' ability to cross-examine caused prejudice. This contention was unsuccessful. Taylor CJ said: 'The counsel for the appellants did not go beyond an assumption or assertion of prejudice by lost opportunity; none has sought to frame the nature or suggest the detail of any admissible evidence of benefit to the appellants which might have been expected to be adduced as a result of the additional material now disclosed.'[151]

Where there is substance in the assertion of prejudice, the court will move to the issue of the impact of the prejudice.[152] The court will determine 'if they think that the conviction is unsafe'.[153] Lord Widgery CJ stated that such issues 'are resolved not, as I say by rules of thumb and not by arithmetic, but they are largely by the experience of the judges concerned and the feel which the case has for them'.[154]

148 Scarman, 1995, cols 1497–8; *Dixon* [1998] 1 SCR 244, p 257.

149 Malleson, 1996–97, pp 183–84.

150 [1996] 1 Cr App R 463 CA.

151 *Ibid,* p 502

152 Eg, see Lloyd LJ, in *McIlkenny and Others* (1991) 93 Cr App R 287 CA, p 318.

153 F [1999] Crim LR 306 CA. The traditional test will continue to be applied in circumstances like those in *Cooper (Sean)* (1969) 53 Cr App R 82 (Smith, 1999). *Francom and Others* [2001] 1 Cr App R 237 CA held that the test of unfairness of a conviction applied by the Court of Appeal is not identical to the issue of unfairness before the ECtHR.

154 *Lake* (1977) 64 Cr App R 172, p 177; *Cooper (Sean)* (1969) 53 Cr App R 82.

Once the conviction is quashed, the question remains whether or not a new trial should be ordered.[155] In deciding if a new trial is appropriate in cases where fresh evidence has come to light, the court will take into account the length of time since the commission of the offence, whether the appellant has been in prison[156] and the impact of the fresh evidence. If the court is satisfied that the fresh evidence received is conclusive of the appeal, a retrial will not be ordered.

10.7.3 Problems in the appeal process as a provider of remedies for prosecution non-disclosure

10.7.3.1 Volume and attitude

Although appellate courts have an important role to fulfil in criminal justice, they cannot be regarded as an efficient source of remedies for issues arising out of the failure of the prosecution to comply with its duty of disclosure. This is vividly demonstrated by the prolonged search for justice in the cases of the Guildford Four, Maguire Seven and Birmingham Six.[157]

The inability of the appellate courts to provide adequate remedies in cases of wrongful conviction arising out of inadequate prosecution disclosure stems from many factors. It has been stated that appellate courts were not established to replace the decision making function of trial courts. However, many additional factors work against the effectiveness of the appeal process as providing a remedy for prosecution non-disclosure. For example, the limited resources of the Court of Appeal have forced it to devise perfunctory screening methods to deal with a large number of cases. Applications for leave to appeal[158] 'are sent out to the judges in batches of six to be decided by them in their spare time, usually in the evening after sitting in court. This is the extent of the review which most appeals receive and without this filter the system could not cope'.[159]

Another factor to be considered is the personality of the members of the court. For example, Lord Lane had such a reputation among the legal community for not allowing appeals,[160] that it was feared that, in spite of the Director of Public

155 CAA 1968, s 7, as amended in the Criminal Justice Act (CJA) 1988, ss 43(1) and 170(2), to read 'the interests of justice so require'.

156 *Saunders* (1974) 58 Cr App R 248 CA; *Grafton and Grafton* (1992) *The Times,* 6 March, CA.

157 The same problems were seen in Canada in the *causes celèbres,* Marshall Jr, Milgaard, Nepoose and Morin.

158 CAA 1968, s 1, as amended by the CAA 1995, s 1(2), provides for an appeal with leave of the Court of Appeal or the trial judge's certificate of fitness for appeal.

159 Malleson, 1996–97, p 331.

160 Morton, 1989, p 2176.

Prosecution's (DPP) refusal to support the convictions of the Guildford Four, he would exercise his influence over the bench so as to encourage them to refuse to overturn the conviction. Hill, a journalist, contends that a 'contrived' consistent pattern of appellate findings exist which concluded that the new evidence presented at appeal did not affect the strength of the main evidence at the original trial, thus, leaving the convictions safe.[161] Another aspect of the personality factor is a desire to consider only interesting legal questions[162] and human frailty.[163] The Runciman Report concluded: 'We are all of the opinion that the Court of Appeal should be readier to overturn jury verdicts than it has shown itself to be in the past.'[164]

10.7.3.2 Decisions of defence counsel

In addition to the foregoing factors that limit the effectiveness of the appellate court as a provider of remedies against prosecution non-disclosure, the impact of decisions by defence counsel should be noted. The legal systems of England and Wales and of Canada have developed the concept that the accused's remedy on appeal is affected by the decision of his lawyer at trial. Poor decisions by counsel, or decisions that had unfortunate results when considered in the light of later events, directly impact the rights of an accused. However, the right to a fair trial does not involve a guarantee against the mistakes of counsel, unless the mistake reveals incompetence and leads to the conclusion that the conviction is unsafe.[165] This extends to issues of facts and law. However, the appellant may seek a judicial stay on the basis of abuse of process, only in the rarest circumstance if it was not argued at trial.[166]

The consequences of the decisions of defence counsel were considered in *Edwards v UK*.[167] The issue before the ECtHR included whether the accused had received a fair trial, even though the prosecution had never provided at trial what was believed to be exculpatory evidence regarding police misconduct (documented in the Carmichael Report). The ECtHR decided that, in determining whether a fair trial had been provided, it was correct to

161 Hill, 1998, p 1028. See JUSTICE, 1989, p 49 and Woffinden, 2001, p 544.

162 Malleson (1996–97, p 330) found appeal judges preferred to address 'a good meaty' question of law or an obvious failure by the trial judge.

163 Some jurists have placed too much confidence in the veracity of police officers. *Eg*, see the comments of Lord Denning in *McIlkenny v Chief Constable of West Midlands Police Force* [1980] 2 All ER 227 CA, pp 239–0.

164 1993, para 10.3; see, also, *Kaufman Report*, 1998, pp 1175–77.

165 Incompetent advocacy may be a material irregularity sufficient for an appeal if it had the effect of making the conviction unsafe, *Clinton* [1993] 1 WLR 1181 CA; *Ullah* [2000] 1 Cr App R 351 CA. Similarly, failing to draft the defence statement in accordance with instructions may render the conviction unsafe, *Wheeler* [2001] 1 Cr App R 150 CA.

166 *Mullen* [1999] 3 WLR 777 CA. See Richardson (1997, para 7–74) regarding the inaction of counsel, wrongful admission of evidence, and appeals.

167 (1992) 15 EHRR 417.

consider also the proceedings in the Court of Appeal. Before the Court of Appeal, the defence counsel had not pressed the request for the disclosure of the report. He had viewed the matter to be closed because of the decision of the prosecutor and judge at trial. Also considered by the ECtHR was the fact that, at trial, defence counsel had failed to attempt to cross-examine the police officer regarding the failure to disclose the fingerprint evidence, or the fact that the victim had not noted the appellant in a police photograph book. The failure of counsel to exploit these opportunities was a factor that was considered by the ECtHR as, effectively, the decision of the accused. In the outcome, the trial and appeal process was not seen as unfair, even though counsel had not taken up an opportunity that might have changed the result. In his dissenting opinion, Judge Pettiti argued that 'one cannot leave to a possibly inexperienced defence [counsel] alone the burden of ensuring respect for a fundamental procedural rule which prohibits the concealment of documents or evidence'.[168] It was for the court to take a more positive role in guarding rights, he opined.

The Supreme Court of Canada has taken a more liberal approach where the efforts of defence counsel in pursuit of disclosure have not been adequate. Cory J stated that if the information withheld was, on the face of it, very material, a new trial could be ordered on this basis alone. Such information would affect the reliability of the conviction and, therefore, the issue of the fairness of the trial process would not fall to be considered. However, where the information was of marginal importance, then the lack of due diligence of defence lawyers will 'be a very significant factor in deciding whether to order a new trial'.[169]

10.7.3.3 Other problems concerning remedies on appeal

Other factors also diminish the effectiveness of the appeal process in providing remedies.[170]

For example, the threat of the 'time loss rule' and the delay in the appeal process. The time loss rule involves a discretion in the Court of Appeal which allows it to order that a portion of the sentence served by the appellant while his appeal is in process may not be credited as time served in the event that the appeal is found to be unmeritorious.[171] Even though the threatened order is

168 (1992) 15 EHRR 417, p 435.

169 *Dixon* [1998] 1SCR 244, pp 264–67. A new trial was ordered.

170 *Runciman Report* (1993, para 10.14) stated that some defence lawyers did not fulfil their obligations found in the CJA 1967 to assist convicted persons on legal aid by providing advice on whether they have grounds to appeal and, if so, by drafting those grounds. Many defence lawyers did not pursue leave after leave had been denied by a single judge (para 10.25).

171 CAA 1968, s 29; Practice Direction (1980).

rarely made, it has had the effect of reducing the number of appeals,[172] especially where the custodial sentence is less than five years.[173] It can be recalled mat the rules of disclosure have not stood still and that the merit of an appeal can better be judged in hindsight. However, a prisoner may be unwilling to take the risk of bringing the appeal in the face of the time loss rule.

Even if the court is able to remedy the legal injustice by ordering a retrial, it remains open to suggest that, in practical terms, justice is not served.[174] The delay, expense, emotional wear and tear on the accused, the victim and their families raise unanswerable concerns. 'Retrials are not a panacea,' stated the Runciman Report and, 'there may be cases where a retrial will be impracticable and even unjust.'[175]

10.8 SUMMARY PROCESS AND APPEAL: THE REHEARING

Magistrates presiding at trial are able to remedy problems arising from prosecution non-disclosure in the same manner as a judge sitting in the Crown Court. In the event that the justices err in law regarding an issue of disclosure, or the defence is able to produce fresh evidence post-conviction in spite of the breach of duty of the prosecution, or because of a lately discovered witness, an appeal may take place. The remedy on appeal is supplemented in limited situations with the remedy of judicial review by the High Court.[176]

Appeals from a conviction by a magistrates' court after a not guilty plea are heard in the Crown Court.[177] Leave is not required but the appeal must be filed within 21 days of sentence.[178] The ground of appeal does not need to be stated. The appeal process takes the form of a new summary trial of the original charge with a circuit judge or recorder presiding (normally) over the bench of two lay magistrates. The parties are not limited to evidence called in the original trial.[179] The court is empowered to consider a full range of orders, including that of overturning the conviction. However, if it confirms the conviction, the court may increase the sentence to the maximum that the magistrates' court could have imposed.[180] It is reported that this is intended to inhibit the filing of

172 Zander, 1972, p 132.
173 Malleson, 1996–97, pp 326–28.
174 Edwards and Walsh, 1996, p 857.
175 *Runciman Report,* 1993, para 10.33. The majority expressed the view that where there was fresh evidence, the Court of Appeal should determine the verdict as if it were the jury.
176 SCA 1981, s 29(3).
177 Magistrates' Courts Act 1980, ss 108–10 and the Crown Court Rules 1982 SI 1982/1109, rr 6–11.
178 Rule 7. The Crown Court can grant leave to appeal out of time, r 7(5).
179 SCA 1981, s 74; *Peterborough Magistrates' Court ex p Dowler* [1996] 2 Cr App R 561.
180 SCA 1981, s 48.

unmeritorious appeals. However, it may also inhibit some meritorious appeals, given that the accused may have served his sentence before the rehearing could take place.[181]

The Canadian legal system uses a very similar system to the one in use in England and Wales.[182]

On some occasions, appellants in England have applied for judicial review when an appeal was the appropriate avenue of redress. The High Court has stated that where the complaint of a procedurally unfair conviction before justices arising from a lack of disclosure could be remedied by a new (fair) trial, leave for judicial review should be refused.[183] Judicial review may involve greater cost and delay than can be justified in most cases and Parliament has provided an appeal process. Judicial review is not attractive for another reason. Certiorari is not available solely on the basis that fresh evidence became available after the conviction.[184] An order for certiorari may be available where the trial was undermined by the action of the prosecution[185] and it appears expedient to simply quash the conviction and acquit rather than order a new trial; for example, if the unfairness originally complained of would continue in the new trial.[186] The case of *Bolton Justices ex p Scally and Others*[187] provides a good example of exceptional circumstances. The defendants were charged with driving while intoxicated and they submitted to a blood test that was conducted in a defective manner. The defect was discovered after conviction on guilty pleas. The court found that the actions of the prosecution, while innocent, had had the effect of corrupting the process and had made the conviction unfair. Similarly, certiorari is available to quash a conviction when there is fresh evidence disclosing fraud or perjury by the sole prosecution witness.[188]

Where a conviction follows both a trial before justices and a hearing before the Crown Court on appeal, and the fairness of the proceedings remains in question consequent upon a breach of the prosecution's duty of disclosure, it is then appropriate to seek relief by judicial review.[189]

It is submitted that a trial *de novo* in circumstances where the evidence is made available after the conviction is a good remedy and assists in the

181 Sprack, 2000, p 448. See, also, the power to order the defendant to pay costs, POA 1985,
182 Appeals are heard in the superior courts of Canada (Criminal Code, s 822). Greenspan, 199l, p cc-904.
183 *Peterborough Magistrates Court ex p Dowler* [1996] 2 Cr App R 561.
184 Sprack, 2000, p 459.
185 *Leyland Justices ex p Hawthorn* (1979) 68 Cr App R 269 DC is an carry example.
186 *Peterborough Magistrates Court ex p Dowler* [1996] 2 Cr App R 561.
187 [1991] 1 QB 537 DC.
188 *Knightsbridge Crown Court ex p Goonatilleke* (1985) 81 Cr App R 31 DC; *Liverpool Crown Court ex p Roberts* [1986] Crim LR 622 DC.
189 *Harrow Crown Court ex p Dave* (1994) Cr App R 114 DC.

administration of justice. It is unfortunate that special provision has not been made to abolish the potential of an increased sentence and an order of costs in the situation where the issue on appeal is fresh evidence. The additional strain and delay caused by a trial *de novo* is sufficient deterrent in this situation. The trial *de novo* cannot, however, replace the proper administration of justice wherein the prosecution provides reasonable disclosure in advance of the trial.

10.9 CONCLUSION ON REMEDIES AND APPELLATE COURTS

The appellate courts have an important role to fulfil in the criminal justice system. However, that role is limited by design and by practical constraints. The criminal justice system is designed on the basis that the trial court is best positioned and equipped to provide a fair trial and to decide the ultimate issues surrounding the provision of a fair trial, or whether it is fair to try the accused, and his guilt. In practice, the Court of Appeal of England and Wales can address only a limited number of cases. The remedies it provides are not timely or easily accessible and require the expenditure of a large amount of resources. The manner in which it is asked to address the questions of the reliability of fresh evidence and the safety of a conviction contain a large measure of discretion. Many other factors influence the decision making process and, therefore, it is not as closely tied to principle as might be hoped. If a new trial is granted on the basis of the prosecution's breach of duty of disclosure, the accused is subjected to further strain and expense. It is open to question whether a new trial after a long delay is a just remedy. In some cases, the wrongfully convicted are vindicated through the appeal process. Occasionally, they receive some compensation, but the amounts of money paid have been very modest[190] and, while recently more substantial, continue to be inadequate.[191] On balance, the appeal process cannot be considered as an efficient provider of remedies against investigative or prosecutor malpractice in relation to the disclosure of information.

Therefore, it will be incumbent on trial judges to be vigilant in addressing allegations of prosecution non-disclosure, as well as other procedural irregularities. It may be necessary for the Crown Court to review prosecutorial decisions relating to primary disclosure under s 3 of the CPIA 1996, in spite of the absence of express authority. Certainly, the decision in *Ex p Lee* in favour of allowing early disclosure is a positive step forward. In the magistrates' court, the right to a trial *de novo* is a good remedy. Unfortunately, it is thought necessary

190 Zander, 1999, p 608; Kaiser, 1989, p 96.

191 Andy Evans was awarded £945,500 (Plavsic, 2000, p 1885); Milgaard settled for Can$10 m (Perreaux, 1999).

by legislators to discourage convicted persons from abusing the right and the system, as now designed, is too imprecise to distinguish between the abusers and the wrongly convicted, leaving the wrongly convicted equally discouraged from seeking redress. It is submitted that the suggestion by the court and the guidance of the Attorney General for disclosure by the prosecution of its case in summary matters should be heeded.

It is apparent from the results of the CPS Inspectorate report and co-BAFS (British Academy of Forensic Sciences joint research) studies that the efforts of the DPP and Chief Constables to ensure compliance with the rules have not been successful. Therefore, the control of the disclosure regime is left primarily to the trial judge. However, if no other safety check is put in place, incomplete disclosure will go undetected and undermine the right to a fair trial, because the unethical investigator and prosecutor are able to disguise inappropriate behaviour. The defence will not always be in a position to know of prosecution malpractice, or, if suspicious, be able to appreciate the significance of the unseen material. Thus, the importance of transparency and those features of law and procedure, such as those in the Canadian justice system, which encourage transparency. Inevitably, without new steps to gain compliance with the disclosure rules and statements of best practice, wrongful convictions from non-disclosure will continue to occur. In the next chapter, the suggestion that police and prosecution adherence to the law requires more extensive procedural and substantive changes to the law is explored.

PROSECUTION ADHERENCE TO THE CPIA 1996

11.1 INTRODUCTION

The duty of the prosecution to reveal to the defence evidence supporting its case against the accused, and certain unused materials in its possession, is rendered hollow if the police do not complete their duties in a responsible manner.[1] In other words, if the police do not conduct a proper investigation, record their findings, and relay all findings to the prosecutor, then the prosecution's duty of disclosure, however formulated, is an empty facade. If the prosecutor does not obey the law, the situation is equally grave.

Evidence exists to support the conclusion that some investigators and disclosure officers are not complying with the Criminal Procedure and Investigations Act (CPIA) 1996. Some investigators are not completing reasonable investigations and some disclosure officers are not properly supplying the prescribed information to prosecutors. The evidence also demonstrates that some prosecutors are not properly reviewing the reports from the disclosure officers and that they are not complying with their duty of disclosure to the defence. It is clear that the level of compliance with the CPIA 1996 is not satisfactory.[2] Most participants in the criminal justice system, including the police,[3] the Director of Public Prosecutions (DPP)[4] and the Attorney General,[5] the court[6] and the profession,[7] have expressed concern.

It is submitted that it is incomplete to address the issues of the law and practice of disclosure without addressing the issue of the failure of the representatives of the State to comply with the law. The rule of law must prevail. The ends do not justify the means.[8] When the police do not take a responsible approach to their duties, from the actual investigation to the final disclosure to the prosecutor, and likewise the prosecutor to the defence, miscarriages of justice will occur. The *causes celèbres*—the wrongful convictions in England of the

1 For an earlier version of the arguments in this chapter, set in the Canadian context, see Epp, 1997.
2 CPS Inspectorate, 2000; Ede, 1999.
3 Phillips, 1999, p 16.
4 Calvert-Smith, 1999, p 20.
5 Williams, 1999, para 57.
6 *Home Secretary ex p Simms and O'Brien* [1999] QB 349 HL.
7 Ede, 1999, p 1.
8 *Latif* [1996] 2 Cr App R 92 HL, p 101.

Guildford Four,[9] the Birmingham Six[10] and Judith Ward,[11] for crimes of murder, and of the Maguire Seven[12] (for possessing bomb making materials) and the wrongful convictions in Canada of Donald Marshall Jr,[13] David Milgaard,[14] William Nepoose[15] and Guy Paul Morin,[16] for crimes of murder—are evidence of this basic truth. Improper actions by the prosecution not only ruin the lives of the persons wrongfully accused or convicted, but may leave the true perpetrators unpunished and it further undermines public confidence in the criminal justice system.[17]

Since the role of the police in criminal proceedings is pivotal, most of the discussion in this chapter will address the question of how to secure police compliance with the CPIA 1996, or its successor. The discussion will begin with the role of the investigator and the broader issues surrounding the police and the malpractice of some of their members. The issues can be better understood by considering the culture of the police force and the 'working rules' which exist within the 'cop culture'. The proposals for reform will be examined, including the Government's current initiatives[18] and a new proposal will be stated. Later the discussion will turn to the suggested measures to be taken to encourage compliance with the law by wayward prosecutors. It is suggested that compliance with the law by prosecutors might be more easily assured if the attitude of the police were modified. Unfortunately, the actions of some investigators and prosecutors in Canada are no better, but, as demonstrated by the brief description of the situation in Canada in the last part of this chapter, some of the problems that can arise are minimised by broad disclosure.

11.1.1 CPIA 1996 Code of Practice

It has been stated that the 'police are, in effect, the first and main keepers of the integrity and fairness of the criminal justice system. … The police have a profound and taxing responsibility to balance individual rights with society's need for security. Another reason why proper policing is so important is because

9 *Richardson, Conlon, Armstrong and Hill* (1989) *The Times,* 20 October, CA.
10 *McIlkenny and Others* (1991) 93 Cr App R 287CA.
11 *Ward* (1993) 96Cr App R 1 CA.
12 *Maguire and Others* (1993) 94 Cr AppR 133 CA.
13 *Marshall Jr Report,* 1989.
14 *Reference Re Milgaard* (1992) 135 NR 81 (SCC); *Milgaard v Mackie and Others* (1995) 118 DLR (4th) 653 Sask CA.
15 *Reference Re Nepoose* (1992) 71 CCC (3d) 419 Alta CA; *Sinclair Report,* 1991.
16 *Morin,* unreported, 19 January 1995, Toronto Ont CA; *Kaufman Report,* 1998.
17 *Runciman Report,* 1993, para 1.22.
18 Home Office, 2001, para 3.130.

shortcomings in a police investigation…may not be caught or corrected later in the process'.[19]

The code now defines for the police the standards of investigation and disclosure practice in England and Wales.[20] The code contains provisions designed to secure that all reasonable steps are taken for the purposes of the investigation, including pursuing all reasonable lines of inquiry. Information, or matter, obtained in the course of an investigation that may be relevant to the investigation is to be recorded, retained, and passed on to the prosecutor via the disclosure officer if requested. The disclosure officer must certify to the prosecutor that he has complied with the code. If the prosecutor is of the view that it is appropriate to disclose certain information to the defence, his direction must be followed.[21]

Guidance on the practical aspects of the disclosure of unused material was given to police officers and caseworkers in Joint Operational Instructions issued by the CPS and the police in March 1997. This is a restricted document and consequently it cannot be reported or analysed in this work. In any event, the CPS Inspectorate found that the instructions were not complied with on a regular basis[22] and, therefore, the absence of an analysis of the instructions does not undermine the discussion in this chapter, but rather supports the main point. The actual forms that are to be completed by disclosure officers are found in the *Manual of Guidance for the Preparation, Processing, and Submission of Files* which was lasted revised in November 2000.[23]

11.1.2 Office of constable

The term 'police' is used in this discussion in the popular sense, limited to full time members of public police forces established under specific enabling legislation.[24] The common law office of constable was defined over a number of decades in England and Wales.[25] A key characteristic of the office is the

19 *Marshall Jr Report*, 1989, pp 249–50; *Runciman Report*, 1993, paras 2.1–2.

20 Before the code, many police believed that, once the investigator is convinced that a suspect is guilty, he was not morally or legally required to pursue exculpatory lines of inquiry (*Fisher Report*, 1977–78, para 2.30).

21 Paragraphs 3.4, 4.1, 5.1, 7.4, 9.1 and 10.

22 CPS Inspectorate, 2000, para 3.29.

23 Home Office, 2000a.

24 Police Act (PA) 1996. The PA 1997 places the National Criminal Intelligence Service on a statutory footing, creates a new National Crime Squad, gives wide ranging powers of intrusive surveillance, creates the Police Information technology Organisation and provides some access to criminal records for employment purposes. The Crime and Disorder Act 1998 places a duty on chief police officers and local councils to work towards developing a strategy to reduce local crime and disorder.

25 Lustgarten, 1986, p 25.

discretion in each holder of the office.[26] Each police officer has 'original and not delegated' discretion.[27] However, the paramilitary structure[28] and the informal features of the police force, such as the culture of loyalty to the force, influence the manner in which an officer exercises his power.[29] This produces confusion regarding the nature and governance of the police.[30] The situation is further complicated by solidarity of some working groups within the police. The full significance of this observation is explored in Pt 11.2.

11.1.3 Investigative malpractice

Recent case reports, surveys and reports of inquiry[31] record many incidents which call into question the integrity and practices of some investigators. The disturbing police conduct reported includes: perjury; the fabrication of evidence; destruction of evidence; negligent, or intentional, inaccuracy in the recording or gathering of evidence; failure to fully investigate other logical suspects; and failure to disclose to the prosecutor such acts and omissions or independent exculpatory evidence.[32] This is a familiar inventory. Reports from other jurisdictions indicate that similar incidents have occurred in investigations carried out by some members of their police forces.[33]

11.1.4 Vexing question

Who will hold the investigator or disclosure officer accountable when he breaks one law to enforce another? The Runciman Report considered this question and its conclusion and recommendations led to legislative action, including the CPIA 1996. However, it is submitted that further reform is required

26 *Holgate-Mohammed v Duke* [1984] AC 437 (police officers exercise executive, rather than judicial, discretion).

27 *Fisher v Oldham Corp* [1930] 2 KB 364, p 372; *Metropolitan Police Comr ex p Blackburn (No 1)* [1968] 2 QB 118, p 136. Therefore, a constable of senior rank is able to assign a constable of lower rank to report to work at a specific location, but he cannot require or prevent the constable's use of power in any individual case. The general function of the Chief Constable is found in s 10 of the PA 1996, and discussed in *Chief Constable of Sussex ex p International Trader's Ferry Ltd* [1997] 3 WLR 132 CA.

28 Eg, the force may set as a priority the detection of certain types of crimes.

29 *PSI Report,* 1985, pp 354–55; Ashworth, 1994, pp 75–80. Eg, loyalty to fellow officers may encourage an officer to ignore noble cause corruption.

30 Lustgarten, 1986, p 25.

31 HMI Constabulary, 1999b.

32 *Guney* [1998] 2 Cr App R 242 CA, p 253; Kaye, 1991, pp 56–63; Dein, 2000, p 801; Rose, 1996, Chapter 7 *Fergus* (1993) 98 Cr App R 313 CA; *Rowe and Davis v UK* (2000) 30 EHRR 1 (ECtHR); Morton, 1993, pp 254–66; *Mullen* [1999] 2 Cr App R 143 CA; *Marshall Jr Report,* 1989; *Kaufman Report,* 1998.

33 The example from other jurisdictions can be found in Epp (1997, p 96), JUSTICE (1989, p 76), Hill (1994, p 1706), *Wood Report* (1996, para 2.79).

before all investigators and disclosure officers comply with the CPIA 1996. In the following pages, potential solutions to the problem of police malpractice in investigation and disclosure are explored. The discussion covers a wide range of potential solutions including criminal and civil actions against offending officers, training and supervision of police, citizens' complaints; and external supervision by a judicial officer or prosecutor.

It is submitted that the solution may be even more generic and, yet, more difficult to realise. It appears that revision of the police mindset will be the most effective solution. It will be suggested that this result might be hastened through strengthening the code with new enforcement measures. One measure suggested is the imposition of an obligation on the prosecution to demonstrate compliance with the code, in addition to the elements of the offence, under threat of adverse inference.

11.2 THE POLICE, 'COP CULTURE' AND INVESTIGATIONS

Policemen share a bond, or culture, which greatly influences their point of view and actions. The 'cop culture' is characterised by an extreme sense of mission in police work and solidarity amongst closely grouped colleagues.[34] Training and management methods and the discretionary nature of police duties shape the culture.[35] The cop culture and solidarity requires unfailing loyalty in all matters where a line can be drawn on the basis of 'us versus them'. Policemen tend to become isolated socially from the public and turn in toward other members. Loyalty is reinforced by general indoctrination by the organisation itself regarding the importance of team play and loyalty to the force. The research indicates that superiors tend not to reward those who report improper conduct. Indiscretions are overlooked generally as a reward for good service. Further, overlooking indiscretions facilitates 'a kind of implied blackmail' to ensure loyalty.[36]

Research has documented that police working groups may become isolated from superiors. When that occurs, policemen primarily adhere to the expectations of the working group, regardless of force policy.[37] Within the group, there may exist a strong aversion to challenging colleagues' judgments,[38] or to complaining openly about malpractice.[39] Unfailing loyalty is reinforced again

34 *PSI Report,* 1985, pp 354–55; Reiner, 1992, pp 111–18; Ashworth, 1994, pp 75–80; Morton, 1993, pp 281 and 341; Rose, 1996, p 211.
35 Maguire and Norris, 1992, p 20.
36 Skolnick, 1966, p 186; Marx, 1995, p 216; Seagrave, 1995, p 6.
37 *PSI Report,* 1985, pp 556 and 568; Hayes, 1996, p 6.
38 *PSI Report,* 1985, pp 535–36, 556 and 568; Baldwin and Moloney, 1992, pp 61–68.
39 *Runciman Report,* 1993, para 2.65.

by the implied threat of withdrawal of collegial support in the face of actual physical danger or exposed indiscretions.[40]

The dynamic is complicated in forces where there exists a stark division between the investigator on the street and those in the supervisory positions in the station. In this scenario, there is a sense of hostility to supervision, and those who supervise do so at a distance out of deference to this feeling. It has been reported that the lack of supervision and group loyalty results in the 'working rules' of the lower ranks being the most determinative force in the procedure followed in day to day policing in some forces.[41]

The working rules are a self-revised version of the law wherein the ends, to a certain degree, are used to justify the means.[42] The police are trained to secure the conviction of criminals. Some investigators adopt the mentality that they are in the best position to determine the guilt or innocence of suspects.[43] While this attitude has been observed amongst certain groups of investigators,[44] there are indications that it is not totally deprecated in the most senior ranks.[45] Giving false testimony, or improving the evidence in prosecutions, can become a routine amongst certain working groups.[46] For example, officers at London's Stoke Newington police station were exposed as giving false evidence in many drug prosecutions,[47] officers in the Metropolitan Police's Flying Squad were exposed as giving false evidence in robbery prosecutions[48] and the ill fated Serious Crime Squad in West Midlands allegedly tortured suspects.[49]

On the whole, police organisations are comprised of many varied and complex features.[50] Many officers who become involved in the various aspects of an investigation comply with the law. Others complete their tasks in a professional manner, but succumb to the temptation to withhold a piece of evidence from the prosecution, either to assist the prosecution or to ensure that the defence is not given any avenues of attack. Likewise, some may ignore the law in furtherance of the perceived mission. Therefore, any attempt to formulate solutions to police investigative and disclosure malpractice must take

40 *Waters v Comr of Police of the Metropolis* [2000] 1 WLR 1607 HL.
41 Baldwin and Moloney, 1992, p 78; *PSI Report,* 1985, pp 535 and 556–58.
42 Skolnick, 1966, p 197; Ashworth, 1994, p 75.
43 Devlin, 1979, p 72.
44 HMI Constabulary, 1999b, para 4.14; Maguire and Norris, 1992, p 20.
45 Mansfield, 1994, p 271; Kaye, 1991, pp 70–71; Gibbons, 1995, p 6; cf Condon, 1995, p 14.
46 *Edwards* (Maxine) [1996] 2 Cr App R 345 CA.
47 *Guney* [1998] 2 Cr App R 242 CA.
48 Dein, 2000, p 801.
49 *Twitchell* [2000] Crim LR 468 CA.
50 *Macpherson Report,* 1999. Rutherford (1999, p 346) suggests there exists a 'powerful cultural resistance to change' within the police.

into account the attitude, the working rules, and the internal dynamic of police organisations.

11.3 SUGGESTED SOLUTIONS DRAWN FROM THE LITERATURE

11.3.1 Introducing suggested solutions

It was demonstrated in the reports of the CPS Inspectorate and the co-BAFS (British Academy of Forensic Sciences joint studies) survey that investigators and disclosure officers have not always complied with the code. It must be determined how this situation might be corrected. Many proposed solutions addressing various issues of police malpractice have been put forward in the literature. These can be usefully examined in the context of current concerns. Some proposals focus on the period post-investigation and suggest behaviour modification primarily through: (i) the exclusion of improperly obtained evidence or evidence that was not revealed pre-trial, or judicial stays; (ii) increased use of criminal prosecutions; or (iii) civil actions against offending investigators; (iv) more stringent complaint and disciplinary procedures; or (v) empowering defence practitioners. Other proposed solutions focus on the period during investigation. Among the proposals for behaviour modification are: (i) judicial or prosecutorial supervision of investigations; and (ii) improved supervision by mid-rank officers. Finally, other proposed solutions seek to avoid malpractice before an investigation begins through improved recruitment, training and management within the force.

It is submitted that each proposal has some potential to reform the police mindset and, perhaps, the working rules.[51] Regardless of the focus of each proposal, all proposals recognise that complementary revision must take place in other areas of concern before any proposed reform can meet its potential. For example, while improved training of investigators might be a valid primary proposal, investigative malpractice could not be alleviated without complementary improvements in supervision techniques.

In this part, solutions canvassed by others will be critically reviewed to determine whether they might successfully be applied to the problem of investigative malpractice in relation to the code.

51 Correction is possible because there are many police of integrity and recent efforts to improve have borne positive results, see Maguire (1994, pp 46–47) (improvements in CID seen in 1994), Wifliamson (1994, p 107).

11.3.2 Post-investigation behaviour modification

11.3.2.1 Exclusion of evidence or stay of proceedings

It has been suggested that the way to encourage behaviour modification in the police might be for judges to demonstrate a strong attitude against malpractice through the exclusion of evidence that has been gathered in breach of statutory codes.[52] This suggestion may be adapted to include evidence that was not revealed in advance or evidence that might be misleading without the disclosure of related information. It might be further adapted to suggest that the court should be more willing to stay proceedings where the disclosure rules have not been complied with.

In England and Wales, the court has taken the position that the exclusion of evidence is not to be used as a mechanism to discipline the police.[53] It unduly hampers the truth seeking function of the court. Also, a judicial stay of proceedings is not intended primarily to discipline the police. It is to be used to protect the fairness of the proceedings and the integrity of the court.[54] Usually, a fair trial can take place after the violation of the disclosure rules has been remedied. (Canada has taken a similar approach in relation to the exclusion of evidence[55] and stays.)[56]

For decades, American courts have attempted to deter investigative malpractice through the automatic exclusion of apparently probative and reliable evidence if it was obtained through illegal means. Justice Burger, later to become Chief Justice of the United States Supreme Court, concluded that the exclusion of evidence is ineffective as a deterrent to improper law enforcement methods,[57] as did the Philips Commission.[58] The lack of effectiveness of this approach is seen in four points. First, in most cases the investigator is not informed that the lack of success in the prosecution hinged on his own improper acts, or, if he is so informed, the time lapse nullifies any notable impact. Second, when an offending investigator does receive notice in a timely fashion, either through being present at judgment (or reading a newspaper account), his lack of formal legal training tends to allow him to justify the acquittal on the basis that the prosecution was the victim of some indefensible 'technicality'. Third, police officers are rarely

52 Morton, 1993, p 371.
53 *Keenan* [1990] 2 QB 54, p 69.
54 *Horseferry Road Magistrates' Court ex p Bennett* (1994) 98 Cr App R 114 HL, p 125. See the discussion in Pt 8.2.4.
55 *Collins* [1987] 1SCR 165, pp 190–94 and *Stillman* [1997] 1 SCR 607, pp 674–75.
56 *La* [1997] 2 SCR 680.
57 Burger, 1964, p 11; *Bivens v Six Unknown Named Agents of the FBI* 403 US 388 (1971) (Burger CJ dissenting).
58 Philips Commission, 1981a, para 4.127.

disciplined by the force for steps taken which later are declared illegal by a court and lead to exclusion of evidence. Where there is no realistic chance of punishment for illegal actions, there can be no realistic deterrent effect. Finally, many laymen sympathise with police efforts in crime detection and do not understand the importance of the goal of the court. This provides the offending investigator with a measure of public sympathy.[59]

Many of the foregoing points apply with equal weight to the question of whether the exclusion of prosecution evidence, which was not revealed pre-trial to the defence due to the secretiveness of the investigator or disclosure officer, would have a positive impact on police practice. Of course, the exclusion of exculpatory evidence arising from its non-disclosure is nonsensical. It is submitted that the foregoing points also apply to discount the corrective potential of stays of proceedings.

11.3.2.2 Criminal prosecutions

Certainly, criminal prosecution will remain one route by which some illegal police activities will be discouraged.[60] Perhaps criminal proceedings should be used more frequently in attempting to control the activities of investigators and disclosure officers. However, a number of points lead to the conclusion that this is not an effective way forward.[61] They can be conveniently categorised as practical, legal and core issues.

Practically speaking, the civilian complainant might be afraid of retaliatory action by colleagues of the accused investigator.[62] Also, the complainant must attract the co-operation of the CPS in bringing the prosecution because the cost of bringing a private prosecution is prohibitive and the Crown could intervene and stay the matter.[63] However, gaining the co-operation of the CPS is not automatic.[64] Any prosecution will encounter the difficulty that the charge relates to a specific man, place and time. Facts are rarely so straightforward in misconduct during investigations.[65] Even then, one must break through the 'blue wall' to ascertain all the relevant facts.[66]

Many legal issues work against modification of police behaviour through criminal sanctions. Investigators who are accused of a crime in the course of

59 Burger, 1964, pp 11–12; Morton, 1993, p 343.
60 Beckman and Taylor, 1991, p 682; Mansfield, 1994, p 271.
61 Lustgarten, 1986, p 138.
62 Sieghart, 1986, p 272.
63 DPP, 2000.
64 Smith, 1997, p 1180; *DPP ex p Treadaway* (1994) *The Times,* 29 July, DC.
65 Eg, DPP Calvert-Smith did not prosecute the policemen involved in falsifying evidence in the Hickey and Molloy wrongful conviction case (DPP, 1999b).
66 *PSI Report,* 1985, p 355.

their duties are entitled to the rights given to all citizens.[67] Charge screening considerations may lead to the termination of the prosecution. Not only must the evidence demonstrate a 'reasonable prospect of conviction', but the question of the public interest in prosecuting might prove fatal. After members of the West Midlands Regional Crime Squad (involved in the miscarriages of justice of the Birmingham Six and Guildford Four) were investigated by the West Yorkshire Police, which recommended that 16 detectives should be prosecuted, former DPP Mills QC chose not to proceed.[68]

Even though criminal sanctions have a role to play in controlling some policemen, the core issue still remains. Prosecutions for an individual officer's crimes in the line of duty do not affect the entire attitude of the police, especially amongst those who follow closely the working rules.[69] In consequence, increased use of criminal sanctions will not provide the desired behaviour modification regarding day to day police investigations and disclosure habits.

11.3.2.3 Civil law suits

Police misconduct during the investigation and disclosure stage can be addressed in civil suits in England and Wales.[70] Causes of action include[71] assault, battery, false imprisonment, intimidation, intentionally causing nervous shock and harassment,[72] trespass to land, trespass to goods and conversion, malicious prosecution or arrest, conspiracy and misfeasance in a public office.[73] The civil suit has the advantage of the lower standard of

67 Milliard, 1998, p 766.

68 Mansfield, 1994, p 272. Critics called for the resignation of DPP Mills QC due to her continued refusal to bring prosecutions against police (Morton, 1997c, p 1141). Glaring mistakes in the exercise of discretion led the Divisional Court to order the DPP to reconsider her decision not to prosecute four West Midlands Serious Crime Squad officers (Smith, 1997, p 1180). One must not forget the possibility that a magistrate may choose not to commit an accused. Bow Street Magistrate Ronald Bartle discharged three Surrey police officers (Style, Donaldson, Attwell accused of conspiracy to pervert the course of justice in the Guildford Four case, much to the horror or dose observers. The Divisional Court reversed the ruling (Rozenburg, 1992, p 95). Further, the trial judge may stay the proceeding due to publicity rendering a fair trial impossible, as in the case of three detectives from the West Midlands Police (Reade, Morris, Woodwiss) accused of conspiracy to pervert the course of justice and perjury arising from the Birmingham Six case (Rose, 1996, p 297). Or the jury may acquit, Attwell and Donaldson Duce 1993).

69 *PSI Report,* 1985, pp 355 and 492.

70 *Treadaway v Chief Constable of West Midlands* (1994) *The Times,* 29 July (£50,000 damages arising from police officers placing a plastic bag over the plaintiffs head in an attempt to extract a confession).

71 Negligence or incompetence in the exercise of duties is not actionable, *Hill v Chief Constable of West Yorkshire* [1989] 1 AC 63 HL; *Elguzouli-Daf v Comr of the Metropolis* [1995] QB 335 CA.

72 Protection from Harassment Act 1997, s 3; *Burris v Azadani* [1995] 1 WLR 1372 CA.

73 *Thompson and Hsu v Comr* of *the Metropolitan Police* (1997) *The Times,* 20 February CA; *Gibbs v Rea* [1998] 3 WLR 72 PC; *Darker (Docker dec) and Others v Chief Constable of the West Midlands Police* [2000] 3 WLR 747 HL.

proof. Studies have demonstrated that civil actions against the police produce tangible results in a vastly greater number of cases than those complaints pursued through the citizen complaint process.[74]

However, a civil suit is not effective in exercising day to day control over the misconduct of officers. It is too blunt and imperfect. Some of the problems in pursuing this remedy include the restrictive definition of the elements of the torts of malicious prosecution and misfeasance in public office, although some assistance is found in the recent restriction of prosecutorial immunity from suit where evidence was alleged to be fabricated.[75] Also, the cost of pursuing a civil action against an officer is high.[76]

The evidence suggests that, even when a civil action is successful, it might have minimal impact on police practice. This is due to a series of factors including, first, damages are not paid by the offending officers, but by public funds or insurance.[77] Secondly, it is unusual for disciplinary proceedings to be taken against policemen where civil actions have been taken.[78] Finally, the judgment is directed against the individual and does not seek to address the deeper issues. The defendant's environment—police culture, management and training—which fostered the misconduct, is beyond the scope of the judgment[79] For example, to limit the impact on the force, the commissioner will blame it on the lawyers.[80] A California study revealed that less than 5096 of police found liable in civil suits altered their behaviour in any way in consequence.[81] Therefore, civil actions are not to be considered as an effective device to discipline the police, or to ensure compliance with the CPIA 1996.

11.3.2.4 Internal discipline and citizen complaints

The police are expected to keep their own affairs in order by careful selection, training, and supervision. The completion of duties is governed by self-control by individual policemen, combined with defined supervisory layers and internal

74 Clayton and Tomlinson, 1992, p 15.

75 *Darker (Docker dec) and Others v Chief Constable of the West Midlands Police* [2000] 3 WLR 747 HL.

76 Home Affairs Committee, 1998a, para 10, referencing the trial costs of £30,000 per day in *Kevin Taylor v Anderton and Chief Constable of Greater Manchester Police.*

77 *Lancashire CC v Municipal Mutual Insurance Ltd* [1997] QB 897 CA (insurer provided public liability insurance to the local authority and was liable for punitive damages arising from actions for false imprisonment, wrongful arrest and malicious prosecution).

78 Clayton and Tomlinson, 1992, p 17. Eg, the eight month false imprisonment of Paul Dandy by the West Midland Serious Crime Squad which resulted in a £70,000 settlement, but no significant disciplinary actions (Rose, 1996, p 271).

79 Lustgarten, 1986, p 127.

80 Sir Paul Condon, quoted in (1996) *The Times*, 7 May.

81 Hogarth, 1982, p 115.

disciplinary systems.[82] It has been argued that the disciplinary system should be the primary method by which investigative and disclosure malpractice is addressed.[83] Certainly, a well managed and disciplined force would be made up of open minded, efficient investigators and, failing that, administrative remedies would be fast and effective. The Government is hopeful that the initiatives announced in *The Way Ahead* will effect this goal.[84] However, additional changes may be necessary.

Internal discipline, as a check against malpractice suffers from the inherent bias of the 'cop culture'.[85] Amongst those who interpret and enforce disciplinary rules are those who understand and sympathise with the subjective police view of a proper investigation.[86] Where the 'cop culture' takes the view that police are not required to search for exculpatory evidence or pass such information on to the prosecutor, then it is unrealistic to expect a police officer to report such behaviour by a colleague. Even where the breach of discipline is obvious, informing on a police colleague requires 'sheer moral courage', observed a former policeman.[87] The Policy Studies Institute (PSI) Report concluded: 'We believe that police officers will normally tell lies to prevent another officer from being disciplined or prosecuted, and this is the belief of senior officers who handle complaints and discipline cases'.[88] Other commentators report retaliation against colleagues who refuse to ignore misconduct.[89]

In the rare situation where a suspect knows of investigative malpractice pre-trial (or otherwise), the civilian complaints system is a possible route of

82 PA 1996, Pt IV. Police Discipline Code is found in the Police (Conduct) Regulations 1999 SI 1999/730, Sched 1.

83 *Runciman Report,* 1993, paras 1.20–24.

84 Home Office, 2001, para 3.130.

85 Eg, officers who are convicted of criminal conduct while off duty tend to receive simple reprimands, eg 'Common Assault or Driving While Intoxicated' (Greater Manchester Police, 1998, para 4). Macpherson Report, 1999, para 28.14 (regarding the biased internal review of the investigation of the murder of Stephen Lawrence). Paul Whitehouse, the Chief Constable of Sussex Police, resigned following criticism of his decision to confirm promotions and pay rises for two officers involved in the shooting dead of James Ashley, a naked unarmed man. John Stalker was an honest officer framed for uncovering death squads.

86 Morton, 1997b, p 1449, the police force corrupts inductees, rather than the other way around. Eg, an inquiry into the falsification of interview notes arising out of the interrogation of Paul Dandy lad to Detective Superintendent Brown, who was in charge of the men who conducted the interview, to plead guilty to the disciplinary offence of neglect of duty. He received a reprimand, which did not impede his career. None of the officers who conducted the interviews or falsified notes were disciplined (Rose, 1996, pp 271 and 280 (quoting 1991 *Home Office Research Study* of victims of police deviance)). Another one of the officers, Lawrence Shaw, was recently convicted of armed robbery; Weaver, 2001.

87 Seabrook, 1987, p 127. A hotline to encourage officers to report on others whom they believed to be involved in corruption received no reports (Morton, 1997b, p 1449, cf Campbell, 1997).

88 *PSI Report,* 1985, pp 354 and 492.

89 Morton, 1993, p 285; *Waters v Comr of Police of the Metropolis* [2000] 1 WLR 1607 HL.

redress.[90] A confirmed complaint will result in disciplinary action or informal guidance. Complaint systems have been justly criticised over the years, as lacking in thorough investigation and being unduly secretive, slow and biased.[91] Even though some steps have been taken to address these criticisms,[92] the basic distrust generated through the past experience will continue to hamper efforts to gain confidence in the system.[93] This is not to say that the Government's proposed independent complaint commission is not important, or welcome.[94] Rather, for current purposes, a commission can be seen only as part of the support structure in efforts to bring reform.

Therefore, it is clear that the complaint and disciplinary systems do not provide the solution to police malpractice in investigations or in the disclosure process.

11.3.2.5 Empowering defence practitioners

The justice system in England and Wales is adversarial in nature and accepts the principle of the 'equality of arms'. It has been suggested that, by providing more information to the defence, the investigation and the disclosure process would be more closely scrutinised and, as a result, malpractice might be addressed.[95] Information to be provided includes the schedules of sensitive and non-sensitive unused material, so that omissions might be found and the listing of materials as not to be disclosed could be challenged if necessary.[96] It was suggested that the defence be allowed access to all non-sensitive unused material so that it could make its own assessment as to the value of the material. These proposals are based on the additional proposal that further resources will be committed to ensuring that defence practitioners, whose clients are almost all legally aided, will be paid appropriately for their time. The need for further resources is seen in low legal aid rates[97] and the move to contracted defence

90 PA 1996, Pt IV, Chapter 1. Typically, the subject matter of the complaints include discourteous conduct by an officer, the use of excessive force, improper arrest or search, neglect of duty, dangerous driving, racial targeting or dishonesty in handling property. However, over the past few years, the number or more serious complaints have more than doubled. Police Complaints Authority, 1999. See, generally, Cotton and Povery, 2000.

91 Landau, 1996, p 291.

92 PA 1996, Pt IV, Chapter 1.

93 Home Office, 2000b, para 1.

94 Home Office, 2001, para 3.163, and consultation document, Home Office, 2000b.

95 Zuckerman, 1997, 606.

96 Corker, 1999, p 38.

97 Legal aid defence fees were reduced by 10% ('News' (2000) 150 NLJ 1040; Emmerson, 2000b, p 990; Napier, 2001). Patrick Allen, senior partner with Hodge Jones and Allen, one of the largest firms in London specialising in criminal defence work was quoted as saying defence work 'is a tough job with antisocial hours in which the pay has been held down by governments for nearly eight years so that a young criminal solicitor will get less than a plumber on call' (Gibb and Ford, 2001b).

services.[98] It is reported that defence practitioners who are not adequately paid cannot be expected to invest the time in preparation necessary to be effective for the accused.[99] The comments of the Foreign Secretary leave little doubt, however, that he would not support increased legal aid fees, although there may be a case for the Lord Chancellor to consider.[100] Other assistance for the defence could include publicly funded assistance in preparing the defence through provisions to retain independent forensic services, private investigators, or professional advice from specially funded general counsel.[101] In situations where the prosecution seek to withhold information on the basis of the public interest, it is suggested that special independent counsel be appointed to represent the accused.[102]

While these proposals may help promote a higher rate of fair trials than currently exists, the proposals are unlikely to facilitate the desired change in attitude. The 'cop culture' can circumvent the proposals, primarily because police officers have the first opportunity to investigate and gather evidence. The restrictions on disclosure to the defence found in the CPIA 1996 were the result of police pressure on the Government to reduce the power of the defence.[103] Also, disclosure is not required in cases where a guilty plea is likely to be entered. When this provision is considered in conjunction with the high rate of guilty pleas,[104] it is clear that most cases will not be scrutinised by defence practitioners. Where disclosure is mandated, most of the issues are not tested until the defence has a more complete picture of the case, which usually occurs at trial.

98 Practitioners state that, in addition to low rates, administrative costs have greatly increased as a result of the reporting provisions in the contract with the Legal Services Commission (Gibbons, 2000, p 1610). The Criminal Defence Service contract for 2001 provides for an increase in rates by 3%, generally, and 10% for police station advice (LSC, 2001a, p 6).

99 Tunkel, 1997, p 1022.

100 Gibb and Ford, 2001a.

101 JUSTICE, 1987, paras 43–59. New York State's Capital Defender Office (CDO) was opened in 1996. Attorney's from the CDO can represent defendants accused or convicted of capital crimes, or provide advice and serve as resource centre for other attorneys engaged in capital defense work. It supplies investigative, expert, and other services, including continuing legal education and skills training (Acker and Lanier, 1999, p 437).

102 Discussed in Pt 14.2.

103 ACPO, 1998. In February, 2001 the then Home Secretary (now Foreign Secretary) Mr Straw, revealed his continuing sympathy to the police position in his comment that criminal law firms were 'cosying up to crooks'. Frank Sinclair, senior partner with Tuckers, one of the largest firms in England specialising in criminal work, responded to the Home Secretary's comment. Sinclair was quoted as saying: "They are intimidating towards Criminal lawyers. It is as if they [the Government] are trying to frighten us out of doing our job. It is a dangerous position when the Government is criticising lawyers for doing their job which is to defend clients.' (Gibb and Ford, 2001b).

104 In the year ending March 2000, Crown Prosecution Service (CPS) figures show that 82% of defendants pleaded guilty in the magistrates' court and 73% in the Crown Court (CPS 2000a, Charts 4 and 9).

11.3.2.6 Conclusion regarding post-investigation solutions

Attempts to eliminate or significantly reduce police malpractice, in the investigation of crime and the disclosure of information to the prosecution through solutions centred on measures such as the exclusion of evidence or stays, criminal or civil proceedings, internal discipline or citizen complaints, or empowering the defence, are likely to be ineffective. The problems with each proposal vary, except for one common denominator. Each proposed solution suffers from the inability to impact the police mindset and the working rules in investigation. Other consequences follow from proposals focused at the post-investigative stage. Time passes, and resources are used by the police to defend allegations of malpractice, which should have been dedicated to finding the actual perpetrator of the crime.

11.3.3 Internal or external supervision during investigation

It has been suggested at the highest level that police malpractice during investigation or disclosure can be controlled by empowering a judicial (or prosecutorial) officer to supervise police investigations[105] and disclosure,[106] or by increased supervision by mid-rank (sergeant to inspector) officers over investigators, during the actual investigation and production phase.[107]

11.3.3.1 Supervision by a judicial or prosecutorial officer

Consideration has been given to the introduction of a judicial officer (or, alternatively, a prosecutorial officer)[108] supervise the investigative process as a means of guarding against police malpractice. Participating in the discussion were such luminaries as Lord Devlin,[109] Lord Scarman[110] and the Runciman Commission,[111] and the concept may be applied again, beyond investigation to disclosure. Lord Devlin, writing years before the CPIA 1996 was anticipated, argued that vague notions that the prosecutor and police should act in a quasi-judicial fashion were not clearly grounded in statute, making it a nonsense in practice. Now that there is such a statute, and it is not being complied with fully, it is submitted that one might consider his suggested solution. He argued

105 Devlin, 1979, pp 54–83.
106 Attorney General, 2000a, 'Commentary', p 8.
107 *Runciman Report,* 1993, para 2.2; Calvert-Smith, 1999, p 25.
108 *Runciman Report,* 1993, paras 2.67 and 5.0–17; Baldwin and Moloney, 1992, p 77; Sharpe, 1999b, pp 79–82.
109 Devlin, 1979, pp 54–83.
110 Scarman, 1991.
111 *Runciman Report,* 1993, para 1.14. For a critique, see Field (1994, p 129) and his proposal 'to place a formal duty on prosecutors and/or a newly created investigating judge [using Dutch model] to seek out and set down all the relevant evidence both for and against guilt and innocence, using new power to direct the police investigation'.

that a pre-trial judicial officer was needed to supervise the investigation. Those holding such an office would be placed between the prosecution and the defence with a 'clear and publicly proclaimed duty to investigate both sides having the police as [their] agents'.[112] It was envisaged that once a charge was laid the accused would be interviewed initially by an examining judge. The judge would then have the opportunity to require further investigation and to take appropriate measures to safeguard exculpatory material. In consequence, charge screening and prosecution disclosure would be enhanced. A similar proposal was put forward by Lord Scarman.

It is respectfully submitted that supervision of police investigations by a judicial (or prosecutorial) officer as the primary means of reducing investigative malpractice is not an appropriate step. It would confuse the role of the court (or the CPS), increase tension between the court and the police, and do little to curb the police mindset.[113]

The nature of the role performed by the judicial (or prosecutorial) office requires the maintenance of a clear separation between that office and the police and their investigative role. Separation ensures a degree of independence and the ability to fulfil the function of a check and balance against the power of the police.[114] Even with the current separation, some members of the court have failed steadfastly to maintain independence from the police cause.[115] Similarly, continuous interaction between prosecutors and investigators during the trial process has allowed the police to reduce prosecutorial independence.[116] Resource shortages have led some prosecutors *de facto* to delegate important duties, such as disclosure, to the police by not reviewing closely the schedules.[117] Requiring the supervision of investigations by a judicial (or prosecutorial) officer would impair the check and balance function of each office.[118] The importance of this separation has again been illustrated by prosecutions conducted by the Solicitor's Office of HM Customs and Excise as documented in the Butler Report.[119] The Government is now in consultation on the issue of whether or not

112 Devlin, 1979, p 78.

113 *Runciman Report,* 1993, para 2.67; McConville *et al,* 1991, p 201.

114 *Runciman Report,* 1993, para 5.16.

115 Eg, Dr Douglas Acres, former chairman of the Magistrates' Association, is reported as having said that he and the police were on the same side (Morton, 1993, pp 315–16). See, also, Lord Denning in *McIlkenny v Chief Constable West Midlands Police Force* [1980] QB 283 CA, and statements of the justice evidencing bias, *Bingham Justices ex p Jowitt* (1974) *The Times,* 3 July, DC.

116 *Runciman Report,* 1993, paras 5.2 and 5.16.

117 CPS Inspectorate, 2000, para 4.52.

118 Philips Commission, 1981a, Chapters 6–7, recommending the creation of the CPS.

119 *Butler Report,* 2000, recs 26 and 27.

the prosecutions of Customs and Excise should be conducted by a separate authority, such as the CPS.[120]

Tension, or even resentment and disagreement, between the judicial (or prosecutorial) officer and police would result if the former was empowered to supervise police inquiries.[121] For example, currently some police have only limited respect for the authority and role of the office of prosecutor. The Crown has had difficulty getting co-operation from the police in respect of disclosure of evidence.[122] Clearly, the unity of the police force impacts prosecutors more than prosecutors impact the police. Policemen, in dealing with outsiders will maintain the force's position. Prosecutors, on the other hand, have more individual discretion, and less organisational support.[123] Any desire on the part of the police to frustrate judicial (or prosecutorial) supervision is easily achieved by the perpetuation of the phenomenon identified by McConville *et al* as 'constructing a case'. Construction of the case occurs when an investigator selects portions of the available evidence and presents it to the supervisor as the only available credible evidence.[124] Avoiding this possibility in a manner other than changing the police mindset would involve either equipping the judicial (or prosecutorial) officer with an independent investigative group, or the skill and resources to investigate crime personally.[125] However, this would violate the principle of the separation of roles. Also, it is questionable as to whether an external investigator could break through the blue wall.

Judicial monitoring is used in other jurisdictions, but the problems identified in the systems of Scotland and France,[126] for example, lead to the conclusion that judicial monitoring in England and Wales is unlikely to have a significant impact on investigator malpractice. In Scotland, the quasi-judicial officer, known as the Procurator Fiscal, is responsible for the initiation and supervision of criminal investigations undertaken by the police[127] and for the prosecution of lesser offences in a District Court or Sheriff Court. In spite of the power of the Procurator Fiscal to order further police investigation, the fiscals seem content

120 HMG Response, 2000, response to rec 26.

121 *Runciman Report,* 1993, para 5.16.

122 CPS Inspectorate, 2000, paras 4.33 and 4.151; Dunnigham and Norris, 1996, p 456 (police did not reveal existence of registered official informers to the CPS in most cases).

123 Nduka-Eze, 1995, p 1844, a former Senior Crown Prosecutor, recounted a personal experience of how police intimidate the CPS to control some prosecutions.

124 McConville *et al,* 1991, pp 135 and 201.

125 Field, 1994, p 122.

126 *Runciman Report,* 1993, para 1.13–14, quoting the report of the French Commission, *Justice Pénale et Droits de L'homme, La Mise en Etat des Affaires Pénales,* Paris, 1991 (chair Mireille Delma-Marry).

127 Criminal Procedure (Scotland) Act 1975, ss 9 and 293. Gordon, 1996, para. 3–04.

to rely on initial police investigation results. Research suggests that fiscals have become pro-police rather than maintaining neutrality.[128]

In France, the *juges d'instruction* (examining magistrates) are responsible for the 'conduct [of] judicial investigations of serious offences'.[129] However, doubts regarding the impartiality of prosecutors and *juges d'instruction* have been noted and the safeguards appear to be failing.[130] In theory, the defence advocate is entitled to examine the investigation material and press for investigation of points which the *juge* may have overlooked. However, in practice, advocates are not able to review the file until the last moments, leaving them with little opportunity to offer constructive input.[131] This allows the police more opportunity to influence or 'construct' the contents of the evidence dossier and does little to control other police malpractice.[132]

It is respectfully submitted that an expansion of the role of judicial or prosecutorial officers in the investigative process is not an appropriate option.[133] The potential of combining the roles is too dangerous and officeholders external to the police are unlikely to be able to break through the blue wall to exert significant influence on practical investigative issues. Further, judicial or prosecutorial supervision of the investigative process is not likely to have the desired impact on the attitude of the police.[134]

11.3.3.2 Increased supervision by mid-rank police

The Government has remained firm in the view that failure to comply with the various codes of practice made to govern police conduct in various situations is primarily a matter for internal discipline and, to a degree, the courts. Therefore, first under s 66 of the Police and Criminal Evidence Act (PACE) 1984 and now under s 26 of the CPIA 1996, failure by an officer to comply with the codes does not in itself render him liable to any criminal or civil proceedings. The relevant code is admissible in evidence at the trial of an accused and any failure to observe a provision may be considered by the court when deciding the outcome.[135]

Although the court will have a role to play in encouraging compliance with the CPIA 1996 code, the fact that it will not be informed of breaches until trial,

128 Moody and Tombs, 1982, pp 44–48, reported that fiscals only asked for further investigation in 6% of the cases.
129 Dadomo and Farran, 1993, p 69.
130 Septe and Campbell, 1995, p 46; Leigh and Zedner, 1992, p 23.
131 Leigh and Zedner, 1992, pp 13–14 and 23.
132 Field, 1994, p 129.
133 *Runciman Report*, 1993, para 1.14 (re judges) and paras 2.67 and 5.2 (re prosecutors).
134 McConville *et al*, 1991, p 201.
135 CPIA 1996, s 26(2), (3); PACE 1984 s 67(10), (11).

which may be well after the incident, greatly reduces its influence. A parallel can be drawn with the ineffectiveness of a rule mandating the exclusion of improperly obtained evidence in stopping police malpractice. Therefore, responsibility for compliance with the code will rest on the willingness of mid-rank officers to first identify violations and then pursue actively the task of changing the behaviour of those responsible.[136] This presupposes that investigators are open to training, correction and supervision.[137]

The Government's proposals for improvement in the police focus on strong leadership and better management, including revised career paths, and a new approach to specialist squads.[138] The proposals have some merit because two related factors contribute significantly to the difficulty of reform in reliance on mid-rank officer enforcement of the code. One factor is 'us versus them', a feature of relations between management and employees common to all jobs, which is intensified by poor management techniques and vague promotion systems within the police organisation.[139] The other factor is the 'working rules'; specifically, the process of unofficial sanction by mid-rank officers of rule breaking by investigators.[140]

Studies show that police organisations tend to suffer from poor management techniques. Promotions to supervisory positions are not supplemented with significant training in supervisory skills.[141] This can result in incompetent or incomplete supervision.[142] The PSI study detailed the problem. Observers found that, in keeping with tradition, CID sergeants did not supervise directly, for example, by accompanying CID constables on investigations. Even when investigators were working in a small group on a single task (like a homicide squad) the direct supervision opportunity was not used. Therefore, most CID members were not supervised at all. Lack of skills resulted in 'negative' (reprimand) rather than 'positive' supervision when supervisory action

136 A problem identified earlier in relation to the codes of practice under PACE 1984 (Fielding, 1991, p 187).

137 Calvert-Smith, 2000, p 5. Mr Barry Madden, former deputy superintendent of North Wales Police, observed that new officers display a strong sense of 'individualism'. He believes that they are less likely to be bent for the job. If they are bent at all, they will be bent for themselves in the sense of corruption for gain. The individualism factor, combined with better educated recruits, may translate into closer adherence to the rules for fear of loss of promotion in the improved promotion system. Correspondence dated 1 February 2001.

138 Home Office, 2001, paras 3.130–139.

139 HMI Constabulary, 1999b, para 5.24; *PSI Report*, 1985, pp 53–49.

140 *PSI Report*, 1985, p 568.

141 According to K Povey, HMI Constabulary, some chief constables view training as a distraction from mainstream policing rather than a positive aspect of career progression (Home Affairs Committee, 1998b, para 27).

142 Irving and Dunnighan, 1993, pp 29–30; Police Complaints Authority Chairman P Moorhouse, quoted in Crandon (1997, p 6).

occurred, thereby neglecting the opportunity to encourage improvement or design constructive plans. This management style separated mid-rank policemen from the lower ranks and led to antagonistic feelings.[143] The division was accentuated by vague promotion criteria.[144] A former officer recounted the feeling amongst his colleagues that supervisors who were promoted without merit deserved and received no respect.[145]

Unofficial sanctioning of rule breaking compounds the problem. PSI observers noted some extreme cases where a mid-rank supervisor 'expect[ed] a working group to break formal rules but expect[ed] the group to be careful to prevent him from getting to know about it, because if he got to know he would either have to back them up and be implicated, or would have to punish them for doing something he expects them to do'.[146]

With specific reference to the role of the disclosure officer, the officer selected for this role has often been the most junior officer on the squad, or the actual investigator.[147] Junior officers possess little practical authority to insist on compliance with the code. If the investigator acts also as the disclosure officer, mere is little hope of any objective assessment.[148]

Therefore, within the confines of the current system, it appears unlikely that mid-rank officers will be able to effect the desired change. The results of the co-BAFS study tend to support this view,[149] as do certain aspects of the CPS Inspectorate thematic review. For example, the Inspectorate found that disclosure issues were accorded a low priority in discussions amongst police management.[150] And, in spite of all the recent publicity concerning the need to follow the rules, wrongful prosecutions continue. For example, the proceedings against Dr Robin Reeves continued while exculpatory evidence remained undisclosed, until a court order.[151] Practical experience with other legislative

143 *PSI Report,* 1985, pp 533–49; Baldwin and Moloney, 1992, p 59; Seabrook, 1987, p 132.

144 HMI Constabulary, 1999b, para 5.24, Tension between a chief and the Police Federation is regularly featured in the pages of the *Police Review,* eg, the dispute over the health and safety of the airwave system portable radios (Mulraney, 2001, p 6) and, earlier, the call to replace the tenure 'mess' with a system of fair appraisals (Graham, 1995, p 9).

145 Seabrook, 1987, p 132; Graef, 1989, p 334 (regarding selection for elite squads based on Freemasonry membership) and Chapter 15.

146 *PSI Report,* 1985, pp 493 and 568.

147 CPS Inspectorate, 2000, para 4.7.

148 Corker, 1999, pp 30–31.

149 Ede, 1999, p 1.

150 CPS Inspectorate, 2000, para 4.44.

151 Woffinden, 2000, p 1025. See, also, the prosecution of Mr Dave Jones, former manager of Southampton *FC* (McDonald, 2001, p 540).

codes of police conduct confirms the conclusion.[152] Police officers following the 'working rules' have invented a litany of ways to bend or avoid the PACE 1984 codes.[153] Field research in relation to PACE 1984 indicates that there is little hope of eliminating police malpractice in these areas without further reform.[154]

The Government's proposals are indicative of a willingness to break away from the current confines of police structures and inadequacies in management. The question remains, however, as to whether the proposals are appropriate as the main thrust of reform, or whether their role would be better seen as supplementing an unorthodox reform model.

According to *The Way Ahead:*

> A highly trained specialist detective capability is critical to success. But it is becoming increasingly difficult to find enough experienced detectives and the pressures in some forces are such as to deter applications. 'The Majesty's Inspector [of Constabulary] is concerned that the relatively low application rate within the Metropolitan Police Service and nationally for senior detective posts will eventually lead to a dilution in the skills base of the officers to the detriment of investigation. In one area of the [Metropolitan Police Service] seven vacancies at detective inspector level were advertised and resulted in only one applicant.' (*Policing London Winning Consent* (2000) para 15.14.) Overspecialisation can result in an elite 'force within a force' leading to a closed culture with risks of ethical failings or even corruption; but the other extreme, of constant rotation of officers between widely different functions, fails to make best use of individual skill and aptitudes, and works against the optimum delivery of any specialist function. An approach which allows a career anchor in a *specialism,* and some experience in other areas, may offer the best solution, along with the increasingly sophisticated strategies now being put in place to ensure higher levels of integrity whatever function is being undertaken. Where there are gaps which cannot be filled by experience or potential with the service, then there should be opportunities to recruit people with relevant specialist skills in other fields whether from the private or public sector. The nature of such appointments should offer rewards and career paths to attract applicants of the required calibre. Raising detection rates and ensuring the highest professional standards of investigation and evidence presentation will significantly increase the chances of offenders being brought to justice. Our aim is to ensure that skilled detective expertise is built up again, maintained with specialist training, and underpinned by effective management strategies to ensure proper supervision and the prevention of corruption.[155]

152 *Keenan* [1990] 2 QB 54 CA, p 61. The court commented on apparent police ignorance of the PACE 1984 codes and the decision not to follow the codes.

153 Fielding, 1991, pp 186–90.

154 McConville *et al,* 1991, pp 189–91.

155 Home Office, 2001, paras 3.138–39.

It is reasonable to assume that the Government has the full co-operation of the Association of Chief Police Officers (ACPO).[156] However, the co-operation of the Police Federation cannot be assumed.[157] One of the few perks of the career police officer is promotion on the basis of seniority. To change hiring practices so as to allow new specialist officers to begin their service above the lowest rank may be met with strong resistance.[158] Also, the Government proposes to increase the number of occasions when foot patrol is conducted without a partner.[159] Traditionally, the relationship between the Federation and senior management has not been good. According to the former editor of the *Police Review,* Brian Milliard: 'Federation officials work to maintain the stereotype of a senior officer as a narrow minded bigot interested only in cutting costs, and sacking anyone who disagrees with him.'[160] The openness to a change in the terms of service may not be favourable for another reason—low morale. For example, in the Metropolitan Police, the largest force in England, members have been labelled as racist, by the Macpherson Report, or corrupt. One officer told the author, after Sir Paul Condon's statement to the effect that there were 250 corrupt officers in the Met,[161] that the first question he and his colleagues faced as a witnesses was whether they were amongst the corrupt officers. Such aspersions greatly damaged morale.

Setting aside the issue of terms of service, the Government has provided some details regarding the manner in which it will seek to encourage 'proper supervision'.[162] The proposal recognises that, 'police authorities need to enhance their professionalism and capabilities, particularly in relation to personnel matters'. Further, 'at all levels in the service more attention needs to be paid to the requirement for leadership abilities'. These changes are to be achieved 'through formal training arrangements' made through the new 'employer led National Training Organisation for the police' and a 'Central Police Training and Development Authority' which is to focus on the development and promotion of professional excellence across the police service'. Also,

156 The proposal was influenced by the ACPO, see, eg, comments of the secretary of the ACPO crime committee (Phillips, 1999, p 18).

157 Chairman of the Police Federation, Fred Broughton, recently referred to then Home Office Minister Charles Clarke (now Minister without Portfolio) as 'two faced' (Broughton, 2001, p 17).

158 The Government is prepared to engage in negotiation, Home Office, 2001, para 3.175. The HMI Constabulary (2001, p 1) was disappointed to note the depth of feeling that existed between the Police Federation and support staff unions with regard to the perceived low levels of consultation' before the commencement of sector policing initiatives

159 *Ibid,* para 3.152.

160 Hilliard, 1998, p 766. The Police Federation represents approximately 100,000 officers up to, and including, the rank of inspector. Hilliard observed that there is no evidence of any willingness in the officials of the Federation to assist in stamping out corruption. This attitude will not assist in a more general initiative to make changes to the culture.

161 Rutherford, 1998, p 527.

162 The Government intends to improve the process of appointments of ACPO rank officers through an accelerated promotion scheme to open the gateway to the senior ranks (Home Office, 2001, para 3.180).

the HMIC will be instructed to make provision for a training inspectorate.[163] The Government is to be applauded for these initiatives. The proposals are well past due and will likely assist in many aspects of reform in the broader functions of the police. However, it is submitted that these initiatives cannot be seen as the solution to the problems arising from the police mindset in investigation and disclosure. Without an indication that the plan includes greater transparency and some mode of external supervision for investigation and disclosure, it is submitted that the Government's initiative must be accepted only as secondary strategy for improvement, which could supplement another proposal.

11.3.4 Recruitment and training prior to investigation

In addition to inadequate supervision, many share the view that many of the problems in police investigations and disclosure are attributable to inadequate training. Undoubtedly, the recruitment of good candidates and better training would assist in reducing investigative malpractice.[164]

Police training in a formal setting is brief, typically lasting less than five months, and, to date, lacks national standards.[165] The primary emphasis is placed on statutes and operational skills including tactics (for example, shooting, movement and cover), surveillance and explosives.[166] Only modest instruction is given regarding investigative skills.[167] Formal training fails to address the very practical conflicts between the realities and pressures of the job and legal/ethical requirements.[168]

Incomplete training retards the ability of an investigator to perform at an acceptable level and often leads to bending rules.[169] Inadequate supervision and management techniques impair appropriate development and maturity. Further, the new constable is left more susceptible to the undesirable influences within the force. Researchers noted the ease with which young policemen in CID were pulled into the working culture, almost without realising it.[170] They suggest that probationers must be protected from the bad attitudes of tutor constables.[171]

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163 Home Office, 2001, para 3.183, and the Criminal Justice and Police Act 2001.
164 *Runciman Report,* 1993, para 2.59; HMI Constabulary, 1999b, Chapter 5.
165 HMI Constabulary, 1999a, p 3, Criminal Justice and Police Act 2001 will set national standards.
166 Irving and McKenzie, 1993, p 83.
167 Phillips, 1999, p 18. The HMI Constabulary (2001, p 41) found that extensive retraining of constables, sergeants and inspectors in the art of evidence gathering and file preparation was necessary in the West Midlands Force.
168 HMI Constabulary, 1999b, para 5.7.
169 *PSI Report,* 1985, p 493.
170 Maguire and Morris, 1992, p 109.
171 HMI Constabulary, 1999b, para 5.3.

A commitment to principled training is important and must be the starting point for all reform. However, the concepts of an ethical investigation and compliance with the code must also be fully integrated into the policies and practices of the police. Therefore, one must return to the question of how the current attitude of the police and the working rules are to be restructured to safeguard and reinforce a revised training regime. Continuing professional education is one avenue, but the few hours which are available for classroom instruction can have no more than a limited impact. Equally inadequate is the guidance from the Attorney General, stating that investigators and disclosure officers should follow the law.[172]

Unfortunately, changes in recruitment, training and codes alone will not bring about the desired level of change. It is submitted that meaningful internal and public scrutiny are fundamental requirements of any reform process.

11.4 INVESTIGATION REVIEW DEPARTMENT AND DEMONSTRATING COMPLIANCE

The foregoing analysis leads to the conclusion that none of the suggested reform methods implemented as the primary focus of a reform programme are likely to curb police investigative and disclosure malpractice. The police mindset and the working rules will defeat the potential behaviour modification aspects of the proposals. Therefore, efforts to eliminate or reduce police investigative and disclosure malpractice must concentrate on changing the attitude of the police and working rules.[173]

Arguably, the process of replacing the current police attitudes regarding investigations and disclosure could begin with the enactment of a new enforcement scheme for the code. Full details will be given in Chapter 14, but briefly, such a scheme might be designed as follows. A key feature would be a requirement on the prosecution to demonstrate, as part of its case, police compliance with the code. It is envisioned that evidence would be presented at an early stage, called the filter hearing, to a Crown Court judge without a jury to demonstrate compliance.[174] A specially trained officer who has reviewed the investigation and disclosure process would give oral evidence. The officer would be part of a proposed new department which would be created for the purpose of focusing on these issues and assisting in encouraging compliance with the

172 Attorney General, 2000a, paras 3–5. This instruction is repeated in *Manual of Guidance, 'Forms—Guidance* Notes', Home Office, 2000a.

173 McConville *et al*, 1991, p 206, Amlot QC quoted in Gibb (1996) and Ede (1999, p 9).

174 In the event that the Government unifies the criminal courts, the proposed review could be held during the pre-trial conference stage.

code. Failure to demonstrate compliance at the hearing, using the civil standard, would result in dismissal of the case or other remedies. Other remedies could include adjourning the hearing to allow the police to complete further investigations and, when appropriate, order disclosure of the result to the defence, or allow the defence to read all non-sensitive papers before the resumption of the proposed filter hearing. Another remedy might be to require at trial a direction to the jury indicating that they may draw an adverse inference against the prosecution arising from non-compliance with the code.[175] This order would be binding on the trial judge, subject to the interests of justice. The interests of justice might require the prosecution to be allowed to demonstrate that the original breach had been remedied and, therefore, the remedy was no longer required, or that the combination of other factors required that the adverse inference not be applied.

Together with improvements in training, supervision and discipline, the suggested reforms may contain the potential to motivate a significant change in police methodology and attitude during investigations. It is hoped that one day the police will 'consider it a matter of honour to preserve all available evidence, to analyse it open-mindedly and to pass it all on to the CPS so that the true merit of a proposed prosecution can be determined'.[176]

11.5 PROSECUTING ADVOCATES AND COMPLIANCE

The DPP recently reminded prosecutors that: 'Crown Prosecutors are personally responsible for conducting prosecutions fairly in accordance with the common law duty (*R v Banks* [1916] 2 KB 621), and have responsibilities as officers of the court.'[177] He did so in the context of a discussion of evidence that demonstrated that some prosecutors were not complying with the duties laid down in the CPIA 1996.[178] This unfortunate behaviour may be a symptom of the recurrence of an attitude of partisanship that was recognised as improper in the 1970s and which spawned the recommendations of the Philips Commission to establish

175 *Lim and Nola (No 3)* [1990] 1 CRR (2d) 148 Ont HC, pp 152–53. The accused's verbal admissions were excluded due to unreliability, a finding based on the accused's limited knowledge of English and the failure of police to tape record the interview as per routine practice. Doherty J (as he then was) drew an inference against the police, surmising that they did not want an independent record of the interview. Zaduk (1993, p 6) commented that Doherty J 'held that the court could take an adverse inference against the credibility of the police from their failure to tape record statements in circumstances which they controlled. This had to be the dawn of a new age'. General approval for this approach is found in *Barrett* (1993) 13 OR (3d) 587 Ont CA.

176 Beckman and Taylor, 1991, p 682.

177 Calvert-Smith, 2000, p 6.

178 CPS Inspectorate, 2000, para 13.10.

the CPS as an independent national prosecuting service.[179] The attitude of partisanship may be a result of the continuing need to work closely with the police. Police officers are able to exert influence over the attitude of some prosecutors, and the manner in which they exercise their discretion.[180] This may occur through the pressure that policemen can exert over civilians, or through the way that investigators can manipulate information.[181] In the current context, prosecutors do not investigate and are to rely on the police investigation and on schedules of unused material compiled by the disclosure officer. The quality of the 'non-sensitive unused' schedules has been called into question as being incomplete or too vague to serve the purpose intended.[182] Some members of the CPS are unable or unwilling to challenge the decision of the disclosure officer regarding which material is or is not to be disclosed.[183] Consequently, some prosecutors have adopted the role of a solicitor being instructed by the police in the legal proceeding against the accused.[184] The failure of some prosecutors to comply with the code may be also the result of, or contributed to by, poor management in the CPS.[185] The resources allocated by the CPS for the disclosure process are not adequate[186] and, therefore, prosecutors do not have the time to review carefully the schedules or call for a revised schedule.[187] It is reported that morale in the CPS is low, which further undermines the professional standards of some prosecutors.[188] It is hoped that the Government's new commitment to improving the CPS, and funding it to appropriate levels, will relieve some of the morale and time pressures.[189]

It is submitted that an improvement in the attitude of wayward prosecutors might best be achieved by reforming the attitude of the investigators and disclosure officers. An improvement in the attitude of investigators and disclosure officers will reduce the pressure to disobey the rules and reduce the

179 Ede, 1999, p 9.
180 Eg, Nduka-Eze, 1995, p 1844.
181 *Hucklesby* [1997] Crim LR 269, p 272; McConville *et al*, 1991, p 201.
182 CPS Inspectorate, 2000, para 4.30, but the sensitive schedules well prepared, para 6.7.
183 Ede, 1999, p 5.
184 Calvert-Smith, 1999, p 26, acknowledges that there may be a perceived lack of independence.
185 *Humphreys and Others*, unreported, 14 February 2000, Maidstone CC, T19990290, T19990344. Crush J stated (p 27): 'On this part of the South Eastern Circuit [Maidstone CC] judges are unfortunately accustomed to having their rulings received without demur and then sometimes persistently ignored by the Crown Prosecution Service.'
186 The budget allocation in 2000 was insufficient (Gibb and Watson, 2000). The increased funding for the CPS in 2001 will be used to increase wages, according to the DPP (Gibb, 2001b) and to expand staff (Home Office, 2001, paras 3.14–15).
187 CPS Inspectorate, 2000, para 4.53.
188 Gibb, 2001b.
189 Home Office, 2001, paras 3.14–15.

number of prosecutors who do not follow the rules. To support further the reorientation of the attitude of some prosecutors, it is submitted that the CPS management,[190] and the profession,[191] must take clear action against those who fail to comply with the CPIA 1996. Encouraging words might not be enough. CPS management must assign the appropriate amount of resources to the fulfilment of this legal duty.[192] The suggestion of the Law Society that the prosecutor should be required to look at each contested file, and certify personally that the rules have been complied with, is one method of beginning the process of reform, while the process of modifying police attitude begins.[193] However, the resource commitment necessary might make this approach prohibitive if it is to be seen as a stopgap measure. A post-conviction review of files selected at random might assist in encouraging prosecutors to follow the rules,[194] but it comes too late in the process to assist in providing 'fair disclosure' for the convicted person whose file is being reviewed. Improving both police and prosecution compliance might be achieved through the filter hearing as proposed above. Nonetheless, the wrongful actions of some prosecutors must be addressed immediately in a constructive manner. At the minimum, the recommendations of the CPS Inspectorate to provide more training and to require prosecutors to read more material, take a more liberal view of the disclosure tests, and to record on the file the reasons for the disclosure decision, should be acted upon.[195]

11.6 THE SITUATION IN CANADA

The statutes of Canada do not contain a code of practice for police investigation and disclosure. The common law, however, does require the police to conduct investigations in a responsible manner and to provide the fruits of the investigation to the prosecutor for disclosure to the defence.[196]

Unfortunately, some investigators and prosecutors do not comply with their obligations and miscarriages of justice are the result. The primary method through which the criminal justice system assists the defence to have a fair trial in spite of prosecution malpractice is through the duty on the prosecution to

190 Calvert-Smith, 1999, p 25. It is less difficult to improve the ethics of prosecutors because of their level of education, professional status, reputation in court and public service penalties.

191 *Auld Progress Report*, 2000.

192 CPS Inspectorate, 2000, para 13.7; Corker, 1999, p 32.

193 Ede, 1999, p 9. The code provides a power, but not a duty, to examine the material (para 7.4).

194 Sharpe, 1999b, p 82.

195 CPS Inspectorate, 2000, paras 13.16–32.

196 *Stinchcombe* [1991] 3 SCR 326.

disclose information to the defence. The duty is stated in very broad terms in the leading case of *Stinchcombe.* The duty and its exceptions closely resemble the law of England and Wales as stated in *Keane.* The right of disclosure is supplemented by the continued availability of the long form committal process. It is submitted that the cause of the fair trial in Canada would benefit from reforms that encourage strict compliance with best practices in investigation and disclosure. This might be achieved by enacting a code of practice and requiring the prosecutor to demonstrate compliance with it as suggested already in the case of England and Wales.[197]

197 For a detailed discussion of the situation in Canada, refer to Epp, 1997.

DISCLOSURE OF THE DEFENCE AT COMMON LAW AND UNDER THE CPIA 1996

12.1 INTRODUCTION

In addition to the many changes made by the Criminal Procedure and Investigations Act (CPIA) 1996 to the prosecution's duty of investigation and disclosure, the act also created certain obligations on the defence. The defence is required, in matters triable on indictment, to provide a statement to the prosecution stating the nature of the defence, issues in the prosecution case that are in dispute and the reason for placing the issues in dispute.[1] It is instructive to explore the issues surrounding the disclosure of the defence, first by considering the position at common law, and then by noting the incremental erosion by legislation of that position in the years before the CPIA 1996. This necessitates a description of the arguments for and against disclosure of the defence, as well as a description of the practice of informal discovery of the defence and the quasi-formal obligations arising out of certain local court initiatives. A brief statement will be made regarding the situation in Canada, where the common law position remains in force. The discussion will then concentrate on the provisions of the CPIA 1996, and provide a report on the experience to date. This chapter will conclude with a comment regarding the propriety of the obligation on the defence in the light of the evidence that some investigators and prosecutors are not complying with the CPIA 1996.

12.2 COMMON LAW AND THE DEBATE IN ENGLAND AND WALES CONCERNING DISCLOSURE OF THE DEFENCE

In England and Wales, the accused, at common law, was under no formal obligation to reveal any part of his defence before the close of the prosecution's case at trial. Generally, he was not required to state the nature of the defence or the issues to be contested. He was not required to mention the evidence or legal argument that might be used to support his position. Two exceptions emerged at common law. Before trial, the accused was required to give notice of a defence of alibi[2] and, at trial, the defence is obligated to put the defence case to the prosecution witnesses during the presentation of the prosecution's case.[3] Failure

1 Section 5(6). Further details are required if the defence is alibi (s 5(7)).
2 *Littleboy* [1934] 2 KB 408 CCA.

to comply may have resulted in an adverse comment from the judge. The latter obligation continues at common law, while the alibi rule was modified in statute in 1967.[4]

The debate regarding whether or not the accused should be obligated to disclose his defence before trial, either generally or with specific details, simmered throughout the last century.[5] In recent decades, many important committees have expressed support for the modified common law position. The James Committee[6] and JUSTICE[7] each came to the conclusion that it was wrong in principle to require disclosure of the defence. Even the Philips Commission, which had indicated its approval of a system that was to be characterised by the 'fullest possible disclosure', took a position against mandatory defence disclosure.[8]

The opponents of the defence disclosure argue that society recognises that certain boundaries should exist in the search for truth, or more practically speaking, the acquittal of the innocent and the conviction of the guilty.[9] Those boundaries include, first, the understanding that the administration of criminal justice should respect human dignity and privacy.[10] Therefore, the accused should not be required to participate in any undue fashion in revealing evidence which may assist in building the case against him.[11] Secondly, core principles, such as the presumption of innocence and the burden of proof on the prosecution to prove its allegation, exist as another boundary.[12] Consequently, it is argued that the accused is entitled to stand silent throughout the proceedings and risk nothing in adopting this course of action.[13] No obligation of defence disclosure should arise.[14] Thirdly, as the criminal justice system is adversarial, and the imbalance of resources falls heavily in favour of the State against the individual,

3 *Roskill Report*, 1986, para 6.70.
4 CJA 1967, s 11.
5 The Poor Prisoners' Defence Act 1903 required an accused prisoner who sought a publicly funded lawyer to disclose his defence at the committal. The debate continued in the *Runciman Report* (1993, paras 6.61–67).
6 *James Report*, 1975, para 229.
7 JUSTICE, 1980, p 14.
8 Philips Commission, 1981a, paras 8.12–19; Law Reform Commission of Canada, 1974a, para 69.
9 Greer, 1994, p 102.
10 Lord Mustill described in detail the basis for the privilege against self incrimination, in *Director of SFO ex p Smith* (1992) 95 Cr App R 191HL, p 198; Law Reform Commission of Canada, 1974a, para 13.
11 Home Office, 1979, para 65.
12 European Convention on Human Rights (ECHR), Art 6(2). The placement of the burden of proof on the prosecution is a practical application of the presumption of innocence (Law Reform Commission of Canada, 1974a, para 14, Charter, s 11(d)).
13 Home Office, 1979, para 65.
14 *James Report*, 1975, para 229.

it is argued that the State should seek no further advantage.[15] No information should be compelled from a suspect once he has become the accused. Finally, an accused person is entitled to put forward a full answer and defence to the allegation made against him. This can be done in any manner the accused, through his counsel, wishes, without regard to giving notice. It is submitted that reliance on any combination of the traditional boundary markers could support the argument against requiring any disclosure from the defence. Together, the boundary markers present a strong case against disclosure of the defence.

Although the theoretical boundaries regarding the search for truth can be stated with reasonable clarity, various, and apparently conflicting, practical outcomes can be justified by the principles. The practical application of the principles can, and indeed, has, varied from one generation to the next.[16] For example, in 1972, the Criminal Law Revision Committee recommended that a suspect be required to answer all police questions, and if he did not, and later relied on a fact not disclosed in his defence, an adverse comment could be made during his trial.[17] The response to this recommendation was so negative that is was put aside.[18] One generation later, the recommendation was enacted in s 34 of Criminal Justice and Public Order Act (CRIMPO) 1994 (as amended in s 58 of the Youth Justice and Criminal Evidence Act 1999 to require the presence of a solicitor) and it may well be that it will survive any challenge in the European Court of Human Rights (ECtHR).[19]

Therefore, as argued by the Home Office, in their *Evidence To The Royal Commission On Criminal Procedure*,[20] and later repeated in the Runciman Report,[21] mandatory pre-trial disclosure of the defence might be characterised as a legitimate requirement and not one outside of the traditional limitations. Depending on certain characterisations, obligations ranging from discovery of the nature of the defence to the provision of witness statements can be justified.[22] Two examples are instructive. First, it is not unusual for the accused to be in a position to present two defences, one of which may be inconsistent with the other and, therefore, held in reserve. The defence may suggest, for example, that the accused did not commit the act alleged, such as theft. If that position appears untenable as the prosecution's case is presented, the defence may focus on the position that the accused lacked the necessary *mens rea.* Requiring the accused

15 One aspect of this concept is seen in the ECHR, Art 6(3), as interpreted by *Jespers v Belgium* (1981) 27 DR 61, p 417 (ECtHR Com). The ECtHR found that Art 6(3) guarantees 'waffenengleichheit', or 'equality between the parties' (JUSTICE, 1995, p 25).

16 Greer, 1990, p 709.

17 Criminal Law Revision Committee, 1972, cl 1(i)(a).

18 JUSTICE, 1972, paras 13 and 19; Zander, 1974.

19 *Murray v UK* (1996) 22 *EHRR* 297, affirming the validity of similar provisions in Northern Ireland (the right to silence is not an absolute right).

20 Home Office, 1979, paras 66–71.

21 *Runciman Report*, 1993, paras 6.61–67.

22 Home Office, 1979, paras 66–71.

to disclose the nature of his defence in advance of trial, it can be argued, would simply force the accused to state his true defence, thus, eliminating a portion of the gamesmanship that seems to have pervaded the criminal justice system.[23] The bounds of legitimate activity, claimed as a facet of the limitation on the pursuit of the truth, should not be stretched to include gamesmanship. This argument can also be used to suggest that not only must the nature of the defence be disclosed, but also the defence evidence. If the accused chooses not to stand silent, but, rather, tenders evidence, it should be truthful evidence.[24] Similarly, it is argued that it does not appear to violate the limitations to require the defence to provide pre-trial what it intends to present as evidence at trial. This requirement would allow the prosecution to verify the defence evidence. Then, it could either concede the point or demonstrate the unworthiness of the defence evidence.

By way of further example, one can consider the situation where defence counsel has not discerned a specific defence when the trial begins. The strategy to be invoked is simply one of reacting to weaknesses in the prosecution evidence, where, for example, a witness does not present his evidence with the forcefulness or clarity suggested by his previous written statement. If an obligation to reveal the nature of the defence was imposed, the defence of 'no proof could be stated without violating the principles. At the other extreme, if one rejects all gamesmanship and imposed a requirement to disclose fully the defence and the supporting evidence, defence counsel may disclose a general defence of 'no proof', on the understanding that defence evidence will not be called.

12.3 THE EVOLUTION OF THE DISCLOSURE OF THE DEFENCE

The process through which the prosecution gained information about the defence to be presented, as well as matters that were in issue and, perhaps, evidence that would be used in support of that defence, evolved over a number of years. The evolutionary process involved the interaction of informal practice, local initiatives between the courts and practitioners, and legislation. It was encouraged by the court's desire to manage its calendar better. It is submitted that, by the time the debate regarding the provisions of the CPI Bill occurred, the idea of, and in certain cases the practice of discovery of the defence, was familiar to practitioners and legislators. Disclosure of the defence was eventually legislated for as part of a scheme that was intended, in the Government's words,

23 Williams, 1959, p 554.
24 Home Office, 1979, para 63.

to ensure that the criminal justice system 'is fair, efficient and effective'.[25] The relevant provisions of the CPIA 1996 are discussed in Pt 12.5. The attitude of treating pre-trial disclosure as an issue of case management may be perpetuated in the forthcoming Auld Report.[26]

12.3.1 Informal defence disclosure

In spite of classic adversarial principles, the provision on an informal basis of the nature of the defence, or some indication of the matters at issue, has been part of the pre-trial practice of criminal law in varying degrees over the years.[27] The literature on the subject indicates that revelation of the defence played a part in gaining disclosure from the prosecution.[28] The exchange of information was akin to a game of 'tit for tat'. First, the defence adviser had to prove his willingness to play by the rules of the game. The trust of the prosecution was gained over a series of cases through entering the appropriate number of guilty pleas in some cases and using information gained in other cases in a manner that would not embarrass the prosecution. Greater access to each other's file followed. Therefore, the frequency and degree of reciprocal informal discovery and disclosure was a function of the relationship of the people involved in the investigation, prosecution and defence.[29]

12.3.2 Quasi-formal defence disclosure

During the 1970s, the efficient management of the court calendar became a greater concern. One procedure that was developed to address this concern was the pre-trial conference. In the original conference model, the parties would meet with the judge or a clerk to discuss the management of the case (the number of witnesses and days required for trial), and perhaps narrow the issues. This would facilitate informal discussion between solicitors or counsel. Participation in the conference was on a voluntary basis, although participation was greatly encouraged in some locations by informal pressure. Gradually, the use of the pre-trial conference increased in various magistrates' courts and Crown Courts.[30] In some courts, the conference became formalised through the issuance of practice

25 Howard, 1996, col 738.
26 *Auld Progress Report*, 2000.
27 Part 3.3.
28 Baldwin and Feeney, 1986, p 595.
29 Eg, discovery on a counsel to counsel basis (Humphreys, 1955, p 741).
30 *Runciman Report*, 1993, para 7.8.

rules.[31] Researchers observed that magistrates conducting mandatory pre-trial conferences often asked the defence solicitor to state the nature of the defence, and that the defence was usually stated.[32] At one point, the Law Society issued a warning to members who were acting for the defence against being too willing to disclose information to the prosecution in conferences in magistrates' courts.[33]

Eventually, various types of pre-trial conference were placed on a statutory footing. The first statute to authorise pre-trial conferences in England and Wales was the Criminal Justice Act (CJA) 1987.[34] This act was designed, and does continue, to govern serious and complex fraud trials. Under s 7 of the Act, the Crown Court has the power to convene a 'preparatory hearing'. The hearing is available to be used to identify the issues, take steps to expedite the trial and to assist the judge in managing the trial. While the preparatory hearing is, in formal terms, part of the trial, it takes place weeks before the jury is sworn. It can be convened on a motion from either party, or the court. It is during this stage that the court is empowered to order the accused to provide a defence statement, to include the matters the defence takes issue on.[35] The court may make rulings on certain issues and these rulings bind the parties at trial, unless the interests of justice demand that the ruling be varied or discharged during the trial.[36] Therefore, either directly or indirectly, discovery of the defence may have an impact on the course of the trial.

Case management in other proceedings was formally established in the 1990s.[37] The Lord Chief Justice issued a practice direction establishing in all cases in Crown Court, other than serious fraud, a pre-trial conference called a Plea and Directions Hearing (PDH). In addition to considering the usual case management issues, the hearing facilitates the disclosure of some aspects of the defence, or at least the issues it will press. The direction states that the parties 'will be expected to assist the judge in identifying the key issues, and to provide any additional information required for the proper listing of the case'.[38] The record of the hearing does not form part of the material used at trial. The reason for this rule is to allow counsel to 'feel free to give the courts, as we know they

31 Central Criminal Court Rules (1974) and the rules used in other circuits are summarised in Murphy (1993, p 1234).
32 Baldwin, 1985, p 57.
33 Law Society, 1983, p 2330.
34 *Roskill Report*, 1986, para 6.28; JUSTICE, 1984, p 16.
35 CJA 1987, ss 7(1)(2), 9(5) and Crown Court Rules.
36 Amended by CPIA 1996, s 40.
37 *Runciman Report*, 1993, paras 7.4–14.
38 [1995] 2 Cr App R 600, para 2.

endeavour to do, the greatest possible assistance towards achieving the primary object' of the hearing.[39]

As explained below, pre-trial hearings like those used in serious fraud cases, are now available in more types of lengthy cases as a result of Pt III of the CPIA 1996.

12.3.3 Statutory defence disclosure

In England and Wales, the evolution of the statutory obligation on the defence to reveal information before the close of the case, or earlier, to the prosecution began with the codification of the provision relating to the defence of alibi. Two decades later, this enactment was followed by provisions creating obligations in relation to expert evidence and, in fraud trials, disclosure of the nature of the defence. More recently, the general requirement to answer police questions in most situations was enacted.

The obligation on the defence to provide notice of its intention to use the defence of alibi in proceedings on indictment was provided for in s 11 of the CJA 1967 and it is continued in s 5(7) of the CPIA 1996. Section 11 stated that a notice of alibi with particulars had to be given within seven days from the committal and, if this was not done, alibi evidence could not be adduced without leave of the trial judge. Disclosure of expert evidence in the Crown Court was prescribed in s 81 of PACE 1984 and made effective by the Crown Court (Advance Disclosure of Expert Evidence) Rules 1987.[40] This obligation is continued by s 20(1) of the CPIA 1996.[41] The rule requires the party intending to call expert evidence to provide to the other side a statement in writing of any finding or opinion which is to be adduced and, if this is not done, the evidence cannot be called without leave of the court.[42] In cases of serious or complex fraud, s 9(5) of the CJA 1987 empowers the court to order the accused to provide a defence statement. That act continues to govern serious and complex fraud cases subject to the modification that the judge may take into account any action taken under the general scheme of the CPIA 1996.[43] The statement must include a description of the nature of the defence, an indication of the principal matters on which the defendant takes issue with the prosecution, any objections to the prosecution case statement and points of law to be taken. Under the CRIMPO 1994, the

39 *Diedrich and Aldridge* [1997] 1 Cr App R 361 CA, p 368.

40 SI 1987/716.

41 The defence is also required to g;ive notice of expert evidence in summary proceedings, s 20(2)(3), authorising the Magistrates' Courts (Advance Notice of Expert Evidence) Rules 1997 SI 1997/705.

42 Rules 3 and 5.

43 CPIA 1996, s 20(1)(2) and other amendments in s 72 and Sched 3.

accused, if represented at the police station,[44] may face adverse inferences if he refuses to give full answers to police questions and later leads evidence in his defence as to a fact raised in an unanswered question.[45] This, also, applies when the accused fails to account for objects, substances or marks found on him by the police, or fails to account for his presence at a particular place.[46]

Encouraging compliance by the defence through the threat of adverse comment and inferences is also a feature of the CPIA 1996.

12.4 CANADA

The law of Canada does not require the accused to provide advance disclosure of the nature of his defence, or to reveal matters in issue, or the evidence he may wish to call. The Supreme Court of Canada recently confirmed the traditional position that the accused is not required to speak or indicate his position until the Crown has completed its case.[47] There are some limited exceptions. Where alibi evidence is led, the absence of timely notice to the prosecution will affect the weight of the evidence.[48] With respect to expert evidence, the expert's report need only be provided if the expert is referred to in the opening speech of the defence, or if the expert is called.[49] However, the Federal Government has announced plans to amend the Criminal Code to require the defence to make advance disclosure of expert evidence to the prosecution.[50]

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44 Sections 34 and 34(2A).

45 The proportion of suspects refusing to answer questions has been reduced from 23% to 16% as a result of this provision (Burke *et al,* 2000, p 31). In Northern Ireland, now that the provisions are widely known, very few suspects refuse to answer questions. Jackson *et al* (2000, p 72) found that silence in police stations was an issue in approximately 1% of contested non-terrorist cases.

46 Sections 36 and 37.

47 *P(MB)* [1994] 1 SCR 555; *Hebert* [1990] 2 SCR 151.

48 *Cleghorn* [1995] 3 SCR 175.

49 *Stone* [1999] 2 SCR 290 (defence of automatism).

50 House of Commons of Canada, Bill C-15, 1st Session, 37th Parliament, 49–50 Elizabeth II, 2001. Goetz and Lafrenière (2001, para G7): 'Clause 72 of the bill requires parties to give advance notice of any expert testimony being offered at trial. This provision is essentially aimed at the defence, because the prosecution is already required by the Canadian Charter of Rights and Freedoms to disclose its case and generally any information which might reasonably be useful to the accused in his or her defence. Notice of expert testimony has to be given at least 30 days before the beginning of trial or within such other period fixed by the court. The notice has to include the name of the proposed expert witness, a description of the witness' area of expertise, and a statement of the witness' qualifications. In addition, a copy of any report prepared by the witness or, if no report Has been prepared, a summary of the opinion to be given by the witness has to be provided in advance to the other side. Certain restrictions apply to the use of information disclosed pursuant to this provision: such information cannot be used in other proceedings, unless a court so ordered; and, absent the accused's consent, the prosecution is precluded from producing into evidence a proposed expert witness' report or opinion summary where the witness did not testify.'

In some larger centres, mandatory pre-trial conferences are held and disclosure of the defence is addressed. Toronto Crown Attorney Gary Clewley observed that judges conducting mandatory pre-trial conferences often ask the defence attorney to state the nature of the defence and that the defence is usually stated.[51]

12.5 THE CPIA 1996

The Runciman Report recommended, as one part of a detailed plan to reform the criminal justice system, that the defence be required to indicate during the pre-trial stage the nature of the defence, but not the evidence that it would use if it called any evidence.[52] It also recommended that issues be narrowed in the pre-trial stages.[53] The obligation on the defence introduced in s 5 of the CPIA 1996 generally reflects these recommendations.[54] The motivation for the legislation was discussed in Pt 4.5. In this part, the provisions relating to defence disclosure are discussed, and then the concerns of various commentators will be referred to. It is clear that many valid objections of defence disclosure stand in the way of the Government's tentative proposal to expand the disclosure duty of the defence.[55]

12.5.1 Disclosure of the defence

A person accused of a crime triable on indictment[56] is required by the CPIA 1996 to reveal his defence by way of a defence statement to the prosecution at the pre-trial stage.[57] The requirement to provide a complete and accurate defence statement is enforced by the threat of adverse comment and inference at trial.[58] The defence duty arises after the prosecution has provided, or purported to

51 Owen, 1993, p 11; Thomas, 1980, pp 3–1.
52 *Runciman Report,* 1993, paras 6.67–69; but, see, Zander's 'Note of Dissent', *ibid,* p 222.
53 *Runciman Report,* 1993, para 7.4.
54 The reciprocal disclosure scheme, as a whole, does not reflect the proposal in the *Runciman Report,* 1993.
55 Home Office, 2001, para 3.42.
56 Section 1(2).
57 Section 5(5)(6).
58 Section 11(3)(4). In *John Tibbs* [2000] 2 Cr App R 309 CA, pp 314–15, the defence unsuccessfully argued that 'in s 11 a distinction has been drawn between "the accused's defence" and "a defence statement". The distinction is highlighted by s 11(1)(c), which refers to inconsistent defences in a defence statement and s 11(1)(d), which refers to a defence which refers to a defence which is different from any defence set out in a defence statement…[T]o comply with s 5(6)(a) an accused need only describe his defence in very general terms: for example, "self defence", "no intent" or "mistaken identification". It is only if the defence put forward at trial can be said to be a [contd]

provide, materials in accordance with the primary disclosure obligation found in s 3.[59] The act does not provide the trial judge with a discretion to waive the provision of a defence statement.[60] The defence statement is to be served on the prosecutor within 14 days of the completion of primary disclosure, subject to the grant of additional time on reasonable grounds.[61] Where the accused is to be tried summarily, the accused may voluntarily provide a defence statement. When a defence statement is filed, the accused is entitled to secondary defence disclosure.[62]

The defence statement is defined as a written statement setting out the nature of the defence and indicating the matters in issue along with the reason why issue is taken on each matter.[63] When the defence is alibi, particulars of the alibi and witnesses must be given in the statement.[64] Sir Derek Spencer, the Solicitor General in 1996, provided the following explanation of an accused's obligation under s 5(6): 'In providing a defence statement it is not intended that the accused should have to provide every last detail of the defence, such as the names and addresses of witnesses and so on. That was originally intended by the Consultation Document [1995]. But we have now decided that is not necessary. It is for that reason that sub-section [(6)(a)] requires only the general terms of the nature of the defence [needs] to be disclosed: self defence, accident, alibi or whatever. Sub-section [(6)(c)]…deals with a much narrower issue. It simply requires the accused to give a reason why he takes issue with a point. There is no suggestion that in giving the reason, details of the evidence to support that reason have to be given. So the fear…that this might require the defence to set out its oral cross-examination is not well founded. That is not intended at all.'[65]

Baroness Mallalieu stated for the Government in the debates that a defence statement should not be expected of the mentally ill or the unrepresented who is semi-literate. Therefore, adverse comments or adverse inferences should not result in such circumstances.[66]

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58 [contd] different defence in this sense that s 11 applies.' The court found that the word 'defence' cannot be restricted to its general legal description.

59 Section 5(1).

60 Murray, 1996, p 1290.

61 The CPIA 1996 (Defence Disclosure Time Limits) Regulations 1997 SI 1997/684, reg 2, and extension reg 3(2).

62 Sections 6(1) and 7. Even the volunteer is liable to adverse comment and inferences if his defence statement is inaccurate (s 11(2)).

63 Section 5(6); *John Tibbs* [2000] 2 Cr AppR 309 CA.

64 Section 5 (7)(8). The sanction for late disclosure of alibi has changed from the need to obtain leave (CJA, s 11) to adverse comment or inference (CPIA 1996, s 11(3)).

65 Spencer, 1996, col 68. The government now is interested in considering again the wisdom of enacting the position put forward in 1995 consultation paper (Home Office, 2001, para 3.42).

66 Mallalieu, 1996, col 1589. Section 11(3), (4) allows the trial judge to exercise discretion when appropriate.

The CPIA 1996 specifically states that the accused must not be convicted solely on an inference drawn under s 11.[67] Guidance regarding the approach to be taken is found in examining decisions interpreting similar provisions in CRIMPO 1994.[68] In *Cowan*,[69] the Court of Appeal stated some of the principles that are to be included in the direction to the jury in situations where an adverse inference might be drawn. These include the principles that the burden of proof rests on the prosecutor throughout, that the jury must be satisfied in its own mind that the prosecution has established a case to answer before an inference can be drawn and that an adverse inference cannot prove guilt by itself. It also confirmed that the court (and jury) must consider any explanation put forward by the defendant for his silence, and only draw adverse inferences if that explanation is first rejected, and that the court is able to decline to permit adverse comment or inference if the circumstances dictate.[70]

Special provision is made in Pt in of the CPIA 1996 for cases that are likely to be lengthy or complex, apart from those that are cases of serious or complex fraud.[71] Where a case is of sufficient length or complexity[72] to merit the assignment of a Crown Court judge to oversee its management, a case management model similar to that used in serious or complex fraud cases will be used.[73] The main feature of the model is the preparatory hearing, which technically is the commencement of the trial, although it occurs weeks before the jury is empanelled.[74] The judge will attempt to identify and narrow the issues to make it easier for the jury to understand the case and to expedite the trial. The judge who manages the case will normally preside at trial. The judge is empowered to make rulings on points of law, including the admissibility of evidence before the trial. These rulings may be appealed with leave.[75] Of particular importance is the power of the judge to order a prosecution case statement under s 31(5) and a response by the defence. If ordered, the prosecution statement must include a proper summary of the evidence, indicate the witnesses who will provide that evidence and list the relevant exhibits. It will also contain any propositions of law on which the prosecutor proposes to rely and an explanation of the inferences the prosecution will invite the jury to draw from

67 Section 11(5).
68 Sections 34 (2), 36(2)(3) and 37(2).
69 *Cowan and Others* [1996] 1 Cr App R 1 CA.
70 See, also,*Condron v UK* (2000) 8 BHRC 290.
71 The *Runciman Report* 1993, paras 7.16–17 recommended expanded use of pre-trial hearings. See also Home Office, 1995b.
72 Eg, money laundering or international drug-trafficking.
73 Section 29. Otherwise, the case will follow the ordinary course through the PDH. Serious fraud cases will continue to be addressed under CJA 1987, ss 7–10, in accordance with CPIA 1996, s 29(3).
74 Section 29.
75 Section 35; CPIA 1996 (Preparatory Hearings) Rules 1997 SI 1997/1052.

the evidence. The defence must then file a reply in the terms found in s 31(6), rather than the less onerous obligation to file a defence statement under s 5(6).[76] The obligation on the defence under s 31(6) is to provide a written statement setting out the nature of the defence and the principal matters on which the defence takes issue with the prosecution. In addition, the defence must give notice of any objection that it has to the case statement and indicate any point of law which the defence intends to take, as well as setting out the authorities to be relied on.

The CPIA 1996 makes provision for voluntary defence disclosure in summary proceedings. If the accused in a summary proceeding wishes to receive secondary disclosure from the prosecution, the defence must file a defence statement. The standard rules and penalties pertaining to reciprocal disclosure in Crown Court are applied if the defence files a defence statement.[77] Evidence gathered by the CPS Inspectorate indicated that very few defence statements were filed in summary proceedings.[78] This issue was discussed in Pt 9.4.

12.5.2 Criticisms of the formulation of the provisions

Many criticisms have been made regarding the formulation of the provisions in the CPIA 1996 which create disclosure obligations on the defence. The criticisms, which are discussed in the following pages, demonstrate that the provisions are poorly formulated and fail to take proper account of other legislation and practical concerns, including police malpractice. In consequence, it is submitted that pre-trial disclosure of the defence, other than alibi and expert evidence, is fundamentally unfair as it interferes with the right to a fair trial and it diminishes the accused's right to silence, his privilege against self-incrimination and the burden of proof on the prosecution.

The first criticism is that the CPIA 1996 does not make provision for a discretion in the court to waive the obligation to file a defence statement. Christopher Murray, past chairman of the London Criminal Courts Solicitors' Association, said he 'can envisage instances where for example the defendant has been the victim of police malpractice, where to be required to disclose to the prosecution such wrongdoing would severely damage the effectiveness of such a defence and possibly threaten the existence of evidence'.[79] Perhaps, this may be a situation where it would be appropriate not to provide a defence statement and argue that the court should exercise its discretion not to allow an adverse

76 The defence statement would be delayed upon the application of the defence, based on the need for the completion of a preparatory hearing.

77 Sections 6 and 11(2).

78 CPS Inspectorate, 2000, para 5.6.

79 Murray, 1996, p 1290.

comment or inference.[80] However, the accused would not be able to seek secondary disclosure.[81] The act does not contain a provision to allow the defence to apply *ex parte* to the court for assistance in such circumstances.[82]

The act does not preclude the possibility that the police will use the defence statement to complete its case against the accused. Murray has warned that the police may commence proceedings, assume that CPS screening will be minimal and await defence disclosure to complete their case.[83] Ede, past secretary to the Law Society's Criminal Law Committee, also considers this to be a danger and argues that the court should rule that the defence statement should not be treated as an admission by the accused.[84] Recently, the DPP has issued policy guidance to the effect that the defence statement should not be used as a means of strengthening a case for the Crown against the accused.[85] It is hoped that this guideline will be strictly followed. However, it is instructive to notice that the *Attorney General's Guidelines* (2000), para 28, encourage defence practitioners to obtain the signature of the accused on the defence statement. The signature will indicate the accused's agreement with the statement and avoid issues of whether the statement reflected his instructions, if he leads evidence at trial that is not consistent with the defence statement.[86] The prosecution is allowed to cross-examine the accused on differences between his defence presented at trial and the defence statement that he has provided in accordance with s 5.[87] The line is crossed easily.

The use of a defence statement by a co-defendant is not specifically addressed in the CPIA 1996, but it is not likely to be available for use. One may argue by analogy the decision in *Tariq*, a decision restricting the use of defence statements by a co-accused in a serious fraud case.[88]

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80 Corker, 1997b, p 961.

81 Section 7.

82 The Court of Appeal has stated, in the context of defence request to gain information about informants, that the defence should not make *ex parte* applications; *Tattenhove and Doubtfire* [1996] 1 Cr App R 408.

83 Murray, 1996, p 1290.

84 Ede and Shepherd, 1997, pp 277–79. See, also, Thompson, 1998, p 802.

85 Calvert-Smith (2000, p 6) stated that 'the defence statement will not be used by the CPS as part of the prosecution case as led', except as always in alibi.

86 *Wheeler* [2001] 1 Cr App R 150 CA. In *Wheeler,* the solicitor made an error in drafting the defence statement. Mr Wheeler contradicted the statement when giving his evidence and he was cross-examined on the point. The solicitor did not make the error known and the judge referred to the discrepancy in summing up. However, the prosecution did not apply for leave to make adverse comment and none was made. Mr Wheeler was convicted. The error was later proven by reference to Mr Wheeler's proof of evidence and original instructions. The conviction was set aside as unsafe.

87 *John Tibbs* [2000] 2 Cr App R 309 CA.

88 *In Re Tariq* (1991) 92 Cr App R 276 CA.

The provisions in the CPIA 1996 creating the penalty of adverse inference against the accused for a late or inconsistent defence statement, or changes to defence, raise many concerns. First, in the light of the provisions of CRIMPO 1994 and the provisions therein relating to adverse inferences,[89] there is a concern that the accused may be convicted by the effect of compounded inferences under that Act and the CPIA 1996. While it is clear from s 11(5) of the CPIA 1996 that the accused is not to be convicted on the basis simply of an adverse inference, Murray believes that the danger of conviction by cumulative adverse inferences remains.[90] Weight is added to his argument by the recent case of *John Tibbs*, where the jury was invited to draw adverse inferences under both acts.[91] The chances of a miscarriage of justice arising from the improper impact of compounded inferences against the accused may have been eliminated had the CPIA 1996 provided that the prosecution could seek an adverse inference under the provisions of either, but not both, the CRIMPO 1994 or CPIA 1996. The decision in *John Tibbs* demonstrated another concern, which is the interference with the right against self-incrimination. In an attempt to avoid conviction on the charge of trafficking cannabis, Mr Tibbs was placed in the situation where he felt that he had to state that he had committed (only) the offence of selling or transporting non-taxed tobacco.

The next concern is that the defence does not have access to all non-sensitive information before drafting the statement. Counsel cannot be certain whether the information that is, as yet, unseen will support a defence that might seem appropriate in the situation. Counsel is left in the dangerous situation of, perhaps, stating a defence on speculation and, if the information held by the prosecution does not contain what was expected, the defence stated cannot be properly brought forward at trial. In consequence the accused might face an adverse inference.[92] Unfortunately, the miscalculated decision of counsel in such circumstances would be unlikely to provide a ground of appeal.[93]

Other concerns include that the defendant might be prejudiced by an improperly drafted defence statement which was completed by, or under the instruction of, a practitioner whose assistance was given under the legal aid programme.[94] While the profession continues to strive for improved quality in defence work, there are variations in the skill level, and commitment to adversarial principle, of defence practitioners.[95] All defence practitioners must

89 Sections 34 and 35.
90 Murray, 1996, p 1290.
91 *John Tibbs* [2000] 2 Cr App R 309 CA.
92 Leng, 2000, p 16.
93 *Clinton* (1993) 97 Cr App R 320 CA.
94 McConville *et al* (1994, pp 271–80) report that there was much room for improvement amongst a section of the profession. See, eg, *Wheeler* [2001] 1 Cr App R 150 CA.
95 Legal Aid Board, 1999, Chapter 1.

work under the limited time allotted and resources available to the defence. The defence statement must be filed within 14 days of the provision of primary disclosure.[96] It may be difficult to consult with the accused and other witnesses in such a short time period. Resource issues stem in part from the payment structure and the administrative process in the criminal legal aid system. While the Legal Services Commission (LSC) now administers and provides criminal legal aid through the Criminal Defence Service (CDS), it is uncertain whether there will be any improvement in the fees paid to defence solicitors over the long term or for the funding to obtain the assistance of defence experts.[97] Historically, the payment structure and the administrative process did not encourage early preparation. Legal aid provided 'rather meagre standard fees' to solicitors for work prior to the committal[98] and this, as well as delays in the issuance of legal aid certificates, had the effect of discouraging many solicitors from taking a full proof until after committal.[99] While the Legal Aid Board could be relied upon to pay at least part of the cost of an appropriate expert, the 'arrangements for securing authorisation [were] cumbersome and time consuming'.[100] The new arrangement, wherein solicitors supply defence services under a contract with the CDS, continues the Government's restrictive approach to financing legal aid and provides no (net) financial incentive[101] to begin preparation of the defence at an early date.[102] Additionally, it is a possibility that funding for criminal legal aid may be decreased in the future.[103] With respect to the defence services supplied by the newly created Public Defenders Office (PDO), according

96 The CPIA 1996 (Defence Disclosure Time Limits) Regulations 1997 SI 1997/684, reg 2. Provision is made for an application for an extension of time.

97 Access to Justice Act 1999, ss 12–18; Criminal Defence Service (Advice and Assistance) Act 2001; Criminal Defence Service (General) Regulations 2001 SI 2001/1144; Criminal Defence Service (Choice in Very High Cost Cases) Regulations 2001 SI 2001/1169. For a discussion of all of the relevant provisions see LSC (2u01b, p 19).

98 Emmerson, 2000b, p 990; *Runciman Report*, 1993, para 7.73.

99 Narey (*Narey Report*, 1997, p 80) reported that the courts were slow to process applications tor legal aid, so solicitors did not begin work on the file because they were not certain that they were to be paid.

100 Roberts and Wfflmore, 1992, p 139.

101 After many years of no increase in payment rates, the payment to contracted criminal practitioners was increased by 3%, as part of the incentive to encourage criminal practitioners to participate in the contract scheme (Lord Chancellor, 2001). Other issues regarding the service contract, such as payments for telephone advice, are not finalised (LSC, 2001a, p 1). The new regime is complex and it includes many unrewarded extra administrative burdens on solicitors (Gibbons, 2000, p 1610). See LSC, 2001c and LSC, 2001d.

102 It is hoped that the new emphasis on quality in legal services, supported by contractual provisions and quality audits, will encourage early preparation of the defence. However, without proper financial remuneration for defence work, it is likely that all solicitors will be reluctant to make significant changes to their approach to case preparation (Tunkel, 1997, p 1022).

103 The Government intends to continue to 'enhance the professionalism' of defence lawyers to put an 'end to time wasting and poor preparation' (Home Office, 2001, para 3.76).

to the experience of other jurisdictions, public defenders also may fail to complete early preparation. PDOs often suffer from the effects of a heavy caseload and underfunding.[104] The question of the adequacy and authorisation of funds to assist the defence by allowing ready access to experts remains.[105] Inadequate preparation may leave the defence solicitor unable to instruct counsel properly regarding the completion of a defence statement. A barrister wrote that, in practice: 'Counsel is instructed simply on the basis of the prosecution's committal bundle, with no or very limited factual instructions, no proof of evidence and no opportunity to see the client in conference… Accordingly, the pressure is on to draft a comment in a hurry on inadequate information.'[106] Under the current Graduated Fee Scheme for counsel, drafting a defence statement is unpaid. It is considered as part of the basic fee.[107] However, the drafter may not be trial counsel and the latter receives the basic fee. It is submitted that the CPIA 1996 can only work effectively if resources are made available to fund properly the PDO and defence experts and to pay defence solicitors for early work and counsel for drafting defence statements. Therefore, the legal aid payment regulations must be amended to make this financially feasible and, when contracting for defence work is finalised, payment rates must be at a level that encourages early preparation.[108] Failure to take the concerns of time and resource pressure into account is a weakness of the CPIA 1996.

Practically speaking, it is impossible to separate the defence statement from defence lawyers.[109] It appears that one practical solution is to restrict the adverse inference provisions in a manner which addresses this concern.[110]

With respect to restricting the adverse inference provision, it might be appropriate to legislate to allow for the suspension of the adverse inference provision at any point during the course of a trial. The suspension of the adverse inference provision could occur when the trial advocate is able to demonstrate to the judge that there was an error in the drafting of the defence statement. Assuming that the defect came to light during the testimony of the accused, as

104 Nunn, 1995, p 801 *et seq;* Thompson, 1998, p 321.

105 See further, Postscript p 252.

106 Bates, 1997, p 9.

107 The graduated fee scheme for standard cases (1–25 days) is currently being re-examined and the Criminal Bar Association is not optimistic about gaining increased fees (Kramer, 2001, p 2).

108 Edwards, 1997, p 321; Tunkel, 1997, p 1022.

109 Fixed fee contracting, first implemented for legal aid services in magistrates' courts, now also applies to criminal proceedings in Crown Court, Court of Appeal and the House of Lords, in the form of a crime franchise contract (Criminal Defence Service (General) Regulations 2001 SI 2001/1144, regs 12–13). The movement towards contracted legal aid services may result in a shift in practice wherein the defence statement might be drawn by a solicitor advocate, or a solicitor as envisaged by the *Runciman Report* (1993, para 6.68).

110 Leng, 2000, p l6.

in *Wheeler*,[111] it is submitted that the defence should be allowed to make an application seeking an immediate direction to the jury indicating that the jury should disregard the discrepancy. Such a direction would prevent the jury from dwelling on an event which tended to cast aspersions on the accused and which likely would have been brought to their attention in dramatic fashion by prosecution counsel in the cross-examination of the accused. This is particularly important in lengthy cases, where it might be many days until the jury hears the judge's direction on the manner in which they are to consider the discrepancy. With respect to the application, provision should be made for the recognition of a limited waiver of litigation privilege so that the judge, but not the prosecution, might view the client's instructions. This provision might mirror the process used by the prosecution in protecting the public interest.[112]

Continuing with the criticisms of the formulation of the provisions which create disclosure obligations on the defence, it has been observed that the sanctions to be applied against the defence for breach of the duty to provide a defence statement are disproportionate to those to be applied against the Crown if it does not provide primary disclosure. If the Crown is tardy in providing primary disclosure, the sanction is simply a postponement of the obligation on the defence to provide a defence statement. If the Crown presents a different case at trial than stated pre-trial, the sanction may be an adjournment. When the defence fails to provide a statement or it is late, or it is found to be defective, or to contain inconsistent defences, adverse comment and inferences may be made and drawn.[113] This also applies to situations where the defence puts forward a different defence at trial.[114] The provisions do require the court to consider if an adverse comment is appropriate and the extent of the comment to be made by the court or another party. However, Lord Mackay of Clashfern stated that it would be inappropriate to allow an adverse comment, or to draw an adverse inference, where the defence put forward at trial a modified defence after being confronted with a modified prosecution case.[115]

Finally, the CPIA 1996 does not provide an efficient and effective mechanism to allow the defence to pursue secondary disclosure, or further investigations by the police, when the prosecution fails to comply with its duties after the defence statement is served. Section 8 provides that the accused must demonstrate reasonable cause to believe that the prosecution has not disclosed

111 *Wheeler* [2001] 1 Cr App R 150 CA, p 158.

112 See Chapter 6. In *Tattenhove and Doubtfire* [1996] 1 Cr App R 408 CA, the prosecutor gave his file to the Chief Justice, so that he might review it for improperly non-disclosed material, for the purpose of attempting to allay the suspicion of the defence.

113 Section 11(2), (3); Ede and Shepherd, 1997, p 262.

114 Section 11(3), (4).

115 Lord Mackay, 1996, col 1589.

prosecution material which might reasonably be expected to assist the defence as stated. The defence is left in the difficult, if not impossible, situation of having to demonstrate the existence of, and the relevance of, something that has not been seen. However, the concerns go further. It will be recalled that one rationale for creating the obligation on the defence to provide pre-trial disclosure was to give the police an opportunity to investigate defences (in addition to alibi) to determine whether or not the proceedings should continue and other suspects be considered. Roger Ede suggested that, due to the police mindset, re-investigation will not be done in an open minded manner and that it will be done only with a view to fortifying the prosecution.[116] (Of course, the police usually will investigate evidence supporting a defence of alibi and the prosecution team will consider and check defence expert evidence.) Other commentators suggest that, in many cases, no further investigation will actually occur. It is argued that many investigators believe that the accused is guilty and that they believe that further investigation is pointless.[117] Such an outcome may arise as a consequence of the choice of enforcement remedies in the code. A violation of the code does not render an officer liable to criminal or civil proceedings, but it will be taken into account when adjudicating upon the charges against the accused.[118] It is submitted that the failure to make a provision designed to facilitate the court, on application from the defence in the pre-trial stage, to enforce the duty to complete a full and fair investigation is a weakness of the Act.[119]

One is left to speculate as to whether a provision allowing the defence to ask the court to order more investigation would have been effective. Had provisions been enacted that empowered the defence in that manner, it is possible that the secondary disclosure system would have been carefully monitored and some of the existing practical defects would have been remedied in the first years. As the situation now stands, prosecutors are not communicating with disclosure officers on a regular basis and defence statements are not discussed in all cases. Consequently, the ability of well meaning disclosure officers to complete a review of the file for information which might assist the defence may be undermined. Other current experiences are discussed in Pt 12.6.

It is submitted that the criticisms of the relevant provisions of the CPIA 1996 demonstrate that the Act does not honour first principles such as the right against self-incrimination, the accused's right to silence,[120] the burden of proof being fully on the prosecution and the right to a fair trial.

116 Ede and Shepherd, 1997, p 271. This observation is supported by the co-BAFS study (Ede, 1999, p 1).

117 Gordon, 1997, p 1473.

118 Section 26.

119 See reform suggestion in Chapter 14.

120 Greer, 1994, p 103. Cf *Director of SFO ex p Smith* (1992) 95 Cr App R 191 HL, p 199, where the court rejected the view that defence disclosure is breach of the right of silence.

12.6 EXPERIENCE TO DATE AND COMMENT

The *Attorney General's Guidelines* (2000) encourage defence practitioners to comply with defence obligations under the CPIA 1996. The defence is told that 'a comprehensive defence statement assists the participants in the trial to ensure that it is fair.'[121] It has been reported that defence practitioners in most locations do provide defence statements in the Crown Court. However, in general, defence practitioners are not complying fully with the provisions. Some defenders regularly file defence statements late, or provide defence statements that are so vague as to be meaningless. The evidence suggests, also, that some courts are not applying sanctions where technically appropriate.[122]

One of the consequences of non-compliance by the defence with the CPIA 1996, and the inaction by some courts faced with such non-compliance, may be to frustrate the police,[123] or the prosecutor. When the police believe that the courts are not enforcing the defence obligation, it may well be that it will be more difficult to encourage some officers to comply with their obligations under the CPIA 1996.[124] Some police officers might think that, if the defence was protecting an accused person,[125] whom they 'knew' to be guilty, and the defence were not complying with the system, then they, in turn, need not comply.[126] Should prosecutors receive inadequate defence statements, experience reveals that some might react by refusing to provide secondary disclosure.[127]

In the context of the law and procedure currently in force in England and Wales, and the manner in which the CPIA 1996 is being applied, it is submitted that the extension of the defence disclosure obligation found in the CPIA 1996 is inappropriate. The obligation on the defence does nothing to facilitate an investigation and trial process that adheres to the fundamental principles of the legal system, and it may have the opposite effect. The CPIA 1996 diminishes the accused's right to silence and his

121 Attorney General, 2000a, para 27.
122 CPS Inspectorate, 2000, paras 5.7–19.
123 ACPO, 1998, para 3.20–21.
124 Eg, Phillips, 1999, pp 7–8. He concedes that the police have not achieved full compliance, but says that for the system to work, the defence must comply and the court must make sure that they do so.
125 The comment of Foreign Secretary, Jack Straw, when serving as Home Secretary, added credibility to this perverse view. Mr Straw was quoted as stating that, '…very aggressive defence lawyers sometimes forget about their wider social responsibilities and their responsibilities to the court, and, in trying to protect their niche markets with the local criminal fraternity, act in a way which would have been unacceptable when I Was practising 25 years ago'. See Gibb and Ford, 2001a.
126 Morton, 1993, p 375.
127 CPS Inspectorate, 2000, para 5.23.

privilege against self-incrimination.[128] At the same time it places greater reliance on the police and their ability to be fair toward the accused. It is submitted that no additional expansion of the duty of the defence should be contemplated.[129] It is submitted that without a change in police attitudes, it does not accord with common sense to ask the investigator, or another police officer, to fulfil roles that conform to the degree of detachment that is required of the police by the CPIA 1996.

12.7 POSTSCRIPT

Further to fn 105, a letter to the author from Freddie Hurlston, LSC Criminal Policy Officer, London, 29 June 2001 explained the current situation. He stated that each month contracted solicitors report to the LSC the volume and value of the work they have completed and any disbursement for expert witnesses. Monthly payments to solicitors made under the contract are adjusted if the volume and value of the work is more than 10% above or below their historical pattern. Solicitors do not have to seek prior authority to instruct an expert, but each firm is audited once a year. The LSC auditor considers whether or not the firm has been correctly reporting the volume and value of the work done and that the work done was necessary, and that the use of the expert was justified. If a case was found where the auditor felt that an expert should not have been instructed or the costs involved were unreasonably high, then the LSC would reclaim the money paid. Advance authorisation for high disbursements can be sought.

128 *John Tibbs* [2000] 2 Cr App R 309 CA, pp 315, *per* Beldam LJ.

129 Home Office, 2001, para 3.42, suggested consideration of disclosure in advance of a list of intended defence witnesses.

SUMMARY, ANALYSIS AND CONCLUSIONS

13.1 INTRODUCTION

The ultimate goal of the criminal justice system in England and Wales, as it is in Canada, is to convict and sentence those who have committed a crime and to acquit those who are innocent. It is of the utmost importance that the innocent should not be convicted. This is because the lives of those wrongfully convicted are ruined, the perpetrator of the crime may remain at large and unpunished and limited resources are wasted. The need to ensure the acquittal of the innocent restricts the vigour with which the guilty can be pursued. One of the three devices used to facilitate this important goal is due process—a fair trial. (The other two devices are the presumption of innocence and the principle that guilt must be proven beyond reasonable doubt.)

It is also important that public confidence in the justice system is maintained. Public confidence is maintained when the administrators of justice, and those who legislate, take into account the various other aspects of the public interest. In addition to the public interest of convicting the guilty but not the innocent, other interests include providing a workable system of justice, the State's interest in disguising police investigation techniques and informants and the privacy of victims and witnesses.

The administrators and the legislators should not get involved in the 'politics of law and order', and should avoid perverting the 'notions of balance' at the expense of the fundamental principle of protecting against the conviction of the innocent.

One important aspect of a fair trial is the disclosure of the information in the control of the State. In England and Wales, Steyn LJ stated in *Brown (Winston),* '…in our adversarial system, in which the police and prosecution control the investigatory process, an accused's right to fair disclosure is an inseparable part of his right to a fair trial'.[1] Glidewell LJ, in *Ward,* said: The duty of disclosure must be clearly defined and the nature and scope of the duty must be properly understood if the risk of conviction of the innocent is to be reduced to an "absolute minimum".'[2] The Attorney General[3] and the Director of Public Prosecutions (DPP) have recognised that innocent persons may be convicted, unless the

1 *Brown (Winston)* [1994] 1 Cr App R 191 CA, p 198, affirmed in *Brown (Winston)* [1998] 1 Cr App R 66 HL, p 70.
2 *Ward* (1993) 96 Cr App R 1 CA, p 52.
3 Williams, 1999.

prosecution provide proper disclosure in a timely manner.[4] This is because pre-trial disclosure of the prosecution case allows the defence to examine the evidence that will be called by the prosecution at trial. That examination will enable the defence to determine if inconsistencies or omissions exist and identify the areas where evidence by the defence could be most effectively directed. Pre-trial disclosure also allows the defence to examine information that the prosecution possesses, but does not intend to use as part of its case. It may include exculpatory evidence, evidence that may weaken the prosecution case, evidence that might lead to other defences, or the uncovering of evidence helpful to the defence. Early pre-trial disclosure provides the opportunity to gather any defence evidence before witnesses move away or memories fade.

In England and Wales, many topics relating to disclosure are addressed now in the Criminal Procedure and Investigations Act (CPIA) 1996. The CPIA 1996 provides a clearly stated code regarding criminal investigations and the recording and preservation of information. It also codifies a scheme of disclosure of unused prosecution material. It does not address the disclosure of the evidence to be used by the prosecution other than in the context of the committal process.[5] It creates a system of reciprocal disclosure and it makes changes to the process of gathering information from third parties. It will be demonstrated below that the CPIA 1996, taken as a whole, fails to promote the fundamental principle of a fair trial. Even if one argued that the CPIA 1996, or portions relating to prosecution disclosure, was reasonable or fair, another problem remains. The evidence indicates that the prosecution is not complying with the provisions of the CPIA 1996 and, where the CPIA 1996 applies, the common law power of the court to review what the CPIA 1996 has defined as primary disclosure has been removed. However, the decision in *Ex p Lee*[6] has reasserted the role of the court in addressing requests for early disclosure, where the interests of justice demand and the proceeding has not yet reached the stage where the CPIA 1996 applies.

In the light of these concerns, it appears unjust to require defence disclosure (that is, discovery of the defence by the prosecution), other than of the defence of alibi and of expert evidence. In the event that the police and prosecution come to follow the spirit of the CPIA 1996, then it might be appropriate to re-examine whether any prosecution discovery of the defence, in addition to alibi and experts, was required at all. Certainly, it is not appropriate to move ahead with the proposal to expand defence disclosure (that is, providing the defence case

4 DPP, 1999a.

5 The *Attorney General's Guidelines* (Attorney General, 2000a, para 43) state that the prosecution should disclose to the defence, in advance of a summary trial, in any evidence upon which it intends to rely.

6 [1999] 2 Cr App R 304 DC.

and unused expert reports).[7] It is submitted that efforts to encourage compliance with the CPIA 1996 by the prosecution through measures such the as *Attorney General's Guidelines* (2000) should be implemented and that efforts to achieve the longer term goal of changing the police mindset and 'working rules' should begin.

In the next part, a summary of the conclusions drawn from the analysis in the main body of this work will be given, along with an analysis of the effect of the changes in England and Wales on the right of the accused to have a fair trial. Thereafter, a contrast to the situation in Canada will be made. In the last chapter, an overview of some suggestions for reform will be presented and an original proposal will be made.

13.2 ANALYSIS AND CONCLUSIONS OF THE CURRENT LAW

13.2.1 Introducing the analysis and conclusions

The DPP stated in an essay on the CPIA 1996 that: 'There are those, myself included, who would say that the principles set out in the case of *Keane* provide a sound basis…on which to operate a disclosure regime.'[8] It is submitted that that comment begs the question of whether the CPIA 1996 provides a sound basis on which to operate a disclosure regime. The discussion in this part will attempt to answer that question, through an analysis of the conclusions of the discussion found in Chapters 5–9. The analysis will be set in the context of whether the CPIA 1996 (and its code) honours, or undermines, the core principle of the right to a fair trial and, specifically, the right to fair disclosure. It is to be recalled that, in Chapter 4, it was demonstrated that the mischief that was to be corrected by the CPIA 1996 was minimal, while the risks of interfering with the right to a fair trial were disproportionate to the mischief to be corrected. The discussion in this part will also address the issue of disclosure of the evidence to be used by the prosecution and the impact of the provisions of the CPIA 1996 which vary the committal process. Further, it includes a comment on the provisions of the CPIA 1996 which affect third parties who refuse to disclose confidential information. Finally, this part considers arguments relating to the question of whether the CPIA 1996 provides a sound basis on which to operate

7 Home Office, 2001, para 3.42.
8 Calvert-Smith, 2000, p 6.

a disclosure regime, arising from the evidence concerning the conduct of investigators, disclosure officers and prosecutors.

It will be concluded that the CPIA 1996 in its formulation and application does not honour, but rather undermines, in most instances, the fair trial principle.

13.2.2 Summary and analysis of conclusions regarding the CPIA 1996

The CPIA 1996 does not alter the requirement that the prosecution provide to the defence advance disclosure of the evidence upon which it intends to rely in cases to be tried on indictment. Disclosure is to be made through the provision of witness statements other than in exceptional circumstances. The Crown Prosecution Service (CPS) has reported that it is providing witness statements usually within seven days of request. Although there was no serious discussion directed at restricting the scope of the advance disclosure of the evidence of the prosecution, the decision not to pursue such a line of reform was appropriate, as advance disclosure promotes the right to a fair trial. The CPIA 1996 also repeals the ill conceived provisions concerning committal to the Crown Court by transfer provisions found in s 44 and Sched 4 of Criminal Justice and Public Order Act (CRIMPO) 1994, which were never brought into force. However, the CPIA 1996 modifies the committal process by terminating the opportunity of the defence to cross-examine the witnesses upon which the prosecution intends to rely.[9] The committal process has been further refined by s 51 of the Crime and Disorder Act (CDA) 1998 relating to the sending of indictable only offences to the Crown Court. Such cases are sent to the Crown Court without an examination by a magistrate. In exceptional indictable only cases, and where the defence argues that there is no case to answer, the Crown Court may grant leave to cross-examine the Crown witnesses at that pre-trial stage. The removal of the right of the defence to cross-examine witnesses in the committal or sending process is inconsistent with the right of the accused fully to understand the case against him. The testimony of witnesses can vary from that written in their statement. In the context of the disturbing evidence referred to in Pt 5.8 regarding the actions of some police officers and prosecutors, the elimination of this safeguard does nothing to further the public interest in the proper administration of justice. Rather, it has the opposite effect.

In summary matters, the *Attorney General's Guidelines* (2000) state that advance disclosure of the prosecution evidence should now be provided to the defence by the provision of witness statements. The evolution of the practice in summary

9 CPIA 1996, s 47 and Sched 1.

proceedings is consistent with the fair trial principle. It is submitted that it would be appropriate for advance disclosure in summary proceedings to be placed on a statutory footing to encourage compliance in all magistrates' courts.[9a]

The CPIA 1996 provides a scheme of disclosure for certain 'unused' material from the investigator through the disclosure officer to the prosecutor, and then on to the accused, even if he is unrepresented. The scheme created a national standard for disclosure with a view to providing uniform disclosure throughout the jurisdiction and to promoting the fair trial principle. The disclosure of evidence to the defence takes place in two stages, primary and secondary disclosure, with the second stage being triggered by the provision of a defence statement. The definitions given to the terms 'prosecution' and 'prosecution material' play an important role in the operation of the scheme. The definition of 'prosecution material' is narrow, referring only to material selected, initially by the police and later by the prosecutor, as being connected to the case against the accused, but which was not selected as material to be used. 'Unused' information is connected to the case for the purposes of primary disclosure if, in the opinion of the prosecutor, it might undermine the prosecution case. The test of materiality for secondary disclosure is linked to the defence statement. No longer is the test of 'materiality' a reference 'to the defence cause', as it was in *Keane*. Secondary disclosure requires the prosecution to disclose any additional unused prosecution material which might reasonably be expected to assist the defence as stated. The information disclosed by the prosecution to the defence is drawn from this limited classification of information. Disclosure is limited further by the public interest and the 'opinion of the prosecutor' as to material that undermines the case. The choice of the phrase 'prosecution material' is unfortunate, as it serves to perpetuate the incorrect impression of ownership in the prosecution, rather than trusteeship. It is submitted that the restricted definition of 'prosecution material' fails adequately to address the rights of the accused. It fails to take into account the fact that the prosecution team conducts the investigation. Obviously, no provision is made under the investigative system for allowing early input from the defence, as no one is appointed for the defence until a suspect is found. It fails to take into account the possibility that, due to the lack of training in investigative skills, relevant information is overlooked and is lost forever. It fails to take into account the unco-ordinated methods used by investigators to record information and the lack of a central investigation log.[10] The definition also fails to take into account the limited resources of the defence, especially in regard to investigation, and, therefore, interferes with the right to a fair trial.

The CPIA 1996 limits the definition of the 'prosecution' for disclosure purposes by referring only to investigators and prosecutors. It is submitted that

9a Eg, rules could be promulgated based on the Criminal Law Act 1977, s 48.

10 Phillips, 1999, p 19; HMI Constabulary, 2001, p 42.

experts, such as forensic scientists retained by the prosecution, should have been included as part of the prosecution team. The cases, discussed in Pt 5.2, demonstrate that experts who regularly work with the police may become partisan. The rules pertaining to the advance notice of expert evidence do not require the disclosure of 'unused' research and results and, therefore, do not provide sufficient information to the defence for the purpose of considering the accuracy of the proposed evidence. While a strict reading of the definition of the 'prosecution' could exclude other Government departments or Crown bodies, the *Attorney General's Guidelines* (2000), in para 29, state that the prosecution team should check with other Government departments or bodies to determine if they might be in possession of relevant material. If complied with, this guidance should represent a positive step. If it is not complied with, it is submitted that the court may, and should, widen the definition of prosecution to include such bodies on the basis of the power of interpretation found in the Human Rights Act (HRA) 1998. Nonetheless, the narrow definition given to the 'prosecution' unduly limits the scope of disclosure and, therefore, restricts the accused's right to fair disclosure and fair trial.

The CPIA 1996 does not provide to the defence or the court the opportunity to review the exercise of the prosecution's discretionary powers in the early stages of the case. The CPIA 1996 features the return of unfettered prosecution discretion in the primary disclosure stage, a change aimed directly at the decision in *Ward*. While some prosecutors have chosen to interpret the criteria governing disclosure in the spirit in which it was intended, it is open to prosecutors to apply the test narrowly. The evidence discussed in Pt 5.9 demonstrates that, in fact, some prosecutors are applying the test narrowly. Information that might have been disclosed under an objective standard, or where the prosecutor knew that his decision was potentially reviewable by the court, might not be given to the defence under the test for primary disclosure. The undue restriction of information from the prosecution might prejudice the defence by restricting the nature or strategy of the defence. The *Attorney General's Guidelines* (2000) may assist to encourage prosecutors to take a more purposive approach. However, if problems persist, it is submitted that it is open to defence solicitors to seek from the court a purposive interpretation to the provision on the basis of the HRA 1998. A successful application could result in the court finding that it has the power to review prosecutorial decisions relating to primary disclosure. It is not certain that the availability of secondary disclosure provides an adequate safeguard. Arguments to the effect that secondary disclosure is an adequate safeguard may be undermined by the evidence that, in practice, the reliability of secondary disclosure is suspect.[11] It is not appropriate to leave to the prosecution the decision as to what material might undermine the prosecution case, or

11 Discussed in Pt 5.9.

assist the defence. It is submitted that giving unfettered discretion in the primary stage is inappropriate as it may undermine fair disclosure.

The court is not authorised to provide guidance to prosecutors regarding issues concerning whether certain material falls to be included in primary disclosure. One exception exists and that is where the prosecution seeks to be excused from disclosure on the basis of the public interest. The rule is another example of where the CPIA 1996 restricts the common law protection offered by the court against the misuse of prosecutorial discretion in disclosure. Therefore, this provision undermines the defendant's right to fair disclosure and fair trial.

By contrast, provision is made for judicial supervision of the exercise of prosecution discretion surrounding secondary disclosure.[12] However, this is restricted by the test to be applied and it does not arise until after the defence has provided a defence statement. Also, the two stage regime ignores the need of the defence, in all but the most straightforward cases, to have all relevant information prior to the submission of the defence statement and the need to have it at an early stage to minimise the difficulty in gathering evidence to support the defence.

Clarification of the above points is instructive. Disputes regarding secondary disclosure can be directed to the court, but the accused is in a 'Catch 22' situation, having to demonstrate the relevance of the document in question before counsel has had an opportunity to view it. Whilst the accused also faced this difficulty at common law, the defence had the benefit of the *Keane* materiality test and the benefit of the fact that the prosecutor, as opposed to the police, was under a duty to review the undisclosed material. Further, the accused is at a greater disadvantage than under the previous regime in disputing the existence of material information that the prosecution alleges does not exist. The termination of the practice of providing to the defence copies of the schedule of sensitive unused material makes the task of challenging the prosecution's position very difficult. This change further reduces the transparency of the disclosure scheme. As the degree of transparency is reduced, the opportunity for abuse of discretion is increased. In the light of these changes, the decision in *Ex p Lee* takes on an even greater significance. The court, in that case, made a strong statement about the role of disclosure in the 'interests of justice' and made provision for early disclosure in special circumstances.

When one considers the two stage disclosure regime as stated in the CPIA 1996 in the light of proceedings that are more complicated, it is apparent that the regime might have a weak foundation, in that it is not built on the fair trial principle. It has been argued by Leng and Taylor that the regime is built on the 'carrot and stick' principle. They argue that the regime is based on the concept

12 Sectio 8.

that the prosecution will keep back some information which may be useful to the defence to encourage the defence to provide a defence statement.[13] That information is given to the defence only if a defence statement is provided and only if the defence statement raises a defence which places the undisclosed information in issue. However, in some cases, the accused knows so little of the facts surrounding the allegations, because he is innocent, that he could not raise a defence which would obligate the prosecution to give information that might help him understand all the circumstances and then advance a good defence. Therefore, the CPIA 1996 has the unintended effect of legitimising the withholding of information by the prosecution that might have assisted the defence.[14]

In the light of the foregoing, it is appropriate to return to the early stages of the process and the role of the police. The CPIA 1996 creates the office of disclosure officer, but it does not provide an opportunity to scrutinise the manner in which decisions by the police regarding the investigation and disclosure to the prosecution are made until the trial. The creation of the office of disclosure officer has merit within the overall scheme created by the CPIA 1996. This officer is to consider the relevance to the proceedings of the material gathered by the investigator and to create schedules listing the sensitive and non-sensitive 'unused' material for the prosecutor. Fortunately, the Act provides standards for the disclosure schedules. After the defence statement is filed, the disclosure officer is required to complete a detailed examination of the unused material to determine if any of that material might assist the defence. Unfortunately, the decision to assign to the disclosure officer the task of reviewing material interferes with the function of the defence. In the adversarial system, it is the responsibility of each party, through their advocates, to review and bring forward the available evidence at trial. The CPIA 1996 precludes the defence from looking at the information to determine, from its point of view, which evidence should be brought to the court's attention. Without the benefit of seeing most of the unused evidence, the defence is hampered in determining the arguments to be put forward as to the significance and weight of any prosecution evidence which may have been tendered but which might have a different meaning without the presentation of other evidence to place it in the proper context. Undermining the adversarial system undermines the right to a fair trial.

Another practical problem can be identified. The CPIA 1996 does not define precisely the qualifications and restriction on the appointment of disclosure officers, nor does it state the manner in which conflicts of interest are to be addressed. Some evidence leads to the conclusion that the role of the disclosure

13 Leng and Taylor, 1996, p 10: 'The stick is the threat of adverse inferences to be drawn against a defendant who raises a defence in court which has not been previously disclosed.'

14 Leng, 2000, p 15.

officer has been undermined in practice in some areas. This result occurred for various reasons, including the practice of the senior management of the police to allow officers to serve as disclosure officers in cases in which they have conducted the investigation.[15] Another factor in the undermining of the office, which applies even where the disclosure officer did not conduct the investigation, is the attitude of certain police officers and the influence of the police working rules. The rules greatly discourage actions that might be perceived as interference by one officer with the decisions of another. The emphasis on team loyalty and unity in the police may encourage the disclosure officer to minimise the significance of material (for example, through vague descriptions in the schedule) which might be seen to weaken the case for the prosecution. Also, completing duties that focus on paperwork, such as the creation of schedules and re-reading material in the light of the defence statement, is considered as boring and unimportant work which may result in it being done in haphazard fashion.[16] The evidence indicates that the quality of schedules created, and the examination of the investigation file for the purposes of secondary disclosure, has often not been adequate.[17] In recognition of this most unfortunate situation, the Attorney General instructed prosecutors to be alert to the possibility that the disclosure officer had not fulfilled his responsibilities.[18] It is submitted that these difficulties undermine the disclosure regime in the CPIA 1996.

The CPIA 1996 does provide for scrutiny at trial of decisions made by the investigator and disclosure officer. An integral part of this important reform was the creation in the CPIA 1996 of a national standard for investigations. The standard was created to encourage investigations of appropriate quality and to promote the fair trial principle. However, the provision for review is so late in the process that it only assists those defendants who have the energy and courage to complete the trial process. Even then, the provision does not take into account the possibility that, as a result of the actions of the police, the defence may never come to know that relevant information was not recorded or was withheld.

It is respectfully submitted that a major defect in the CPIA 1996 is its failure to take into account and address the police culture and their working rules. By failing to address this issue there was, from the outset, no realistic way of making the regime work properly, or even adequately. This point is addressed further below. However, before returning to the other provisions of the CPIA 1996, it is useful to note at this point that the police culture has a (negative) 'knock on' effect. As stated above, prosecutors exercise discretion at the primary disclosure stage. Even the well intended prosecutors can take differing views

15 Ede, 1999, p 4.
16 Calvert-Smith, 1999, p 20.
17 CPS Inspectorate, 2000, paras 4.88–103; Ede, 1999, pp 2–3.
18 Attorney General, 2000a, para 14.

on the proper ambit of disclosure. This is highlighted by the practice of broad informal disclosure in some courts and restricted disclosure in others. The evidence indicates that prosecutors can be influenced by police attitudes. This may result from various factors, such as the power of the cohesiveness exuded by the police, which may have a psychological effect on others and the inadequacy of the resources available to prosecutors.[19] Placing prosecutors in police stations may further undermine their independence.[20] Recently, the DPP and the Attorney General have called on prosecutors to adhere to the spirit of the CPIA 1996 by carefully reviewing the schedules given by the police and by providing disclosure as prescribed. The role of the prosecutor and the disclosure officer currently is under review. It may be appropriate to provide greater authority and resources to prosecutors to balance the effect of the influence of the police.

While the CPIA 1996 has imposed many restrictions on disclosure to the defence, it does not purport to alter the important principle that primary disclosure should be given as early in the proceedings as practicable. This principle is supported by the rule in *Ex p Lee,* which provides that, where the interests of justice demand, disclosure can be ordered, even before the disclosure regime attaches to the proceedings. The *Attorney General's Guidelines* (2000) emphasise that early disclosure under the CPIA 1996 is preferred.[21] Often, in practice, however, disclosure in summary proceedings is not completed until the days before trial. Unfortunately, this may result in delay and it often interferes with the accused's right to a fair trial.

The CPIA 1996 preserves the prosecutor's continuing duty of disclosure. However, the division of responsibility between the disclosure officer and the prosecutor found in the CPIA 1996 has made it impractical for prosecutors to comply with the continuing duty in certain cases. For example, where a single prosecutor has conduct of a case, it may be impractical in the confines of the days of trial to instruct and motivate the disclosure officer to review the police files for information relating to a new point raised by the testimony. While the *Attorney General's Guidelines* (2000) encourage the prosecuting advocate to be alert to disclosure issues and to consult with those instructing him and the disclosure officer, 'it is recognised that in practice consultation on disclosure issues may not be practicable' during trial.[22] Therefore, the CPIA 1996 has the effect of making it more difficult for prosecutors to comply with the continuing duty of disclosure and, thus, it has the effect of interfering with the fair trial principle.

The CPIA 1996 does not vary the common law relating to the ambit of Public Interest Immunity (PII), but it does codify the procedure in relation to an

19 Nduka-Eze, 1995, p 1843.
20 Bridges and Jacobs, 1999, p 2.
21 Paragraphs 34 and 40.
22 Attorney General, 2000a, para 25.

application by the prosecution to be excused from the obligation to disclose based on the public interest.[23] Unfortunately, however, the CPIA 1996 relieves the prosecution of the duty to provide the defence with a copy of the schedule of sensitive material that was created by the police for the prosecutor. Without this schedule, the defence may be unable to mount a reasoned challenge to the prosecution application to be excused. This undermines the right to fair disclosure and to a fair trial. It is appropriate to acknowledge that there is public interest in 'fighting crime' and protecting police investigation techniques and informants. However, the past practice of providing a copy of the sensitive schedule to the defence was an important feature of the reasonable balance made at common law. Recall, also, that the CPIA 1996 narrows the definition given to 'prosecution material' and leaves the decision of the contents of primary disclosure with the prosecutor. It is submitted that it would be appropriate to return to the past practice of providing a copy of the sensitive schedule to the defence.

The CPIA 1996 fails to clarify the boundaries of the public interest in protecting the State and prosecution from revealing information. The Auld Committee considered PII and it is hoped that their forthcoming recommendations will lead to legislation clarifying the boundaries of PII in criminal proceedings. The public interest in the privacy of citizens needs to be considered in this overall reformulation. Certainly, the recent practice of the CPS of giving to the defence the criminal records of all prosecution witnesses, regardless of the age of the conviction or whether it is an offence relevant to credibility, should be reviewed. The new policy of the CPS eliminates the potential for the improper use of prosecutorial discretion, but it ignores the possibility that convicted persons can tell the truth and that rehabilitated persons need privacy, unless the reason to breach that privacy is cogent. Further privacy concerns are addressed by the provisions in the CPIA 1996 that prohibit the use of disclosed material in other proceedings and the specialised legislation addressing sexual offences and witness protection.

The CPIA 1996 affects third parties who hold confidential (sensitive) information by adding to their rights to be heard in applications by the prosecution to withhold information on the basis of the public interest and to challenge summonses to give evidence. Members of the prosecution team have been reminded by the Attorney General not only to gather, where appropriate, information from third parties acting in a professional capacity, but also to be alert to privacy interests of their clientele when information is produced and consideration is being given to disclosure. The additional emphasis on the rights of third parties in participating in the hearing and requiring the prosecution to be alert to privacy issues is appropriate. However, the addition of requirements in obtaining witness summonses found in the CPIA 1996, such as an affidavit in support of the application for a summons, add to difficulties

23 Subject to the wider definition in the code of sensitive material (para 6.12).

faced by the defence. For example, it may be difficult for the defence to demonstrate in an affidavit how information that has not been read is likely to be 'material evidence'. In the context of the other concerns arising from the CPIA 1996, these provisions are inappropriate and interfere with the right to a fair trial.

The CPIA 1996 regime which features limited primary disclosure and then, potentially, additional secondary disclosure is a waste of resources and it interferes with the efficient administration of justice. The waste of resources arises, in part, from the provision requiring the prosecution team to review the police file again to facilitate secondary disclosure.[24] The wastage could have been avoided by broadening the materiality test in the primary stage, or by simply specifying a list of documents, often requested by the defence, to be disclosed at the primary rather than secondary stage. For example, the CPS Inspectorate found that most defenders seek access to the crime report and the log of messages. The disclosure officer could be instructed to read these items and to score out any sensitive information before the documents are provided to the defence. It is suggested above that the schedule of sensitive material should also be given. The *Attorney General's Guidelines* (2000) do include a suggested list of material, but it pertains to the secondary disclosure stage. Wasting resources interferes in an indirect manner with the right to fair disclosure and a fair trial. The amount of resources committed to the criminal justice system is limited and, if resources are wasted on the prosecution side, fewer resources are made available to the defence, whether they are to be used for legal aid, expert fees, or private investigation. With respect to efficiency, the CPIA 1996 interferes with the efficient administration of justice by delaying the point in time when one side has access to information which will have an impact on the disposal of the case. Justice delayed is justice denied.

The CPIA 1996 also fails to take into account the developments in Information Communication Technologies (ICT) and failed to provide for recognition of electronic statements, signatures and the provision of disclosure by email.[25] These technologies can facilitate electronic copies that can be accessed by the

24 Wastage of resources is found also in the fact that the second trawl through the prosecution material is generally ineffective (CPS Inspectorate, 2000, paras 5.49–57). The Inspectorate reported (para 5.52): 'The weakness in the system is that the prosecutor again relies on the original MG-6C schedule, with the frequent lack of detail we commented upon in para 4.42–51. Furthermore, we found that prosecutors very rarely examine material that the disclosure officer has not identified as material that might assist the defence case. Relying only on what the disclosure officer has entered on the MG–6E may not support an informed decision. We were surprised that prosecutors do no examine material more often, as many expressed concerns about whether disclosure officers are able to differentiate between the two tests, and one prosecutor queried whether the material was being considered afresh after receipt of the defence statement as require by the Code of Practice.'

25 The Home Office (2001, para 3.250) announced a new emphasis on developing ICT, recognised its value in case preparation, but failed to recognise the potential uses of ICT in disclosure (para 3.153).

defence without any copy costs. Many other practical concerns, arising from issues such as central file storage, fees for copies and the delay arising from the return of incomplete schedules to the police by the prosecutor, are soon to be overcome by information technologies. Hopefully, police administrators will adopt a log entry system for recording information gathered in investigations which can form the basis of electronic disclosure.

13.2.3 Conclusions on remedies in England and Wales

The European Court of Human Rights (ECtHR) has determined that the question of whether the accused has received a fair trial is to be answered, not by examining the discrete stages of the process, but by considering the whole of the case from pre-trial through to appeal.[26] In this part, the remedies which may be obtained from the trial and appellate courts in support of the right to fair disclosure are stated and conclusions are drawn. The magistrates' court, the Crown Court and the High Court are able to provide various remedies for the defence when the prosecution fails in its duty of pre-trial disclosure. The authority of the court rests in the common law principles of abuse of process. The CPIA 1996 does not modify significantly the remedies at common law. The Criminal Division of the Court of Appeal may assist in more limited circumstances. The House of Lords, ECtHR and the Criminal Cases Review Committee all have relevant roles to play, but the roles are too remote to be included in the discussion of efficient remedies.

In the adversarial system, the court does not participate in the investigation of the case. It has a role to play, however, in the disclosure process, by adjudicating disclosure issues. For example, where the defence seeks disclosure soon after the accused is arrested, but before the accused is committed, transferred or sent to the Crown Court, the court will order disclosure if the accused is able to demonstrate actual prejudice and the interests of justice so demand.[27] Once the matter is before the Crown Court, the provisions of the CPIA 1996 apply and disclosure of unused material will follow the regime of primary and secondary disclosure set out therein. Applications pertaining to disclosure issues may be made to the pre-trial judge at the Plea and Direction Hearing (PDH), or other pre-trial hearings. For example, the court will determine applications by the prosecution to withhold information on the basis of the public interest either *inter partes* or *ex parte* in accordance with court rules modelled on the rule in *Davis, Johnson and Rowe*. The court is under a duty to review continuously any decision allowing material to be withheld from the defence on the basis of PII.

26 See, also, *Craven* (2001) *The Times*, 2 February, CA.

27 *DPP ex p Lee* [1999] 2 Cr App R 304 DC; *X Justices ex p J* [2000] 1 All ER 183 DC.

Applications for various remedies may be made during trial. The court will attempt to grant a remedy that is appropriate to the circumstances. The available remedies range from adjournments and costs orders, through to the recalling of witnesses to testify at trial and special jury directions. In the rarest of cases, the court may order a stay of the proceedings on the basis that, due to the conduct of the prosecution and the continuing prejudice to the accused, a fair trial is not possible, or it is not fair to try the accused.

The court is reliant on the integrity of investigators, disclosure officers and prosecutors to provide adequate information when determining any application pertaining to disclosure. In the event that the prosecution does not provide all relevant information to the court, the ability of the court to grant appropriate remedies is restricted. For example, recent cases have highlighted the fact that not all police officers give accurate information to the court when the prosecution is seeking an order to limit disclosure.[28] This raises the issue of whether accused should be represented by 'special counsel' in PII applications, an issue which is discussed below. In the cases of lost (or destroyed) evidence, it is respectfully submitted that the court should take a principled, rather than a technical approach, and register disapproval of rogue police officers, or their agents, by granting stays or other strong remedies.

The mandate and power of the Court of Appeal is more restricted than that of the Crown Court. In practice, the combined influence of a heavy caseload and other factors, such as the lapse of time in the appeal process, limit the ability of the Court of Appeal to provide efficient and adequate remedies for the defence where the prosecution has failed in its duty of disclosure. By way of contrast, where the accused in a summary proceeding is convicted after a not guilty plea, he may appeal without leave, or even stating a ground of appeal, to the Crown Court and he will be granted a rehearing. The accused is not subjected to the restrictions on the admission of fresh evidence found in proceedings before the Court of Appeal.

However, in any case, the remedy of a new trial cannot replace the need to strive for the proper administration of justice wherein the prosecution provides reasonable disclosure in advance of the trial.[29]

It is respectfully submitted that, while the whole trial and appeal process is to be considered, in practical terms, the primary responsibility of attempting to provide remedies against the improper exercise of prosecutorial discretion in disclosure rests with the trial court rather than the Court of Appeal. Rarely, will the Court of Appeal be in a position to provide a timely remedy.

28 *Jackson* [2000] Crim LR 377 CA.

29 Attorney General, 2000a, para 43.

13.2.4 A critical problem

The Attorney General, the DPP and the Association of Chief Police Officers have now acknowledged that defence practitioners were correct to state that the CPIA 1996 was, and is, not operating as intended. Some investigators do not undertake a reasonable investigation, or record all potentially relevant material. Many disclosure officers do not provide complete and accurate schedules to the CPS and many prosecutors do not properly review the schedules of non-sensitive and sensitive unused material, nor are corrections to the schedules properly pursued. Many respected commentators have drawn the conclusion that the root of the problem is the attitude of the police, which is compounded by the prominent role assigned to them in the disclosure process.[30]

13.2.5 Does the CPIA 1996 provide a sound basis on which to conduct a disclosure regime?

It is submitted that the foregoing analysis leads to the conclusion that the CPIA 1996 does not provide a sound basis on which to operate a disclosure regime. The provisions concerning prosecution disclosure were enacted to address concerns that were of minimal significance, or were caused by factors apart from the former disclosure rules. Critics warned that the CPIA 1996 created a high risk of interfering with the right to a fair trial. The reduction in the protection has not been, and it cannot be, justified by arguments that the protection of other interests should override the right to fair disclosure to the extent that is found in these provisions. The provisions and application of the Act have led to many situations wherein the defendant's right to fair disclosure and a fair trial have been undermined.

13.3 CONTRAST TO CANADA

Canada retains the disclosure regime based on the rule in *Stinchcombe*, which closely resembles the law in England and Wales as stated in *Keane.* In Canada, the disclosure obligation on the prosecution is slightly greater, as the prosecution must reveal to the defence information which might undermine the credibility of defence witnesses. The right to hear prosecution witnesses during a traditional committal assists the defence to appreciate more fully the case for the prosecution and it affords the defence an opportunity to probe for unused materials that might not otherwise have been disclosed. An order for costs where the

30 Part 5.8.

prosecution has failed in its duty to disclose is 'quite fashionable'.[31] Further, no legislation exists, such as that found in CRIMPO 1994, which reduces the right of the accused to refuse to answer police questions, or the CPIA 1996, which requires the accused to provide a defence statement. Otherwise, the relevant rules and practices in Canada are very similar to those found in England and Wales. The differences in the Canadian criminal justice system that do exist cannot be used to support an argument that the reason that the disclosure regime in Canada is broadly formulated is because it is necessary to provide a balance against other provisions which might restrict the rights of the defence. It is submitted that the Canadian criminal justice system is functioning at least as well as the system in England and Wales. The statistics relating to case resolution, for example, in Ontario, are similar to those found in England and Wales.[32] It is submitted that the experience in Canada provides evidence in support of the argument that a disclosure regime based on rules similar to those found in *Keane* can properly function over a long period of time.[33] The experience in Canada also provides evidence that those rules can provide a good base on which to operate a disclosure system in England and Wales. Unfortunately, Canada, also, must face the challenging task of attempting to revise the attitude of the police in relation to disclosure. However, Canada has the advantage of not having first to face the task of rectifying its disclosure regime before beginning that challenge.

13.4 ANALYSIS AND CONCLUSIONS ON DEFENCE DISCLOSURE

The CPIA 1996 has created an obligation on the defence to provide before trial a defence statement to the prosecution and the court in matters to be tried in the Crown Court. This obligation exists in addition to the provisions of CRIMPO 1994, which require the accused, *inter alia,* to state any fact in response to police questions which he may later use in his defence. The defence statement must be provided within 14 days of the provision of primary disclosure by the prosecution, such as it is, and it triggers the obligation of the prosecution to provide secondary disclosure. The Act has made special provision for complex proceedings, but it does not replace the reciprocal disclosure regime of the Criminal Justice Acts 1987 and 1991, which govern serious or complex fraud and child witness issues in sexual assault cases. The accused in summary

31 Lawyer Donald Bayne, quoted in Harper, 1997, p 13.

32 Letter from John Pearson, Senior Crown Attorney, Hamilton Ontario, 27 February 2001, analysing the Ontario Court of Justice Statistics 1998–99 *Annual Report.*

33 'Disclosure has had a neutral effect on conviction rates', letter from Paul Culver, Crown Attorney, Toronto, Ontario, 9 April 2001.

matters may file a defence statement, which would have the effect of providing him with a right to secondary disclosure. However, defence statements are rarely provided in summary proceedings.

It is submitted that the obligation on the accused to provide disclosure of the defence to the prosecution is open to criticism on a number of fronts. It has been demonstrated in Pt 4.5 that it was an unnecessary innovation in the current context, as rarely did the prosecution lose what it believed to be a valid case due to an ambush defence. It is submitted that the provisions are poorly formulated and fail properly to take into account other legislation and practical concerns. Most importantly, however, defence disclosure, as formulated in the CPIA 1996, is not consistent with the first principles of the justice system. In consequence, pre-trial disclosure of a defence, other than alibi and expert evidence, is fundamentally unfair in the current legal landscape.

The following points can be made in support of the criticism of the obligation to provide a defence statement. First, the CPIA 1996 does not make provision for a discretion in the court to waive the obligation to file a defence statement. This may create difficulties in effectively presenting certain defences, such as a defence based on police dishonesty. The Act does not preclude the possibility that the police will use the defence statement to complete its case against the accused. Although the DPP has directed that this strategy not be adopted, the issue is not closed.

The decision to provide the penalty of adverse inference against an accused for a late or inconsistent defence statement, or for changes to a defence, raises at least three problems.[34] First, in the light of the provisions of CREMPO 1994, and the provision as to adverse inferences therein, there is a concern that the accused may be convicted by the combination of inferences under that Act and the CPIA 1996. The second problem is that the defendant might be prejudiced by an improperly drafted defence statement, even though practitioners who work on the case are meant to be quality assured by the Legal Services Commission. Finally, the defence does not have access to all non-sensitive information before drafting the statement, and it cannot be certain whether that information will support a defence that might seem appropriate. The defendant is left in the dangerous situation of stating a defence while only being able to speculate on its viability. If the information held by the prosecution does not contain that which was expected by the defence, the defence stated could not properly be brought forward at trial.[35]

The provisions of the CPIA 1996 create disproportionate penalties against the defence to encourage compliance with time deadlines, which are very tight. The short time deadlines are an indication that the legislators ignored the

34 CPIA 1996, s 11.
35 Leng, 2000, p 17.

pressures faced by the defence which are created by limited time and resources. It is apparent that no proper account was taken of legal aid restrictions and rates. Therefore, it is no surprise that the evidence indicates that defence statements in Crown Court proceedings are late or vague.[36]

Finally, the CPIA 1996 does not provide an efficient and effective mechanism to allow the defence to pursue secondary disclosure, or further investigations by the police, when the prosecution fails to comply with its duties after the defence statement is served. The reciprocal disclosure regime was based on the premise that the prosecution would give secondary disclosure and complete further investigations. As the situation now stands, prosecutors are not communicating properly with disclosure officers about the defence and reviews of the investigation files are not being done carefully.[37] In consequence, the requirement to provide a defence statement has not had the effect intended. Since the problem has now stood uncorrected for four years, reforms that might have been achieved through early monitoring and correction may be lost. The problem with the relevant provision[38] is that the defence is placed in a 'Catch 22' situation by being required to demonstrate the relevance of information which it has not seen before the court will assist. The defence is given no facility to invite the court to cross-check suspicious situations, or to require further reasonable investigations. It must be left until trial, which may be too late.

It appears reasonable to acknowledge that pre-trial disclosure of the defence of alibi, and expert evidence, have an appropriate role to play in the fair trial process. The police usually investigate evidence supporting a defence of alibi. Time is required to understand and check expert evidence. A fair trial is one that is fair to both parties.

On the whole, it can be concluded that the creation of an obligation to provide a defence statement (over and beyond alibi and expert evidence) does little or nothing to promote the public interest in the proper administration of justice. Rather, it may actually undermine the right to a fair trial and it diminishes the burden of proof on the prosecution and the privilege against self-incrimination. Informal defence disclosure, whether in a PDH, or otherwise, and with the instruction of the client, is sufficient for current purposes. Should it prove to be the case that the police and prosecution always comply fully with their obligations in investigation and disclosure and the proper execution of their discretion generally, then it may be appropriate to reopen the debate on defence disclosure to the prosecution.

36 CPS Inspectorate, 2000, paras 5.5–18.
37 *Ibid*, paras 5. 39–61.
38 Sections.

REFORM

14.1 INTRODUCTION

Various proposals concerning the reform of the disclosure regime have been made. Some commentators suggested improvements which amounted to minor variations of the system, or a combination of variations, which could be implemented with a minimum of disruption. Other commentators have made far reaching proposals. In this part, the main proposals for reform made by other writers will be stated. Many of the proposals flow from the criticisms of the current regime in England and Wales discussed in Chapter 13. Other proposals were discussed in detail in Chapter 11. Therefore, the following discussion of those proposals is very brief. It is submitted that some of the proposals do have some merit in the interim and are likely to make a positive impact in some cases. Ultimately, however, the main thrust of attempts to reform the investigation and disclosure system must, as the Chairman of the Law Society's criminal law committee, Malcolm Fowler, has said, involve 'root and branch' reform.[1] This invites a discussion of new proposals. It may even justify considering some extreme suggestions. It may be instructive, at least from an academic point of view, to consider whether or not fundamental changes to key features of the trial process can be justified. One such proposal, which is briefly analysed below, is to change the standard of proof to beyond doubt. It is submitted, however, that the long term goal must be to secure police compliance with the fair trial principle. Thereafter, the details of the disclosure regime will be much easier to assemble. It is to this end that two original proposals for reform will be presented. The proposals are variants of the theme that the way forward might be to require the prosecution to prove compliance with the code at trial, or preferably, pre-trial.

14.2 INTERIM REFORMS

Progress towards securing the goal of a fair trial for many defendants may be made by adopting many of the reforms discussed in this part. The proposals are grouped in relation to prosecutors, police, judges and defence lawyers. Two other proposals are discussed thereafter, but it is suggested that those proposals be rejected because they would not assist in the provision of fair trials. The

1 Times staff, 2000.

following discussion provides another view of the proposals, which were discussed primarily in Chapter 11 (but were there grouped according to the stage of the proceedings wherein the reform would have its main impact), and those added elsewhere. It was demonstrated in Chapter 11 that the following proposals, as the primary focus of reform, could not effect the degree of reform required to guarantee fair disclosure in all cases because of the impact of the police mindset and working rules.

Immediate relief for some defendants will occur if prosecutors follow the spirit of the law, and as suggested also by the *Attorney General's Guidelines* (2000), if prosecutors do not assume that the disclosure officers have completed their tasks.[2] Other reformers have proposed that, once again, the prosecutor should be made ultimately responsible for disclosure,[3] or that prosecutors be required to audit the police file in relation to disclosure.[4] The Director of Public Prosecutions (DPP) has suggested correcting wayward prosecutors through training.[5] Anthony Heaton-Armstrong has suggested that prosecutors and disclosure officers must break out of their 'professional mindset' and adopt the view of the defence in reviewing unused material.[6]

Chief Constable Sir David Phillips, the chairman of the crime committee of the Association of Chief Police Officers, suggested, among other things, that investigators and disclosure officers might be encouraged to complete their tasks more faithfully by a revision of police management and new career structures to encourage a more specialist police service.[7] Sybil Sharpe suggested a retrospective scrutiny of randomly selected files by an independent commissioner.[8] The Crown Prosecution Service (CPS) Inspectorate suggested that, in addition to better training, consideration be given to expanding the material sent by the disclosure officer to the prosecutor, for example, the crime reports and the log of messages. This would better equip the prosecutor to deal more quickly with the request of the defence for that material, which, according to the research of the Inspectorate, was a standard request.[9] Similarly, it is likely that Plotnikoff and Woolfson will recommend better training for all participants

2 Attorney General, 2000a, para 14.
3 Law Society, 2000, para 8.4. The CPS Inspectorate (2000, paras 13.5–7) suggested the proposal should be considered.
4 Raised in, and rejected by, the Attorney General, 2000a, 'Commentary', p 8.
5 Calvert-Smith, 1999, p 20.
6 Heaton-Armstrong, 2000, p 3. Heaton-Armstrong is a barrister who worked closely with the co-BAFS studies.
7 Phillips, 1999, pp 17–18. Phillips also suggested that compliance by disclosure officers might be achieved through a reduction in the scope of prosecution disclosure, supplemented by the enforcement of the defence disclosure obligation to encourage officers (pp 17–18).
8 Sharpe, 1999b, p 82.
9 CPS Inspectorate, 2000, para 4.74.

in the Criminal Justice System (CJS), with special emphasis on disclosure officers, and an improved system of checks and balances—quality assurance and monitoring—at all stages within the current regime.

Some critics and judges believe that it is appropriate for judges to have an active role in reviewing disclosure, as was the case immediately before the Criminal Procedure and Investigations Act (CPIA) 1996, and remains the case in Canada. The evidence indicates that some judges now are active in resolving disclosure issues 'generally as a result of a strong indication from the judge at the PDH [Plea and Directions Hearing]'.[10] On a narrower point, it has been suggested that, after allowing the prosecution to withhold evidence on the basis of the public interest, the trial judge must maintain a 'rigorous focus upon the specific documents in issue and to the issue in the particular case to be tried.'[11]

Members of the legal profession have stated that legal aid fees must be increased, so that defence practitioners can afford to allocate sufficient time to each case and to retain independent investigators or experts where appropriate. Other issues pertaining to the defence include the proposal that the defence should be given the opportunity to consider the non-sensitive unused material and complete its own assessment regarding what information might assist the defence.[12] It is proposed that it would be appropriate to revive the past practice of providing to the defence the schedule of sensitive unused material.[13] As the Runciman Report stated: 'We endorse the principle that it should not be a matter purely for the prosecution to decide what is relevant and what is not: the defence should have the right to see a schedule of all the evidence in the prosecution's hands and to ask for the disclosure of any further material that seems to them to be relevant to the case.'[14] The 'fruits of the investigation' should be held 'in trust' by the prosecution so as to facilitate a fair trial.

It has been suggested that the interests of the accused and the administration of justice[15] would be better safeguarded if special independent counsel were appointed in certain cases. Where applications are brought by the prosecution to withhold evidence from disclosure on the basis of the public interest, special counsel could protect the interests of the defence.[16] The need for special counsel is particularly pressing since the

10 CPS Inspectorate, 2000, para 9.5.
11 Corker, 1999, p 41.
12 *Ibid*, p 38.
13 JUSTICE, 1995, p 26.
14 *Runciman Report*, 1993, para 6.3.
15 Ashworth, 1999b, p 412.
16 This was unsuccessfully argued in *Rowe and Davis v UK* (2000) 30 EHRR 1 (ECtHR).

prosecution, in the *ex parte* hearing, is able to rely on prejudicial and/or inadmissible material relating to the defendant or his alleged associates. No provisions exist which require the applicant to provide sworn evidence from the witness box or in the form of an affidavit. This may be tolerated by the court simply because there is no one to put the case for the defence.[17] By assisting in cross-examination of the relevant prosecution witness, and by providing argument, the special counsel would greatly improve the information available to the trial judge. The judge would be better equipped to make the initial determination regarding which material evidence was to be withheld and to monitor the issues as the trial unfolds.

Finally, it has been demonstrated that there is a danger in making the 'rights' of the accused contingent on the thoroughness of his defence lawyer. Practically speaking, it is impossible to separate the defence statement from the defence lawyer that prepared it. One may question the fairness of placing the accused in the position of being vulnerable to an adverse inference because of the poor quality of the work of his lawyer. It appears that a practical solution may be to restrict the adverse inference provisions.[18]

By way of contrast, it is respectfully submitted that the following two views will not aid the cause of fair trials. The Auld Committee, in the review of the practices and procedures of criminal courts, has treated the issue of disclosure as an example of ineffective case management. The committee suggested that there should be an 'improvement of mutual advance disclosure by the prosecution and defence so as to achieve early identification of the issues and shorter trials'. This might be encouraged by 'a change of culture among legal practitioners, possibly encouraged by their own codes of professional conduct'.[19] This fails to give due accord to the principles of the adversarial system and obligation on the prosecution to prove its case. Secondly, Sir David Phillips has argued that the scope of prosecution disclosure should be further restricted.[20] As demonstrated in Chapter 11, the fair trial principle may be at risk under the current regime and further restrictions on prosecution disclosure will only undermine the fair trial principle.

17 Corker, 1999, pp 38–42.
18 Leng, 2000, p 16.
19 *Auld Progress Report*, 2000.
20 Phillips, 1999, p 19.

14.3 LONG TERM REFORM

14.3.1 Introduction

It is submitted that efforts to improve the law and practice of disclosure in criminal proceedings in England and Wales must ultimately focus on investigators and disclosure officers and the transfer of information to the prosecutor.[21] In any attempt to improve this process, attention must be given to addressing police methodology and attitude during investigations and, ultimately, in reporting the result. It is submitted that recognising the police mindset and their working rules will be a critical factor in planning and working towards reform.[22] Improving the investigation of crime and the attitude toward disclosure will reduce the possibility of further miscarriages of justice and support the right to a fair trial.

Against this background, two ideas will be analysed and, ultimately, dismissed. The third idea is the author's proposal for reform.

14.3.2 Beyond doubt

It is of academic interest to begin by mooting the question of whether the standard of proof should be changed from proof 'beyond reasonable doubt'[23] to proof 'beyond doubt'.[24] To the casual observer of the criminal justice system who is also concerned with the potential for the wrong conviction of the innocent under the Taw and order' regime implemented during the last decade, it might be attractive to say that a radical change is necessary. Certainly, there is a large number of convicted persons seeking assistance from the Criminal Cases Review Commission (CCRC).[25] The fact that a reasonable argument can be made to the effect that many first principles have been abandoned might serve as a springboard for the suggestion that the State has gone too far, and the protection of the innocent justifies a change in the standard of proof.

Increasing the standard of proof to 'beyond doubt' would not alter the mode of proving facts, but it would increase the amount of evidence needed

21 The Law Society (1995, para 40) made the point that the proposed CPIA 1996 contained a fundamental flaw, as it did not make provision to ensure that the police made proper disclosure to the prosecution in the first place.

22 Discussed in Chapter 11.

23 *Woolington v DPP* [1935] AC 462 HL, p 481.

24 Epp, 1996, p 11.

25 At 31 March 2000, the accumulation of cases that had progressed early screening measures and were awaiting review was 900 (CCRC, 2000, p 1).

to convict. The amount of evidence needed would be such that there was no room for any doubt. The jury might be instructed to convict if the odds were 1000:1 against any other theory of the events alleged. The jury could not be asked to say that they were 100% certain, because that could be accomplished only if the jury witnessed the crime.[26] It is predicted that changing the standard might reduce the possibility of convicting the innocent. However, it might also make it very difficult for the court to convict the guilty. Some empirical research is available on this issue. Studies by Montgomery pertaining to the current standard of proof and jury instruction found that 73.5% of mock jurors stated that they felt that they would have to be 100% confident of a person's guilt before they convicted. This appears to be a stringent interpretation of the current standard. By contrast, a similar study by Zander QC came to a different result. He found that 51% of the sample of potential jurors would require themselves to be 100% confident before they convicted. Including the results from the second possible response, 71% of the sample said that they would need to be at least 90% confident before convicting.[27] By sampling magistrates, the study revealed that 75% of that group indicated that they would have to be at least 90% confident before convicting.[28] As such, it is difficult to predict whether or not increasing the standard would have a large negative impact on the conviction of the guilty.

Changing the standard might have other ramifications. Two ramifications come to mind. First, more guilty persons may choose to plead not guilty than otherwise might have been the case, if the standard is changed. Secondly, the police may see the change in the standard of proof as making their task in fighting crime almost impossible. In consequence, the police attitude and the working rules might take on an even greater significance in the day to day operations of policing and some police officers might react by using unacceptable methods to secure convictions—noble cause corruption. It is submitted that the protection found in the proposed standard of proof might be in danger of being undermined by the working rules, including fabricated or destroyed evidence. Police officers might pressure prosecutors to use improper tactics to secure convictions. It is also possible that some prosecutors might be willing to bend the rules for their own purpose of maintaining a good working relationship with the police, and to be seen to be successful by securing convictions, thereby maintaining their employment.

This proposal is unlikely to do anything to improve the attitude in the 'cop culture', nor would it assist in promoting better disclosure, or the fair trial principle. In consequence, the argument, while of academic interest, must be rejected.

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26 Montgomery, 1998, p 585

27 Zander, 2000b, p 1517.

28 *Ibid*, p 1519. Substituting the word 'confident' with the word 'sure' did not change the result

14.3.3 Proving compliance with the code as element of the offence

It has been concluded that the code of practice governing the investigation, retention and disclosure of evidence was a positive development arising from the CPIA 1996. It has been argued that one of the deficiencies of the code is its lack of an efficient and effective remedy when its provisions are breached. Section 26(4) of the CPIA 1996 provides that any failure to comply with the code 'shall be taken into account in deciding the question' arising in the proceedings. It may be suggested that one manner by which the code might be strengthened would be to amend the law so as to require that the prosecution prove the completion of a reasonable investigation as one element of proving the offence. Failure to demonstrate compliance, using the civil standard, would result in a directed verdict or, alternatively, the jury would be invited to consider whether an adverse inference should be drawn against the credibility of the police. Many of the features of the proposal made below would apply to this suggestion, including the creation of an Investigation Review Department

The suggestion of proving compliance at trial, rather than earlier, suffers from the defect that the accused and the State are required to go to trial to finalise the issue. As with the current formulation of the law, the defence would not have access to an efficient and early remedy. In consequence it is submitted that the following proposal is preferred.

14.4 DEMONSTRATING COMPLIANCE

14.4.1 Introduction

Arguably, the process of replacing the current police attitudes regarding investigations and disclosure could begin with the enactment of a new enforcement scheme for the code. As stated in Chapter 11, such a scheme might be designed as follows.[29] A key feature would be a requirement on the prosecution to demonstrate, as part of its case, police compliance with the code. It is envisioned that evidence would be presented at an early stage,[30] called the filter hearing, to a Crown Court judge without a jury to demonstrate compliance.[31] A specially trained officer who has reviewed the investigation and disclosure

29 Epp, 2001, p 151. The comments of Roger Leng on this section are gratefully acknowledged.

30 In the event this reform is adopted in its entirety, it is hoped that police malpractice will be reduced. In consequence, defence disclosure then might be appropriate. Therefore, the proposed review (filter) might best take place after the defence statement is served.

31 In the event that the Government unifies the criminal courts, the proposed review (filter) could be held during the pre-trial stage.

process would give oral evidence. The officer would be part of a proposed new department which would be created for the purpose of focusing on these issues and assisting in encouraging compliance with the code. Failure to demonstrate compliance at the hearing, using the civil standard, would result in dismissal of the charge, or other remedies. Other remedies could include adjourning the hearing to allow the police to complete further investigations and, when appropriate, order disclosure of the result to the defence, or allow the defence to read all non-sensitive papers before the resumption of the proposed filter hearing. Another remedy might be to require at trial a direction to the jury indicating that they may draw an adverse inference against the prosecution at trial arising from non-compliance with the code.[32] This order would be binding on the trial judge, subject to the interests of justice. The interests of justice might require the prosecution to be allowed to demonstrate that the original breach had been remedied and, therefore, the remedy was no longer required, or that the combination of other factors required that the adverse inference not be applied.

14.4.2 The Investigation Review Department

The proposed Investigation Review Department would be responsible for determining whether the investigator and disclosure officer had complied with the code. They would be in the unique position of being able to move within the confines of the 'blue wall', while being subjected to external scrutiny by the prosecutor in the pre-hearing phase and by the court at the proposed filter hearing. Officers who demonstrate appropriate attitudes and have proper training would be engaged in overseeing and encouraging investigators and disclosure officers. There are numerous officers who are appropriate for this role.[33] Careful selection and separation would avoid the problems of the cop culture, for example, rubber stamping the original investigation,[34] or treating the review as a mechanical exercise.

The department, as proposed, would have no direct supervisory role over investigations in progress. Only when the investigator has laid a charge, and an indication that a 'not guilty' plea will be entered has been received, would the department conduct its review. It would consider the investigation and disclosure provided and give advice on the question of adequacy, first to the prosecutor and, then, before the examining court. The department would avoid the negative stigmatism relating to the internal affairs department because its function would be to judge the adequacy and

32 *Lim and Nola (No 3)* [1990] 1 CRR (2d) 148 (Ont HC), pp 152–53. See, also, Zaduk, 1993, p 6.

33 Baldwin and Moloney, 1992, p 78; Maguire and Norris, 1994, p 120.

34 *Macpherson Report,* 1999, rec 19.

appropriateness of the investigations, rather than the conduct of officers *per se*. Only in extreme cases would the reviewer be expected to request the supervisor to initiate a disciplinary proceeding against an investigator. However, all investigators would be cognisant of the fact that if a review uncovered fabrication, the destruction of evidence, intentional inaccuracy in the records, failure to investigate plausible alternative suspects and failure to disclose to the prosecutor, such acts and omissions may attract disciplinary proceedings or criminal charges.

The proposed review process should result in better investigations and disclosure to the prosecutor. The knowledge that an investigation would be thoroughly considered by a review officer would motivate the investigator and disclosure officer. Supervisors might also be motivated to monitor more closely their investigators. The review would serve other functions as well. It would serve a performance review function, adding objective promotional indicators, or demonstrating the need for retraining, or indicating the need to change defective internal procedures. Recurring problems would lead to groups of investigators and their supervisors being retrained.[35] The reviews would reduce reliance on the assumption that everyone else is doing his or her job properly.[36]

The proposed filter hearing would make for greater transparency and facilitate judicial scrutiny of the investigation process and individual investigations, thereby further increasing public confidence. Where the 'error' was not critical, or the omission was based on a reasonable exercise of judgment, then it is left for the court to determine, in the light of this evidence, its significance in the particular case. If dismissal results, all concerned will gain a valuable lesson.

A combination of increased training, better supervision, pre-trial police reviews and prosecution and court scrutiny, regarding compliance with the code, appears to offer hope to change police practices and assistance in achieving the aims set for the police and the CJS in *The Way Ahead*.

14.4.3 Achieving the aims

It might be suggested that requiring the prosecution to demonstrate compliance with the code would unduly interfere with the aim of an effective system, specifically in the conviction of the guilty. It must be recognised that the vast

35 In questioning working group loyalty within the police, former Chief of Police C Hayes answered the question, Need we act loyally toward the groups and individuals who have entered into our sense of who we are?' in the negative. He stated: 'A large part of one's maturity is about unlearning false truths and disentangling oneself from the intellectual and emotional associations which gave rise to them.' See Hayes, 1996, p 18.

36 Attorney General, 2000a, para 14; Law Society, 2000, para 13.4

majority of convictions are gained through pleas of guilty. Many accused persons wish the matter to be resolved at first appearance, or at the PDH for a great variety of reasons.[37] Of the remaining minority of cases, the Crown Court conviction rate is approximately 57%.[38] A case that has been through the proposed filter system is likely to be well prepared and result in a conviction. Also, the filter would encourage confidence in the evidence of investigators. Police integrity is again in the headlines on a regular basis[39] and the scrutiny of the police has reached greater levels than ever before.[40] Without taking some effective steps to address investigative malpractice, the public and the court will continue to lose respect for the evidence of the police and the conviction rate may fall. The range of remedies available to the filter judge would ensure an appropriate measure of flexibility. An adjournment for further investigation, rather than an adverse inference against the prosecution, would be appropriate in many situations. In the case of the innocent, the likelihood of the true perpetrator being detected would be increased

It is submitted that the filter hearing would also promote the aims of effectiveness, specifically in bringing about the acquittal of the innocent, and fairness to all involved. To a degree this proposal would reduce the problem of the imbalance of resources in the adversarial system. Investigations conducted with an open mind and greater care would be more accurate and the completion of thorough investigations would reduce the effect of the shortage of defence resources. Disclosure by the police to the prosecutor certainly would be facilitated. Prosecutors would be in a much stronger position to direct police to turn over material that otherwise might be hidden.[41] The recording of evidence would be marshalled and centralised.[42] Similarly, the Crown's charge screening and disclosure review function would be enhanced.

The filter hearing would also promote the aims of fairness and efficiency by providing a forum for identifying and removing cases which did not justify jury trial. In this respect, the hearing would partly fill the void left by the

37 In the Crown Court, the rate of guilty pleas in cases which proceed past initial charge screening and committal is approximately 84% (CPS, 1999, Chart 9), as opposed to 95% in Magistrates' Court (Chart 4). The Plea Before Venue procedure has led to more guilty pleas in either way cases being entered in Magistrates' Court rather than in the Crown Court (Chart 9).

38 Approximately 57% of trials completed end in a guilty verdict on at least one count (CPS, 1999, Chart 9)

39 Dein, 2000; Campbell, 1997, p 1 (re Scotland Yard's elite Flying Squad); Tendler, 1998, p 6 (further arrests just as the dust was starting to settle after Operation Jackpot to clean up Stoke Newington police station); Weaver, 2001.

40 HMI Constabulary, 1999b.

41 Police have a duty to disclose material to the prosecutor (code, para 7.1–5), but this is not always done (Ede, 1999, p 2).

42 A problem recognised by Phillips, 1999, p 19.

reforms of the CPIA 1996, which left the committal process for either way offences little more than a rubber stamp procedure.[43]

Finally, it is submitted that the aim of efficiency, in focusing on the issues that really matter at trial, will be promoted. The proposed filter hearing would provide an evidential and contextual basis for any pre-trial rulings that may be required. For example, a defence submission of no case to answer could be heard at the conclusion of the filter hearing,[44] as could applications by the prosecution to withhold information on the basis of the public interest.[45]

It is proposed that, if the filter judge finds that the code has been complied with, then that element of the prosecution case would be satisfied for the purposes of the trial. The number of issues at trial would be reduced as a result. This would not preclude the defence from raising issues in the defence statement regarding a point addressed in the proposed filter. For example, the investigator may have completed a reasonable investigation and properly passed all related information to the prosecutor. He may have taken the view that certain information given by a person was unrelated to the case, a decision which, while sound at the time, was undermined by late arriving information, perhaps in the form of previously unknown witness who tied the information to the case. The information, and the fact of the connection, would be disclosed under the prosecutor's continuing duty of disclosure. This would be addressed in trial, as the elements of the offence will remain to be proved.

Issues arising from the concerns surrounding disclosure by the defence and secondary disclosure by the prosecution may be alleviated.[46] It is submitted that the filter process would increase the confidence of the defence Bar in the disclosure scheme and may encourage detailed defence statements. Defence disclosure, as argued by its proponents, will ensure that investigators focus on appropriate details for secondary disclosure and avoid unnecessary resource depletion.[47] However, it is possible that the filter will have satisfied, in practical terms, any need for further prosecution disclosure. At least, the proposed review would provide an opportunity for the files to be considered by a specially trained person, who could consider material not yet disclosed.

43 Magistrates' Courts Act (MCA) 1980, s 6(1), amended by CPIA 1996, Sched 1, paras 3 and 4, precludes oral evidence and defence evidence.

44 Crime and Disorder Act 1998, ss 51, 52 and Sched 3.

45 This idea might address the need, stated by Phillips (1999, p 17), to have post-committal 'a process, judicially supervised, to protect "PII", where both sides can discover the extent of their opponent s case'.

46 In the event this reform is adopted in its entirely, it is hoped that police malpractice will be reduced. In consequence, the principle of criminal justice and defence disclosure can be considered afresh and perhaps then defence disclosure might be found to be appropriate.

47 Phillips, 1999, p 17; Calvert-Smith, 1999, p 25.

Critics of the proposal may wish to argue that the problems of years past, arising from the abuse by solicitors of pre-trial processes like committals and the inept practices of lay magistrates in committal hearings, may be repeated in the current proposal. However, the filter hearing is to be before a Crown Court judge and he would have the new purpose of considering the issues arising from the code. The problems of unethical defence practices are being addressed. The emphasis on quality representation seen in the new Criminal Defence Service[48] and the Bar's Practice Management Standards and Guidelines may greatly assist.[49] In the event that fixed contracts for defence legal services in Crown Court actually comes to fruition, it is hoped that appropriate funds will be made available to encourage advocates to seek filter hearing in appropriate cases. It is submitted that, to encourage some defendants to reflect carefully on whether a filter is appropriate, custody time limits may be waived.[50]

In the final analysis, it might be appropriate to concede that the number of filter hearings would be significant. Further, the costs would not be set off by such things as a reduction in the number of cases committed for trial, but that could not be proceeded with due to defects in the prosecution case.[51] Arguably, this is a cost that is well justified. This is not only about the accused having a fair trial, or the cost of court time, it is about the integrity of policing.[52] The police must be trained and encouraged to follow the code. This process might assist in changing the culture and raising the level of police compliance with other legislative provisions as well.

14.4.4 Exceptions

Another concern in requiring the prosecution to demonstrate compliance with the code may arise in relation to the prosecution of complex crime, such as serious fraud or racketeering. The testimony at the filter might forewarn other criminals or endanger undercover officers or informants. There are a number of points to be made in response. The ordinary law of public interest immunity (PII) would apply. In consequence, in certain investigations, initiation of criminal

48 Legal Aid Board, 1999, p 1.

49 Hockman, 1999, p 18.

50 CPIA 1996, s 71, varies the Prosecution of Offences Act 1985, s 22, and regulations, to state that custody time limits run through to when the jury is sworn or guilty plea (Leng and Taylor, 1996, p 120).

51 In Crown Court: 'Cases which could not proceed have risen over recent years, from 7.7% in 1997–98 to 11.1% in 1999–2000 [ie, 9600]. This is believed to be because the abolition of "live" committals in April 1997 removed the opportunity of testing witnesses before a case reaches the Crown Court.' (CPS 2000a, Chapter 3, p 8).

52 Reform has the potential to save vast amounts of money that otherwise would be used to pay damages to the wrongly convicted and to expand greatly the budget of the CCRC, and to avoid the unquantifiable embarrassment to society arising from miscarriages of justice.

proceedings could be delayed until the point in time where all criminals in a group can be arrested. Perhaps, the filter would be a closed hearing,[53] subject to the provision of special counsel, answerable to the court, to protect the interests of the accused.[54] Another suggestion may be to exempt certain classes of prosecution from the onus to demonstrate compliance with the code, leaving it for the defence to attack the investigation. For example, serious fraud prosecutions are dealt with in a unique manner.[55]

The proposed scheme does not apply to summary only offences. As the use of the advancements in information and communication technology continues to increase, it is only a matter of time[56] before witness statements can be recorded and disclosed electronically.[57] This will be sufficient disclosure in summary matters, especially as the working rules begin to reflect the law. In addition to requiring primary disclosure, the CPIA 1996 also provides the option for the defence in summary proceeding to participate in secondary disclosure by providing a defence statement.[58]

14.4.5 Conclusion

It is respectfully submitted that, until police officers become willing, and equipped, to comply with the rules of investigation and disclosure, the aims of fairness, efficiency and effectiveness to promote confidence will remain unfulfilled.[59] Compliance with the rules will only be achieved through a revision of the cop culture and the working rules. As the primary focus of the reform process, a potent external and internal review must be adopted. This might be achieved in a filter hearing, where, as part of the case for the prosecution, the prosecutor is required to demonstrate, with the assistance of the review officer, that the code had been complied with. The internal review process might

53 This may be accommodated under the exception of the 'ends of justice', so requiring in the MCA 1980, s 4(2).

54 In *Rowe and Davis v UK* (2000) 30 EHRR 1 (ECtHR), para 46, the court considered the benefits, and growing use in special situations, of appointed 'security cleared' independent defence counsel in disputes pertaining to PII. For example, the Youth Justice and Criminal Evidence Act 1999, s 38, Special Immigration Appeals Commission Act 1997, s 6, and the Special Immigration Appeals Act Commission (Procedure) Rules 1998 SI 1998/1881, r 7.

55 Criminal Justice Act 1987. The Serious Fraud Office reported that 65 cases are in progress (Serious Fraud Office, 1999, p 11).

56 Disclosure by email and CD ROM is not, as yet, standard practice in Ontario. It is planned, however, to provide fully electronic briefs within the next year, including digital photographs and videos. Thereafter, disclosure in electronic format will be standard practice (letter from Paul Culver, Crown Attorney, Toronto, Ontario, 9 April 2001).

57 Witness statements in summary proceedings ought to be disclosed before trial (*Stratford Justices ex p Imbert* [1999] 2 Cr App R 276 DC; Attorney General, 2000a, para 43).

58 Sections 1(1), 6 and 7.

59 CJS, 2001, p 10.

encourage better investigations, disclosure practices, management practices and training. The external review process would provide a degree of scrutiny that might encourage in a tangible way the internal review process. In contrast to the disciplinary system or court proceedings, where actions resulting from investigative malpractice are directed against individual police officers, the review would consider the investigator, his supervisor and the methodology. It is submitted that by emphasising that compliance with the code is an appropriate goal, irrespective of conviction, and by demonstrating that success can be achieved through good investigative technique, this reform might be able to have a significant impact on police investigative malpractice. This would enhance public confidence in trial processes and verdicts and promote the realisation of the aims of the CJS.

14.5 CLOSING COMMENT

In the short term, it is hoped that better management and monitoring by professional bodies and the police will encourage more appropriate conduct in some wayward prosecutors and officers. It is submitted that, although the court will move cautiously, it must (and that it is inevitable that it will) assert a supervisory role over primary disclosure where justice demands. This is not a new challenge. A decade ago, the English Court of Appeal (as did the Canadian Court in *Stinchcombe*) and, recently, the Scottish High Court in *McLeod, Petitioner,*[60] took the position that pre-trial disclosure—once unquestionably a matter for prosecution discretion—can be reviewed by the court to prevent injustice. This was the very point of *Ward*. Lord Taylor CJ, in *Davis, Johnson and Rowe*, said: 'The effect of *Ward* is to give the court the role of monitoring the views of the prosecution as to what material should or should not be disclosed and it is for the court to decide. Thus, the procedure described as unsatisfactory in *Ward*, of the prosecution being judge in their own cause, has been superseded by requiring the application to the court.'[61] Glidewell LJ, in *Ward,* acknowledged that it is the duty of judges to persevere in attempting 'to ensure that the law, practice and methods of trial…[are] developed so as to reduce the risk of conviction of the innocent to an absolute minimum'.[62]

60 (1998) SLT 233; SCCR 77.

61 (1993) 97 Cr App R 110, 114 CA. This statement was quoted with approval by Lord Hutton in *Mills and Poole* [1998] 1 Cr App R 43 HL, p 63.

62 *Ward* (1993) 96 Cr App R 1 CA, p 52. These concerns were shared by Sopinka J in *Stinchcombe* [1991] 1 SCR 326, p 336.

ATTORNEY GENERAL'S GUIDELINES (2000) *DISCLOSURE OF INFORMATION IN CRIMINAL PROCEEDINGS*

FOREWORD

The disclosure provisions contained in the Criminal Procedure and Investigations Act 1996 have now been in operation for a period of over three years. For much of that time, concerns have been expressed about the operation of the provisions, by judges, prosecutors, and defence practitioners. Although research is underway evaluating the operation of the provisions, I have concluded that the case for improving the operation of the arrangements is sufficiently strong to warrant my issuing guidelines concerning the role of participants in the cdisclosure process, pending any review by the Government of the legislative scheme established by the Criminal Procedure and Investigations Act. I am pleased to publish such guidelines today.

A draft set of guidelines went out for consultation earlier this year, and resulted in many thoughtful and detailed responses from practitioners, including members of the judiciary, who have to work with the scheme on a daily basis.

The Group that I established to advise me on the preparation of the Guidelines has revised the original draft extensively following the consultation exercise. I am publishing today, together with the guidelines themselves, a commentary on the changes that have taken place to the original draft. There have been a number of highly significant changes addressing areas not covered by the legislation. For instance, prosecutors are told that they should provide to the defence all evidence upon which the Crown proposes to rely in a summary trial; disclosure officers will not be appointed or continue in that role if that is likely to result in a conflict of interest; open access will be provided to the defence in respect of material seized by investigators out of prudence but not examined because it does not appear likely ever to be relevant; and disclosure will now usually be given by prosecutors of certain material, identified in paragraph 40, where some basic conditions are met Beyond this, the Guidelines do a great deal to clarify the responsibilities of investigators, disclosure officers, prosecutors and defence practitioners. If properly applied, the guidelines should substantially allay the concerns that have been expressed about the legislation.

GARETH WILLIAMS

29 November 2000.

DISCLOSURE OF INFORMATION IN CRIMINAL PROCEEDINGS

INTRODUCTION

1 Every accused person has a right to a fair trial, a right long embodied in our law and guaranteed under Article 6 of the European Convention on Human Rights. A fair trial is the proper object and expectation of all participants in the trial process. Fair disclosure to an accused is an inseparable part of a fair trial.

2 The scheme set out in the Criminal Procedure and Investigations Act 1996 (the Act) is designed to ensure that there is fair disclosure of material which may be relevant to an investigation and which does not form part of the prosecution case. Disclosure under the Act should assist the accused in the timely preparation and presentation of their case and assist the court to focus on all the relevant issues in the trial. Disclosure which does not meet these objectives risks preventing a fair trial taking place.

3 Fairness does, however, recognise that there are other interests that need to be protected, including those of victims and witnesses who might otherwise be exposed to harm. The scheme of the Act protects those interests. It should also ensure that material is not disclosed which overburdens the participants in the trial process, diverts attention from the relevant issues, leads to unjustifiable delay, and is wasteful of resources.

4 These guidelines build upon the existing law to help to ensure that the legislation is operated more effectively. In some areas guidance is given which goes beyond the requirements of the legislation, where experience has suggested that such guidance is desirable.

GENERAL PRINCIPLES

Investigators and Disclosure Officers

5 Investigators and disclosure officers must be fair and objective and must work together with prosecutors to ensure that disclosure obligations are met. A failure to take action leading to proper disclosure may result in a wrongful conviction. It may alternatively lead to a successful abuse of process argument or an acquittal against the weight of the evidence.

6 In discharging their obligations under the statute, code, common law and any operational instructions, investigators should always err on the side of recording and retaining material where they have any doubt as to whether it may be relevant.

7 An individual must not be appointed as disclosure officer, or continue in that role, if that is likely to result in a conflict of interest, for instance, if the disclosure officer is the victim of the alleged crime which is the subject of criminal proceedings. The advice of a more senior officer must always be sought if there is doubt as to whether a conflict of interest precludes an individual acting as the disclosure officer. If thereafter the doubt remains, the advice of a prosecutor should be sought.

8 Disclosure officers, or their deputies, must inspect, view or listen to all material that has been retained by the investigator, and the disclosure officer must provide a personal declaration to the effect that this task has been done. The obligation does not apply, however, in the circumstances set out in paragraph 9 below.

9 In some cases, out of an abundance of caution, investigators seize large volumes of material which may not, because of its source, general nature or other reasons, seem likely ever to be relevant. In such circumstances, the investigator may consider that it is not an appropriate use of resources to examine such large volumes of material seized on a precautionary basis. If such material is not examined by the investigator or disclosure officer, and it is not intended to examine it, but the material is nevertheless retained, its existence should be made known to the accused in general terms at the primary stage and permission granted for its inspection by him or his legal advisers. A section 9 statement will be completed by the investigating officer or disclosure officer describing the material by general category and justifying it not having been examined. This statement will itself be listed as unused material and automatically disclosed to the defence.

10 In meeting the obligations in paragraph 6.9 and 8.1 of the Code, it is crucial that descriptions by disclosure officers in non-sensitive schedules are detailed, clear and accurate. The descriptions may require a summary of the contents of the retained material to assist the prosecutor to make an informed decision on disclosure. The same applies to sensitive schedules, to the extent possible without compromising the confidentiality of the information.

11 Disclosure officers must specifically draw material to the attention of the prosecutor for consideration where they have any doubt as to whether it might undermine the prosecution case or might reasonably be expected to assist the defence disclosed by the accused.

12 Disclosure officers must seek the advice and assistance of prosecutors when in doubt as to their responsibility, and must deal expeditiously with requests by the prosecutor for further information on material which may lead to disclosure.

Prosecutors generally

13 Prosecutors must do all that they can to facilitate proper disclosure, as part of their general and personal professional responsibility to act fairly and impartially, in the interests of justice. Prosecutors must also be alert to the need to provide advice to disclosure officers on disclosure issues and to advise on disclosure procedure generally.

14 Prosecutors must review schedules prepared by disclosure officers thoroughly and must be alert to the possibility that material may exist which has not been revealed to them. If no schedules have been provided, or there are apparent omissions from the schedules, or documents or other items are insufficiently described or are unclear, the prosecutor must at once take action to obtain properly completed schedules. If, following this, prosecutors remain dissatisfied with the quality or content of the schedules they must raise the matter with a senior officer, and if necessary, persist, with a view to resolving the matter satisfactorily.

15 Where prosecutors have reason to believe that the disclosure officer has not discharged the obligation in paragraph 8 to inspect, view or listen to material, they must at once raise the matter with the disclosure officer and, if it is believed that the officer has not inspected, viewed or listened to the material, request that it be done.

16 When the prosecutor or disclosure officer believes that material might undermine the prosecution case or assist the defence case, for instance in the case of records of previous statements by witnesses, prosecutors must always inspect, view or listen to the material and satisfy themselves that the prosecution can properly be continued. Their judgement as to what other material to inspect, view or listen to will depend on the circumstances of each case.

17 Prosecutors should inform the investigator if, in their view, reasonable and relevant lines of further inquiry exist.

18 Prosecutors should not adduce evidence of the contents of a defence statement other than in the circumstances envisaged by section 11 of the Act or to rebut alibi evidence. Where evidence may be adduced in these circumstances, this can be done through cross-examination as well as through the introduction of evidence. There may be occasions when a defence statement points the prosecution to other lines of inquiry. Further investigation in these circumstances is possible and evidence obtained as a result of inquiring into a defence statement may be used as part of the prosecution case or to rebut the defence.

19 Prosecutors must ensure that they record in writing all actions and decisions they make in discharging their disclosure responsibilities, and this information is to be made available to the prosecution advocate if requested or if relevant to an issue.

20 In deciding what material should be disclosed (at any stage of the proceedings) prosecutors should resolve any doubt they may have in favour of disclosure, unless the material is on the sensitive schedule and will be placed before the court for the issue of disclosure to be determined.

21 If prosecutors are satisfied that a fair trial cannot take place because of a failure to disclose which cannot or will not be remedied, they must not continue with the case.

Prosecution advocates

22 Prosecution advocates should use their best endeavours to ensure that all material that ought properly to be made available is either presented by the prosecution or disclosed to the defence. However, the prosecution cannot be expected to disclose material if they are not aware of its existence. As far as is possible, prosecution advocates must place themselves in a fully informed position to enable them to make decisions on disclosure.

23 Upon receipt of instructions, prosecution advocates should consider as a priority all the information provided regarding disclosure of material. Prosecution advocates should consider, in every case, whether they can be satisfied that they are in possession of all relevant documentation and that they have been instructed fully regarding disclosure matters. Decisions already made regarding disclosure should be reviewed. If as a result the advocate considers that further information or action is required, written advice should be promptly provided setting out the aspects that need clarification or action. If necessary and where appropriate a conference should be held to determine what is required.

24 The prosecution advocate must continue to keep under review until the conclusion of the trial decisions regarding disclosure. The prosecution advocate must in every case specifically consider whether he or she can satisfactorily discharge the duty of continuing review on the basis of the material supplied already, or whether it is necessary to inspect further material or to reconsider material already inspected.

25 Prior to the commencement of a trial, the prosecuting advocate should always make decisions on disclosure in consultation with those instructing him and it is desirable that the disclosure officer should also be consulted. After a trial has started, it is recognised that in practice consultation on disclosure issues may not be practicable; it continues to be desirable, however, whenever this can be achieved without affecting unduly the conduct of the trial.

26 The practice of 'counsel to counsel' disclosure should cease: it is inconsistent with the requirement of transparency in the prosecution process.

Defence practitioners

27 A defence statement should set out the nature of the defence, the matters on which issue is taken and the reasons for taking issue. A comprehensive defence statement assists the participants in the trial to ensure that it is fair. It provides information that the prosecutor needs to identify any remaining material that falls to be disclosed at the secondary stage. The more detail a defence statement contains the more likely it is that the prosecutor will make a properly informed decision about whether any remaining material might assist the defence case, or whether to advise the investigator to undertake further inquiries. It also helps in the management of the trial by narrowing down and focussing the issues in dispute. It may result in the prosecution discontinuing the case. Defence practitioners should be aware of these considerations in advising their clients.

28 Defence solicitors should ensure that statements are agreed by the accused before being served. Wherever possible, the accused should sign the defence statement to evidence his or her agreement.

INVOLVEMENT OF OTHER AGENCIES

(a) Material held by Government departments or other Crown bodies

29 Where it appears to an investigator, disclosure officer or prosecutor that a Government department or other Crown body has material that may be relevant to an issue in the case, reasonable steps should be taken to identify and consider such material. Although what is reasonable will vary from case to case, prosecutors should inform the department or other body of the nature of its case and of relevant issues in the case in respect of which the department or body might possess material, and ask whether it has any such material. Departments in England and Wales have established Enquiry Points to deal with issues concerning the disclosure of information in criminal proceedings. Further guidance for prosecutors and investigators seeking information (including documents) from Government departments or other Crown bodies may be found in the pamphlet 'Giving Evidence or Information about suspected crimes: Guidance for Departments and Investigators' (March, 1997, Cabinet Office).

(b) Material held by other agencies

30 There may be cases where the investigator, disclosure officer or prosecutor suspects that a non-government agency or other third party (for example, a local authority, a social services department, a hospital, a doctor, a school,

providers of forensic services) has material or information which might be disclosable if it were in the possession of the prosecution. In such cases consideration should be given as to whether it is appropriate to seek access to the material or information and if so, steps should be taken by the prosecution to obtain such material or information. It will be important to do so if the material or information is likely to undermine the prosecution case, or assist a known defence.

31 If the investigator, disclosure officer or prosecutor seeks access to the material or information but the third party declines or refuses to allow access to it, the matter should not be left. If despite any reasons offered by the third party it is still believed that it is reasonable to seek production of the material or information, and the requirements of section 2 of the Criminal Procedure (Attendance of Witnesses) Act 1965 or as appropriate section 97 of the Magistrates Courts Act 1980 are satisfied, then the prosecutor or investigator should apply for a witness summons causing a representative of the third party to produce the material to the Court.

32 Information which might be disclosable if it were in the possession of the prosecution which comes to the knowledge of investigators or prosecutors as a result of liaison with third parties should be recorded by the investigator or prosecutor in a durable or retrievable form (for example potentially relevant information revealed in discussions at a child protection conference attended by police officers).

33 Where information comes into the possession of the prosecution in the circumstances set out in paragraphs 30–32 above, consultation with the other agency should take place before disclosure is made: there may be public interest reasons which justify witholding disclosure and which would require the issue of disclosure of the information to be placed before the court.

DISCLOSURE PRIOR TO PRIMARY DISCLOSURE UNDER THE CPIA 1996

34 Prosecutors must always be alive to the need, in the interests of justice and fairness in the particular circumstances of any case, to make disclosure of material after the commencement of proceedings but before the prosecutor' s duty arises under the Act For instance, disclosure ought to be made of significant information that might affect a bail decision or that might enable the defence to contest the committal proceedings.

35 Where the need for such disclosure is not apparent to the prosecutor, any disclosure will depend on what the defendant chooses to reveal about the defence. Clearly, such disclosure will not normally exceed that which is obtainable after the duties under the 'Act' arise.

PRIMARY DISCLOSURE

36 Generally, material can be considered to potentially undermine the prosecution case if it has an adverse effect on the strength of the prosecution case. This will include anything that tends to show a fact inconsistent with the elements of the case that must be proved by the prosecution. Material can have an adverse effect on the strength of the prosecution case:

(a) by the use made of it in cross-examination; and
(b) by its capacity to suggest any potential submissions that could lead to:

(i) the exclusion of evidence;
(ii) a stay of proceedings;
(iii) a court or tribunal finding that any public authority had acted incompatibly with the defendant' s rights under the ECHR.

37 In deciding what material might undermine the prosecution case, the prosecution should pay particular attention to material that has potential to weaken the prosecution case or is inconsistent with it. Examples are:

i Any material casting doubt upon the accuracy of any prosecution evidence.
ii Any material which may point to another person, whether charged or not (including a co-accused) having involvement in the commission of the offence.
iii Any material which may cast doubt upon the reliability of a confession.
iv Any material that might go to the credibility of a prosecution witness.
v Any material that might support a defence that is either raised by the defence or apparent from the prosecution papers. If the material might undermine the prosecution case it should be disclosed at this stage even though it suggests a defence inconsistent with or alternative to one already advanced by the accused or his solicitor.
vi Any material which may have a bearing on the admissibility of any prosecution evidence. It should also be borne in mind that while items of material viewed in isolation may not be considered to potentially undermine the prosecution case, several items together can have that effect

38 Experience suggests that any item which relates to the defendant' s mental or physical health, his intellectual capacity, or to any ill-treatment which the defendant may have suffered when in the investigator' s custody is likely to have the potential for casting doubt on the reliability of an accused' s purported confession, and prosecutors should pay particular attention to any such item in the possession of the prosecution.

SECONDARY DISCLOSURE

39 Prosecutors should be open, alert and promptly responsive to requests for disclosure of material supported by the comprehensive defence statement. Conversely, if no defence statement has been served or if the prosecutor considers that the defence statement is lacking specific and/or clarity, a letter should be sent to the defence indicating that secondary disclosure will not take place or will be limited (as appropriate), and inviting the defence to specify and/or clarify the accused's case. The prosecutor should consider raising the issue at a preliminary hearing if the position is not resolved satisfactorily to enable the court to give directions.

40 Experience suggests that material of the description set out below might reasonably be expected to be disclosed to the defence where it relates to the defence being put forward. Accordingly, following the delivery of a defence statement and on receipt of a request specifically linking the material sought with the defence being put forward, such linked material should be disclosed unless there is good reason not to do so. However, if defences put forward in a defence statement are inconsistent within the meaning of section 11 of the Act, then the preceding guidance set out in this paragraph will not apply. Conversely, if material of the description set out below might undermine the prosecution case, and does not justify an application to the court to withhold disclosure, prosecutors must disclose it at the primary stage. The material is:

i Those recorded scientific or scenes of crime findings retained by the investigator which:
relate to the defendant; and
are linked to the point at issue; and
have not previously been disclosed.

ii Where identification is or may be in issue, all previous descriptions of suspects, however recorded, together with all records of identification procedures in respect of the offence(s) and photographs of the accused taken by the investigator around the time of his arrest;

iii Information that any prosecution witness has received, has been promised or has requested any payment or reward in connection with the case;

iv Plans of crime scenes or video recordings made by investigators of crime scenes;

v Names, within the knowledge of investigators, of individuals who may have relevant information and whom investigators do not intend to interview;

vi Records which the investigator has made of information which may be relevant, provided by any individual (such information would

include, but not be limited to, records of conversation and interviews with any such person). Disclosure of video recordings or scientific findings by means of supplying copies may well involve delay or otherwise not be practicable or desirable, in which case the investigator should make reasonable arrangements for the video, recordings or scientific findings to be viewed by the defence.

APPLICATIONS FOR NON-DISCLOSURE IN THE PUBLIC INTEREST

41 Before making an application to the court to withhold material which would otherwise fall to be disclosed, on the basis that to disclose would not be in the public interest, a prosecutor should aim to disclose as much of the material as he properly can (by giving the defence redacted or edited copies of summaries).

42 Prior to or at the hearing, the court must be provided with full and accurate information. The prosecution advocate must examine all material which is the subject matter of the application and make any necessary enquiries of the prosecutor and/or investigator. The prosecutor (or representative) and/or investigator should attend such applications.

SUMMARY TRIAL

43 The prosecutor should, in addition to complying with the obligations under the CPIA, provide to the defence all evidence upon which the Crown proposes to rely in a summary trial. Such provision should allow the accused or their legal advisers sufficient time properly to consider the evidence before it is called. Exceptionally, statements may be withheld for the protection of witnesses or to avoid interference with the course of justice.

MATERIAL RELEVANT TO SENTENCE

44 In all cases the prosecutor must consider disclosing in the interests of justice any material which is relevant to sentence (eg, information which might mitigate the seriousness of the offence or assist the accused to lay blame in whole or in part upon a co-accused or another person).

APPLICABILITY OF THESE GUIDELINES

45 These guidelines should be adopted with immediate effect in relation to all cases submitted in future to the prosecuting authorities in receipt of these guidelines. They should also be adopted as regards cases already.submitted to which the Act applies, so far as they relate to stages in the proceedings that have not yet been reached.

COMMENTARY

Earlier this year the Attorney General issued a draft set of guidelines on disclosure for public consultation. A large number of responses were received from a wide range of participants in the criminal justice system. Many of the comments and suggestions have been adopted in the final version of the guidelines which is published today. The guidelines are applicable to all investigations and prosecutions undertaken by the Crown, and therefore relate to prosecutions by government departments as well as prosecutions by the Crown Prosecution Service. The guidelines are binding on all public prosecutors, and it is expected that they will have a persuasive effect on other participants in the criminal justice process. It is hoped that this commentary will explain the reasoning behind the decisions to accept or reject the various suggestions that were made through the consultation exercise.

These guidelines have been produced in response to concerns about the operation of the disclosure provisions in the Criminal Procedure and Investigations Act 1996, and the accompanying Code, by many criminal practitioners, including the Director of Public Prosecutions. The guidelines cover the role of investigators, disclosure officers, and lawyers, concentrating particularly on the prosecutor. The opening section puts disclosure issues in context. One of the themes of the guidelines is that there is an inter-relationship between the differing responsibilities of the participants in the trial process. Investigators and disclosure officers may not be able to do their job properly without advice from the prosecutor.

Equally, prosecutors cannot do their job properly without satisfactory recording and retention of material, followed by full revelation of the material. Again, prosecutors may not be able to do their jobs properly without adequate defence statements. Prosecution advocates will not be able to make reliable disclosure decisions nor comply with their obligation to keep the need for further disclosure under continuing review if they have not been placed in a fully informed position by the investigator, disclosure officer and prosecutor.

The guidelines build upon the existing law to provide interim guidance which will ensure that the legislation is operated more effectively, pending planned changes to the Joint Operational Instructions to the police and the CPS, and the

review of the disclosure arrangements by the Government in the light of the research commissioned by the Home Secretary.

Some general points may be helpful. A number of respondents to the consultation exercise favoured lists of the kind of material that should automatically or usually be disclosed by prosecutors. Such lists had not been included in the draft guidelines because the interdepartmental working group preparing the guidelines reached the view that the content of any such a list would be highly debatable, and that such a list could not in any event be definitive. Creation of such list would also result in a confusing hierarchy for material which might potentially be disclosed, and might lead to an over-mechanistic approach which ignored the legislative requirements. It would also be impossible to devise lists which applied to all prosecuting and investigative bodies.

Notwithstanding these objections a number of respondents favoured the idea, one judicial commentator noting that such an approach solves 95% of all disclosure issues in a case. The Bar conceded the strength of the argument that a mode of practice requiring disclosure of types of matter by category of item is of debatable value, but argued that there should be something akin to automatic disclosure of certain types of material by reference to their subject matter. They put forward an extensive scheme based on this proposal. Having reflecting carefully on the representations the Group concluded that the balance of the arguments was in favour of a change. In paragraph 40 we have identified material which might reasonably be expected to be disclosed to the defence where it relates to the defence being put forward. Disclosure of such material will be made (unless there is good reason not to do so) following the delivery of a defence statement and on receipt of a request specifically linking the material sought with the defence put forward. Such material should of course be disclosed at the primary stage if appropriate.

In opting for this solution, whilst not going so far as to provide for automatic disclosure, we have identified material which should usually be disclosed by prosecutors. This should avoid time-consuming and ultimately fruitless exchanges between the prosecution and the defence in respect of material which can quite reasonably be disclosed in normal circumstances. We concluded that it was necessary to link the material disclosed with a specific request relating to the defence in order to avoid the wholesale disclosure of material which is not in fact required. The respondents to the consultation exercise who commented on this issue usually made suggestions as to what material should be included in the list. While the rationale behind almost all the suggestions was clearly understood, we opted to include in the list only those items that we thought would command general support. Paragraph 40 has been the subject of extensive consultation with the Criminal Bar Association, Law Society and the police, and also within Whitehall.

The Working Group responsible for the preparation of the guidelines considered carefully the various suggestions that were made in the responses for some form of certification and audit procedure. However it was thought that these would not be workable in the absence of formal line management roles across the various parties involved in the trial process. We would however encourage all participants to discuss difficulties and work together to resolve any local difficulties. In order to assist this, the guidelines outline the roles and responsibilities of those involved at each stage of the disclosure process.

The guidelines are an attempt to strike a fair balance between the respective needs of the participants in the investigative and trial process. Publication of the guidelines should be seen in the context of the various initiatives taking place concerning disclosure issues. These are as follows:

- As part of the Government' s responsibilities to evaluate new pieces of legislation, the Home Secretary has commissioned independent research to evaluate the working of the disclosure provisions in the Criminal Procedure and Investigations Act 1996, which came into force on 1 April 1997. The study, which began in January 2000 and will be completed early next year, involves a thorough independent examination of all aspects of the working of the disclosure provisions. It will build on the work undertaken by the CPS Inspectorate' s thematic review of disclosure, which was published in March and as well as examining both police and CPS case files, views will be sought from police, prosecutors, the defence and the judiciary. The project is being overseen by interdepartmental Steering Group, which includes representatives from the Criminal Bar Association and the Law Society. The research will enable the Government to take informed decision on whether any changes are needed to the current disclosure arrangements.
- In May last year, the Director of Public Prosecutions initiated a programme of work within the Crown Prosecution Service to redress the problems with the operation of the current disclosure regime. This included a number of joint training initiatives with the police. Some CPS Areas have also put into place practices to monitor disclosure.
- In March this year the CPS Inspectorate published a thematic review of the disclosure of unused material, which contained a number of conclusions, recommendations and suggestions. Some of these are given effect in the Attorney General' s guidelines published today. Generally, the Inspectorate Report is being considered by the CPS with a view to taking forward the recommendations, suggestions and conclusions that are accepted. This will be done by agreeing a joint action plan with the police.

Detailed comments on the responses to the consultation exercise are set out below.

Introduction

In considering the interests of all those involved in the trial process, the group has tried to ensure that due emphasis is given to the scheme of disclosure under the Act. The scheme relies on each participant fulfilling their obligations at each stage of the process. This interdependence will ensure that disclosure takes place in a fair and timely way. Whilst some respondents viewed open access to all material as the only true solution to problems of disclosure, this is not the scheme of the Act, nor is it appropriate to simply abdicate all the duties and responsibilities under the Act.

A new paragraph, paragraph 4, has been added to make plain that in some instances the guidelines have established arrangements which are outside and go beyond the requirements of the legislation. Examples can be found in paragraphs 7, 9, 40, 43 and 44. There is of course no reason why new arrangements cannot be put in place which add to those contained in the legislation, and where the case for such arrangements has been made out we have not hesitated to establish them.

There have been a number of relatively minor changes to the first three paragraphs.

Investigators and Disclosure Officers

There was a general welcome for the greater involvement of the prosecutor proposed in the draft guidelines. Some respondents advocated that all unused material should be provided to the prosecutor. They felt that the disclosure officer was not qualified to assess whether unused material undermined the prosecution case or assisted a defence disclosed by the accused. Those criticisms were based upon a perceived lack of competence and independence on the part of the disclosure officer. However, a change of the kind proposed would involve a significant departure from the scheme laid out in the and could not be justified in the absence of evidence. Research commissioned by the Home Secretary on the effectiveness of the current scheme will be completed in the course of the next few months, following which there will be a review of the disclosure scheme.

On the other hand, concerns were expressed about the shift in the role of the prosecutor to provide the prosecutor with, arguably, a more supervisory role than at present, thus compromising the prosecutor's independence. Despite this, it was felt that a greater role for the prosecutor is a necessary consequence of effective improvement of the arrangements.

The issue of routine revelation to the prosecutor of standard documentation, for example, crime reports and CAD messages, coupled with routine disclosure, was favoured by many respondents including members of the Judiciary. This was rejected by the group, after some considerable thought. ACPO referred to

the effect this would have on resources and were concerned about the disclosure of such documents without the editing of sensitive information. One of the recommendations of the CPS Inspectorate Report on the Thematic Review of the Disclosure of Unused Material is that CPS should consider with ACPO an amendment to the JOPI and the Manual of Guidance which would have the effect that in all cases a copy of the Crime Report and Log of Messages is provided with the MG6C: paragraph 4.74. The Group decided that the question of routine revelation of such documentation was most appropriately taken forward as part of the CPS response to the Thematic Review, given the fact that such information is specific to CPS cases, whereas the guidelines are applicable to prosecutors generally. Other prosecutors may wish to consider whether there are specific documents in the cases they deal with regularly that would benefit from routine revelation.

Original 4 (new 5)

Most responses were favourable, whilst some argued for an even more interventionist role by the prosecutor. The Law Society were concerned about a lack of objectivity by disclosure officers, and the Criminal Bar Association compared the status of custody officer under PACE and highlighted the fact that the Act does not require the disclosure officer to be independent of the investigation. These matters were also raised by interviewees during the course of the Thematic Review and are referred to at paragraph 4.8 of the Review. The group added words to emphasise the importance of fairness and objectivity by both investigators and disclosure officers.

Original 5 (new 6)

Most respondents favoured this paragraph and thought it was helpful. There have been no changes.

New paragraph 7

A number of respondents, including the Judiciary, expressed concern that there was nothing to stop the disclosure officer having a conflict of interest For instance, the disclosure officer could be a victim. The Group responded to these views by adding this paragraph which makes plain that an individual must not act as a disclosure officer if that is likely to result in a conflict of interest. The case of an officer who is a victim is a clear and obvious case to be covered by the guidelines. Other instances are more debatable. For instance, an unscrupulous defendant might make a complaint about the conduct of a disclosure officer in order to create an apparent conflict of interest to preclude the officer from continuing to act in that role. To cover that situation we have established a mechanism for determining whether the disclosure officer should continue to act in that role.

Original 6 (new 8)

Some respondents wanted detailed certification with regard to the examination of the material and greater sanction for failure. One of the suggestions of the Thematic Review is that the Director of Policy in the CPS should pursue with ACPO whether the JOPI should be amended, to make it a requirement for disclosure officers to endorse on the report that they have considered all the material listed on the MG6C and MG6D (and other material if retained and not listed), and that in their opinion, there is no material which might undermine the prosecution case. (Paragraph 11.11). The point is being taken forward by the CPS. Other prosecutors may also wish to consider whether some form of certification would assist the disclosure process. Amendments have been made to this paragraph, however, to emphasise the absolute nature of the requirement in the paragraph (subject to the situation covered by paragraph 9) and to allow for the fact that the obligation can be discharged by a deputy (which will be important in large cases) but subject to the continuing supervision of the disclosure officer.

New paragraph 9

Old paragraph 6 caused difficulty to ACPO and the SFO, in relation to those untypical cases in which large amounts of material are seized during an investigation which may not appear to be relevant, for example, videos taken from a much wider area than that in which an.7 incident took place and the contents of computers. Such material is seized out of prudence, in case it might at some stage become relevant. If material of the nature was not seized (because at the time it did not seem to be relevant) but then later, because of a subsequent turn in the investigation, it was realised that the material was in fact relevant, then of course in many instances it would be too late to seize the material because the material will have been destroyed. On the other hand, to examine the material in depth at the stage when there is no case for doing so would be disproportionate. Equally, it is important that if the investigator is not to examine the material, nevertheless the defence should have open access to it. The new paragraph provides for this. Amendments will also be made to the MG6C form so that investigators will be prompted to complete a section 9 statement describing the material by general category and justifying it not having been examined. This statement will be disclosed to the defence.

Original 7 (new 10)

Some respondents welcomed the provision, whilst other expressed the view that the paragraph simply reiterated what was contained in the Act and the Code. The paragraph was designed to strengthen the Code and to answer comments from respondents about poor scheduling. The paragraph has now been strengthened to make plain the underlying intention behind paragraphs

6.1 and 8.1 of the Code. It deals with the need to provide, if necessary, a summary of the contents of the retained material.

Original 8 and 9 (new 11 and 12)

These represent a balance between respondents who thought that the prosecutor should take a far greater role and those who were concerned about resource issues and the change in the role of the prosecutor to supervisory one. They should be read in conjunction with paragraph 12.

Prosecutors generally

Original 10 (new 13)

The approach taken in this paragraph was generally welcomed although there was concern from some, for example the Criminal Law Solicitors Association, that this was a re-statement of what should be happening in any event. However, the group thought it appropriate to reiterate and emphasise the importance of this. Some consultees, and in particular a member of the judiciary, thought that as originally drafted, it could be interpreted as minimising the role of the police. The paragraph has been amended to reflect that concern. Although a suggestion was made that it 8 may be appropriate to include defence advocates in this paragraph, the role of defence practitioners is dealt with at paragraph 27.

Original 11 (new 14)

This is now included in paragraph 14. There were concerns expressed by some consultees that this was putting an unfair burden on prosecutors, expecting them to be aware of material of which they could not be expected to have knowledge. However, the paragraph does not go this far; rather, it emphasises that prosecutors have to be proactive about seeking material which they should reasonably be expected to know about. Some consultees would like to have seen examples of this type of material but as this would vary greatly depending on the circumstances of each case, it was felt that such a list may be unhelpful.

Original 12 (new 13)

This is now more appropriately placed in the new paragraph 12.

Original 13 (new 14)

Accurate and complete schedules are essential for the successful operation of disclosure. The Law Society made the point that it is difficult for the defence to use the schedules as they were intended if they consist only of

lists with no further detail. The group has attempted to address the problem of poor schedules by stating that any concern prosecutors have about the quality or content of schedules should be taken up with a senior officer. Paragraph 10 of the guidelines also deals with the need for the police to provide detailed, clear and accurate descriptions which may also entail including a summary of the contents of material. The Criminal Bar Association recommends the use of certification by prosecutors but the group considered that this would be difficult in practice particularly where there may be a number of lawyers involved in the disclosure process at a number of different stages. There was some suggestion that prosecutors should inspect a sample of schedules to monitor the accuracy and completeness of schedules. Although this is attractive, it was not felt that these guidelines were an appropriate place to deal with that issue.

Original 14 and 15 (new 15 and 16)

The approach in these two paragraphs were generally welcomed. The paragraphs have been strengthened by replacing the word 'should' with 'must' to emphasise the obligations contained in the paragraphs. The importance of previous statements by witnesses has been underlined, at 9 the request of the Law Society, by citing this as a particular example of material that the prosecutor should specifically examine.

New paragraph 17

This paragraph has been added at the suggestion of the Criminal Bar Association to buttress the existing requirement in the Code for investigators to pursue reasonable and relevant lines of further inquiry.

Original 16 (new 18)

There was a mixed response to this paragraph although the Law Society generally welcomed it. The approach taken by the group in this paragraph was to outline the limited circumstances in which the contents of a defence statement can be used and to set out the fact that evidence obtained as a result of investigations into a defence statement can be adduced by the prosecution. The paragraph accords with current caselaw.

Original 17 (new 19)

The Law Society and the London Criminal Courts Solicitors Association thought that continuing review was rarely carried out. A number of difficulties were identified by some of the consultees with the original paragraph. These included the difficulties of a disclosure officer being present during court hearings when the officer may be a live prosecution witness or where the officer' s attendance may not be otherwise necessary. The paragraph has, therefore, been deleted in its original form. The new paragraph does, however, add a new requirement

that prosecutors always record their decision-making process. Concern was also expressed about the role and responsibility of counsel and this is addressed within the section 'Prosecution Advocates'.

Original 18 (new 20)

This was generally welcomed and has not been amended.

Original 19 (new 21)

This has been amended to emphasise that prosecutors have to be satisfied that a fair trial cannot take place before the decision is taken not to continue with a case. In reaching such a decision, prosecutors must apply the CPIA, the Code of Practice and these guidelines. It was also suggested that there should be an objective assessment in such cases and that it should not be left to the prosecution. Although this was considered, it was felt inappropriate and impractical to take this responsibility away from prosecutors. The Court, in any event, has the ultimate sanction of halting proceedings where it is concerned about disclosure. Prosecution counsel and solicitor advocates

New paragraph 22

A new introductory paragraph as been added at the suggestion of the Criminal Bar Association which sets out the general principles which should guide the conduct of prosecution advocates. Subsequent paragraphs in this section flesh out the detail.

Original 20

Original paragraph 20 referred to Prosecution counsel and solicitor advocates as being prosecutors for the purpose of the guidelines and the Criminal Procedure and Investigation Act and as being therefore subject to the obligation imposed by them.

It was observed that this would lead to a 'blurring of roles' when other paragraphs of the guidelines were considered and that this would impose duties upon prosecuting counsel which would be difficult to fulfil. The comments made are accepted. Paragraph 20 has been removed.

Original 21 (new 23–25)

Recommendations by the Law Society and the Criminal Bar Association that prosecuting advocates should review disclosure decisions already made and that they should keep under review the need for disclosure throughout the trial process have been accepted; indeed the original paragraph 21 has undergone extensive revision. Originally, the Criminal Bar Association recommended that

(a) prosecution advocates should be required to comply with a form of certification as to their involvement in the disclosure process, (b) prosecution advocates must view certain categories of material and review them for disclosability, (c) all unused material was to be available at court. In regard to (a) and (b) a number of factors were considered. Any certification requirement for Counsel was more a matter for arrangements between prosecutors and counsel and was not appropriate for the Guidelines. It was doubted whether in any event such certification was necessary given the professional responsibilities and duties already placed on prosecution counsel by the Bar Code of Conduct and given the extra guidance now contained in this section of the Attorney General' s Guidelines.

In regard to (c) the view was taken that it would be impractical, particularly in large cases, to require police to make available all unused material to cater for the situation when a brief is 'returned' late so that newly instructed counsel could review the material. Furthermore, that a brief should be 'returned' at such a late stage that newly instructed counsel could only view or consider the unused material at Court was a matter which was to be deprecated and was 'bad practice' which was not to be approved or encouraged.

The guidelines now deal specifically with the importance of consultation between the advocate and those instructing the advocate.

The phrase 'in exceptional circumstances' has been deleted because there could be situations when counsel might be required to make disclosure decisions very quickly and where not to be able to make such decisions might delay, unnecessarily, a trial. However, the desirability of consultation where possible without affecting the conduct of the trial is made plain.

The Law Society and the Criminal Bar Association have been fully consulted over the changes, and agree with them. New paragraph 24 gives effect to the suggestion of the CPS Inspectorate at paragraph 13.42 of its report on disclosure, the reasoning of which applies to all prosecutors.

Original 22 (new 26)

While there were some submissions which referred to exceptional circumstances where 'counsel to counsel' disclosure was necessary the weight of submissions was clearly for the practice to cease and this paragraph was strongly supported.

It was considered that the practice of 'counsel to counsel' disclosure went against the idea of transparency. That defence counsel would be informed of disclosure matters by prosecution counsel and not subsequently inform his instructing solicitor of what had been revealed was a questionable practice in any event and appeared to have no basis in the Bar Code of Conduct.

Defence practitioners

Original 23 (new 27 and 28)

A view was expressed that as drafted paragraph 23 did not express strongly enough the thr ust of the Act. It was thought that there should be an emphasis that a proper defence statement is required by law in Crown Court cases and that requests for further disclosure should be supported by reasons to assist the prosecutor in responding to these requests.

There were suggestions that the guidelines set out what is and what is not to be considered as an adequate defence statement and that reference be made in the Guidelines to the guidance given by the Professional Conduct and Complaints Committee of the Bar in relation to defence statements.

As now drafted paragraph 27 tries to reflect some of the above stated views in that it points out that the more detail a defence statement contains the easier it is for the prosecutor to make an informed decision about further disclosure. It also sets out more fully the purpose of a defence statement, as explained in the case of *R v Tibbs*. New paragraph 28 underlines the importance of defence solicitors agreeing defence statements before serving them. The wording of the paragraph has been agreed with the Law Society.

It was not considered appropriate or necessary for the Guidelines to repeat what is in the Act (in relation to the requirement for a defence statement), nor what is already in the guidance given by the Professional Conduct and Complaints Committee.

Involvement of other agencies

Original 24–26 (new 29–33)

The approach in the guidelines was welcomed generally by the Criminal Law Solicitors Association, the Society of Labour Lawyers (Criminal Law Group) and other respondents. A number of changes have been made to strengthen and clarify the paragraphs, adopting suggestions made by respondents, in particular the Criminal Bar Association..

ACPO and CPS commented that there was confusion between the paragraphs caused by reference in original paragraph 24 to 'Government departments or agencies' and in paragraph 25 to 'local authorities, social services departments and similar agencies'. Concern was also voiced by the police and CPS that paragraph 24 would require routine trawls of departments, for no apparent good reason. These points have been dealt with in the redrafts.

The police observed that paragraph 25 (now 32) was wholly impractical when stating that information that has not been written down or otherwise

recorded is to be regarded as in the possession of the prosecution. It was envisaged by police that this would require all corridor conversations and telephone calls be recorded on the off chance that something might later emerge as relevant. The CPS voiced similar concerns that prosecutors would be deemed to be in constructive possession of material which they knew existed but of which they did not know the full contents.

The amended draft refers to material or information that is disclosable. The effect of the paragraph is to ensure that it is the responsibility of investigators to record such information when they come across it, rather than, for instance, rely upon the fact that a written record of a case conference will be produced by a social worker). It is also to be observed that this paragraph re-enforces the requirements in paragraph 4.1 of the Code.

Paragraph 26 (now 33) has been amended to take account of the need to place third party material before a Judge whenever there may be reasons to justify withholding disclosure in the public interest

Disclosure prior to primary disclosure under the CPIA 1996

Original 27 (new 34)

Those that commented on this paragraph were generally content with the draft, although the CPS felt that the force of the Court of Appeal judgment in Lee was not fully reflected in the summary. The text has therefore been modified in order to meet this point. The Criminal Bar Association proposed that the text should include the list of material suggested in Lee. However, it was noted that the Court of Appeal had not fully endorsed this list and it was not considered that it was appropriate to include lists of material in these guidelines, although as a compromise examples have been cited.

Primary disclosure

Original 28 (new 36)

The original text has been supplemented by further guidance about situations in which material can have an adverse effect on the strength of the prosecution case, at the suggestion of the Criminal Bar Association.

Original 29-31 (new 37-39)

A number of respondents suggested that prosecutors do not consider the wider implications of material. This point has been addressed in paragraph 37(vi). Other suggestions on widening the scope of the list in paragraph 37, although well argued and understandable, were felt by the group to be impracticable. A tailpiece has however been added addressing the situation in which while

items viewed in isolation may not appear to be potentially disclosable, several items taken together may have a significance which does make them potentially disclosable. It is important not to lose sight of the overall picture when looking at material item by item.

The issue of disclosure of previous convictions of prosecution witnesses provoked strong comment on both sides. The need to provide relevant information on background to the defence must however be tempered by respect for an individual' s privacy. This is an issue that may well be raised under the Human Rights Act. Different prosecutors have different views as to whether or not there should be automatic disclosure of convictions and the issue has not been resolved. For these reasons, the group decided not to extend the current guidelines.

Paragraph 38 is new. It identifies particular circumstances relating to the defendant which demand particular attention by the prosecution.

Secondary disclosure

Original 32 (new 39)

Generally, the sending of reminders to the defence concerning case statements was thought to be a useful tool to assist in resolving disclosure issues. The service of a defence case statement is a vital step in the disclosure process. It is hoped that the guidance at paragraph 27 will enable the.15 defence team to use the case statement as an effective tool to obtain secondary disclosure and identify the issues in the case.

New 40

We have already explained, in the introduction to the commentary, the rationale behind paragraph 40. It might be helpful, though, to provide some further explanation of some of the items in the list.

Item (i) has been drafted in a way which is intended to cover the material relevant to the point at issue in the defence without bringing in its wake any extraneous material. In a medium to large scale investigation a great deal of scientific or scenes of crimes findings might be generated. If the point at issue concerns only one aspect of those findings, it would be wasteful of time and resources to provide that disclosure should usually be made of the remainder.

Item (v) covers the situation, not uncommon, in which the investigator has gathered all the information to enable a complete understanding of the case and therefore does not think it necessary to interview more witnesses. For instance in a street fight there may have been dozens of witnesses. If the investigator knows the names of such uninterviewed witnesses (because the names were taken, or the witnesses were previously known to the

investigator) then the names are disdosable if the conditions in paragraph 40 are met.

Item (vi) is a failsafe to ensure the disclosure of all information in the possession of the investigator that might be relevant. It does not involve a new obligation on investigators to record information; rather it ensures that information which they should in any event be recording is disclosed where the conditions in paragraph 40 are met.

Original 33 (now deleted)

The consultation document contained a paragraph concerning the current common law position of disclosure of material which reflects only on the credibility of defence witnesses. Many respondents commented that the *Jespers v Belgium* decision may well affect this caselaw. It is not possible to anticipate how the courts will deal with the issue in the light of tike Human Rights Act. Although the Group had some sympathy with the representations made, it did not feel that it would be appropriate to prejudge the outcome of such deliberations. The existing common law remains applicable. Nonetheless, it was felt that there would be little value in repeating this, and therefore the old paragraph has been deleted.

Application for disclosure in the public interest

Original 34 (new 41, 42)

New paragraph 42 reflects recommendation 23 of the recent report by HH Gerald Butler QC concerning the handling of the case of *R v Doran and Others.* It stresses the need for the court to be fully and accurately informed about all matters prior to or during such applications. Although the report relates to a Customs case, it is considered that the reasoning has an application to all prosecutors.

Summary trial

Original 35 (new 43)

All those that commented on this paragraph welcomed its inclusion. There is no statutory obligation to provide disclosure of prosecution evidence in summary trials. However it is best practice to do so. A sentence has been added inviting prosecutors to consider disclosing in the interest of justice any material which is relevant to sentence despite the fact that there is no obligation to do so under the legislation.

MATERIAL RELEVANT TO SENTENCE

New 44

Material relevant to sentence may not strictly fall within the CPIA, either because it does not fall within the statutory tests or because there is an early guilty plea and so the Act is not applicable. Nevertheless the case for disclosing such material in the interests of justice may be compelling. This paragraph requires prosecutors to consider disclosing such material.

Original 36 (new 45)

This has been amended slightly to underline the fact that the guidelines are retrospective.

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PROVINCE OF ONTARIO MINISTRY OF THE ATTORNEY GENERAL CROWN POLICY MANUAL OF 'DISCLOSURE', 1995

Policy	Original Date	Update
D-1	January 15, 1994	February 15, 1995

Disclosure	CROSS REFERENCE:
	Spouse Partner Assault
	Child Abuse—Physical and Sexual
	Sexual Offences
	Victims of Crime
	Victim/Witness with Special Needs
	Charge Screening
	Resolution Discussions

1 The purpose of Disclosure is to assist in guaranteeing the accused's common law and constitutional rights to a fair trial and to make full answer and defence.

2 Timely and full Disclosure by Crown counsel, when diligently utilized by the defence, benefits both the accused and the administration of justice as a whole. Among these benefits are:

(a) the resolution of non-contentious and time-consuming issues in advance of the preliminary hearing or the trial, which ensures the most efficient use of court time;
(b) the waiver or shortening of preliminary hearings and the shortening of trials; and
(c) early resolution of cases including, where appropriate, the entry of pleas of guilty or the withdrawal of charges.

3 The governing principle is that Crown counsel is under a duty to disclose all information in his or her possession relevant to the guilt or innocence of the accused unless the information is excluded from disclosure by a legal

privilege. Crown counsel's duty to disclose any relevant information in his or her possession, whether favourable or unfavourable to the accused extends to any information which is not clearly irrelevant. All decisions by Crown counsel not to disclose on grounds of either privilege or relevance are reviewable by the trial judge. Crown counsel will have satisfied himself or herself during the charge screening process that the police have provided all such information to die Crown (see guideline 4 of the Charge Screening Policy). The concept of possession, in law, requires control. Without control there is no duty to disclose. Paragraph 18 of the Crown Policy gives examples of the kinds of documents that are not under Crown counsel's control.

4 (a) Part of Crown counsel's obligation to disclose all relevant information in his or her possession includes the disclosure of information in his or her possession which is relevant to the prosecution's case, thus enabling the accused to know the case that he or she must meet. Crown counsel must not withhold such information for the purpose of cross-examining on it. This paragraph does not require pre-trial disclosure of reply evidence tendered by Crown counsel in response to issues raised by the accused at trial where the relevance of that evidence first becomes apparent during the course of the trial itself.

(b) By way of clarification the above disclosure directive holds the Crown to the same standard as applies to calling evidence in reply. If, during the Crown's case in chief, it becomes reasonably foreseeable that particular evidence in the possession of the Crown counsel will be relevant, whether by virtue of the unfolding narrative of events from the mouths of Crown witnesses or by virtue of cross-examination or any other indication by defence counsel, that evidence should be disclosed as soon as reasonably possible. Such evidence should not be held back and disclosed only prior to an attempt to call it in reply. This sort of evidence is properly part of the Crown's case in chief, and should be disclosed and tendered then.

(c) Two results flow from the latter part of paragraph 4(a).

(i) Where the accused prior to trial has disclosed his or her defence, for example alibi, in sufficient detail to permit the defence to be investigated, or has stated to Crown counsel that he or she will be relying upon evidence of good character in support of the defence advanced, and the Crown is in possession of evidence that rebuts or tends to rebut the defence advanced or has evidence that tends to rebut the evidence of good character, that evidence must be disclosed promptly to the defence. Conversely, if the Crown is in possession of evidence that tends to confirm the defence advanced, or the evidence of good character, such evidence must likewise be disclosed promptly to the defence. These defence disclosures should be in writing or confirmed in writing by the defence or by Crown counsel.

(ii) During the trial, Crown counsel must disclose to the defence any undisclosed information in his or her possession as soon as reasonably possible after it becomes reasonably apparent that the information is relevant.

5 Crown counsel's obligation to disclose is a continuing one and disclosure of additional relevant information must be made when it is received. Even after conviction, including after any appeals have been decided or the time for appealing has lapsed, Crown counsel must disclose information which he or she realizes shows an accused is innocent or which raises a doubt as to the accused's guilt.

6 An accused is entitled to disclosure, but where an accused is represented by counsel this right is triggered by a request for disclosure made by counsel. It is recommended that such disclosure requests are to be made in writing unless waived by Crown counsel. Where mere has been a timely request by defence counsel, disclosure must be made before plea or election or any resolution discussions. Defence counsel who wish disclosure have a responsibility to make a timely request for it. Where the request is not timely disclosure must be made as soon as reasonably practical and in any event before trial. Crown counsel as a Minister of Justice, should not permit an accused to be wrongfully convicted, simply because there has been no request for disclosure as required. Therefore, even in the absence of a request Crown counsel must specifically advise the defence before trial, whether the accused is represented or not, of any information in his or her possession that is obviously exculpatory or which Crown counsel realizes is exculpatory of the accused.

7 Where the accused is not represented by counsel, the Court or Crown counsel must inform the accused of the right to disclosure and how to obtain it. The accused should be advised of the right to disclosure and how to obtain it as soon as he or she indicates an intention to proceed unrepresented. Unless the u nrepresented accused clearly indicates that he or she does not wish disclosure, it must be provided before plea or election, so as to enable the accused sufficient time to consider the information disclosed. Disclosure must be provided or waived prior to any resolution discussions. Crown counsel may mail disclosure to an unrepresented accused's last know address.

8 Crown counsel has a discretion, reviewable by the trial judge:

(a) to withhold disclosure where he or she has reasonable cause to believe withholding is necessary to protect the identity of an informant, to preserve an evidentiary privilege, to preserve investigative techniques or to respect a Court Order. Crown counsel should be sensitive to the fact that the law of privilege is not a static or closed set of categories. The common law has flexibly developed new classes of privilege where changing social needs demonstrate that the benefits of confidentiality outweigh the importance of the evidence to the case, (see: *Slavutych v*

Baker [1976] 1 SCR 254). An illustration of this approach is the developing case law surrounding witnesses' psychiatric records and rape crisis centre records.

(b) to delay disclosure where he or she has reasonable cause to believe delay is necessary to protect the safety or security, which includes protection from harassment, of persons who have supplied information to the Crown, or to complete an investigation. Any delays in disclosure to complete the investigation should, however, be rare.

9 (a) Defence counsel must not leave disclosure material in the unsupervised possession of an accused person, or give disclosure materials to the public, as discussed at pp 179 and 217 of the Martin Report. Defence counsel must maintain custody or control over disclosure materials so that copies of such materials are not improperly disseminated. These obligations are part of defence counsel's duties as an officer of the court and violations should be reported to the Law Society. Special arrangements may be made between defence and Crown counsel with respect to maintaining control over disclosure materials where an accused is in custody and where the volume of material disclosed makes it impractical for defence counsel to be present while the material is reviewed. Where defence counsel refuses to give an undertaking or make an arrangement consistent with the above provisions Crown counsel should make disclosure available by means of controlled and supervised, yet adequate and private, access to the disclosure material.

(b) An unrepresented accused is entitled to the same disclosure as the represented accused. However, if there are reasonable grounds for concern that leaving disclosure material with the unrepresented accused would jeopardize the safety, security, privacy interests, or result in the harassment of any person, Crown counsel may provide disclosure by means of controlled and supervised, yet adequate and private, access to the disclosure materials. Incarcerated unrepresented accused persons are entitled to adequate and private access to disclosure materials under the control and supervision of custodial authorities. Crown counsel shall inform the unrepresented accused in writing of the appropriate uses, and limits upon the use, of the disclosure materials.

10 Dialogue between Crown and defence counsel before and after disclosure and in any event prior to setting a date for preliminary inquiry or trial is strongly encouraged. Crown counsel and defence counsel, as officers of the court, will usually be able to resolve disputes with respect to disclosure. In the event that they are unable to resolve a dispute with respect to disclosure Crown counsel should invite defence counsel in writing to bring an application before the trial judge.

11 The principle of disclosure applies to prosecutions for indictable offences and summary conviction offences. In summary conviction prosecutions, proper disclosure will no doubt vary with the nature of the statute defining the offence and the circumstances defining the prosecution. Accordingly, the detailed recommendations in this directive with respect to disclosure may have varying degrees of applicability and/or importance. In most summary conviction prosecutions, the disclosure will be simple and brief.

12 The accused, pursuant to the foregoing principles, is entitled to complete disclosure. Without limiting the generality of the foregoing, the Crown is required to provide the following information in its possession, unless clearly irrelevant:

(a) a copy of the charge or charges contained in the information and indictment;

(b) an accurate synopsis of the circumstances of the offence alleged to have been committed by the accused, as prepared by the investigating agency;

(c) subject to Crown counsel's discretion to delay or withhold disclosure pursuant to paragraph 8, all statements obtained from persons who have provided relevant information to the authorities should be produced, even though Crown counsel does not propose to call them as witnesses. Statements of any co-accused (whether made to a person in authority or not) should also be produced. Crown counsel shall provide to the accused:

(i) copies of any written statements;

(ii) copies of any will-say summaries of anticipated evidence, and copies of the investigator's notes or reports from which they are prepared, if such notes or reports exist;

(iii) a reasonable opportunity, in private, to view and listen to the original or a copy of any audio or video recording of any statements made by a potential witness other than the accused. This does not preclude Crown counsel, in his or her discretion, from providing copies of any video or audio recording or a transcript thereof, where available and where appropriate, but only after obtaining appropriate undertakings which take into account any privacy interests. In child abuse cases, Crown counsel must comply with the Crown Policy on Child Abuse (C-3) which prohibits release of the tape of a child victim's disclosures, in the absence of a court order;

(iv) where statements or recordings do not exist, copies of the investigator's notes, in relation to the persons who have provided relevant information to the authorities, must be

provided. If there are no notes, then all relevant information in the possession of Crown counsel that the person could give should be supplied;

(v) in addition to the foregoing, Crown counsel may also provide the name, telephone number, address, and occupation of any person who has relevant information to give. Greater caution should be taken before releasing witnesses' addresses, telephone numbers or occupations and consideration should be given to the applicability of paragraph 8(b) before making such a disclosure;

(vi) any discretion exercised by the Crown with respect to disclosure of the foregoing is reviewable by the trial judge.

(d) information regarding the criminal record of the accused and any co-accused;

(e) a copy of any written statement made by the accused to a person in authority, and, in the case of verbal statements, an accurate account of the statement attributed to the accused and copies of any investigator's notes in relation thereto, and a copy of, and a reasonable opportunity to view and listen to, any original video or audio recorded statement of the accused to a person in authority. All such statements or access thereto must be provided whether or not they are intended to be introduced in evidence;

(f) an appropriate opportunity to inspect any police occurrence reports and any supplementary reports produced or acquired during the investigation of the offence and which remain in the possession of the investigators;

(g) as soon as available, copies of any forensic, medical, and laboratory reports which relate to the offence, including all adverse reports, except to the extent that they may contain irrelevant or privileged information;

(h) where reasonably capable of reproduction, and where Crown counsel intends to introduce them into evidence, copies of documents, photographs, audio or video recordings of anything other than a statement by a person, and other materials should normally be supplied to the defence. The defence may be limited to a reasonable opportunity, in private, to view and listen to a copy of any audio or video recording where Crown counsel has reasonable cause to believe that there exists a reasonable privacy or security interest of the victim(s) or witness(es), or any other reasonable public interest (12(c)(iii)), which cannot be satisfied by an appropriate undertaking from defence counsel; (see paragraph 12(c)iii supra; and policy C-3)

(i) a copy of any search warrant relied upon by the Crown, the information in support, and a list of items seized thereunder, if any, subject to paragraph 8 (a);

(j) if intercepted private communications will be tendered, a copy of the judicial authorization under which the private communications were intercepted;
(k) an appropriate opportunity to inspect any relevant items seized or acquired during the investigation of the offence which remain in the possession of the investigators, whether or not Crown counsel intends to introduce them as exhibits in court;
(l) upon request, information regarding criminal records of material Crown or defence witnesses that is relevant to credibility. Information taken from a C.P.I.C. computer print-out would usually meet the requirements of this provision;
(m) upon request, any information in the possession of Crown counsel, for example information regarding outstanding criminal charges or criminal convictions, demonstrated to be relevant to the defence; and
(n) where identity is in issue, and the Crown relies in whole or in part on the visual identification of the accused as the person seen in the circumstances of the crime, all information in the possession of Crown counsel that has a bearing on the reliability of the identification must be disclosed to the accused.

13 Crown counsel is required to disclose any information in his or her possession relevant to the credibility of any proposed Crown witness. Crown counsel is required, for example, to disclose:

(a) any prior inconsistent statements or subsequent recantations of that person;
(b) particulars of any promise of immunity or assistance given to that person with respect to a pending charge, bail, or sentence, or any other benefit or advantage given; and
(c) any mental disorder that person is suffering from relevant to the reliability of his or her evidence. This class of evidence may raise issues of privilege, discussed in paragraph 8(a) above. Crown counsel should consider the applicability of such an argument before disclosing this kind of evidence.

Good faith disagreements as to whether or not any information is relevant to credibility are to be resolved by reference to paragraphs 10 and 16;

14 Subject to Crown counsel's discretion as to relevance, which is reviewable by me trial judge, counsel on behalf of the accused or an unrepresented accused may, upon request, inspect the investigative agency's file in relation to the offence. The defence should, where possible, particularize their request to assist Crown counsel in exercising their discretion as to the relevance of undisclosed information in the investigative file. Any dispute arising from such a request should usually be resolved in discussions between Crown and defence counsel where the relevance of

the disclosure request is particularized by the defence counsel. This recommendation does not preclude Crown counsel from limiting the defence to access to photocopies of the file material wherever necessary to preserve the integrity of the originals, for example, where editing the originals would destroy their integrity, or from taking other reasonable steps necessary to protect:

(a) the safety, security or freedom from harassment of people who have provided information to the Crown;
(b) the informer privilege;
(c) any other privilege; or
(d) ongoing police investigations or investigative techniques.

15 Crown counsel generally need not disclose any internal Crown counsel notes, memoranda, correspondence, or legal opinions. Where, however, Crown counsel learns of additional relevant information in the course of interviewing Crown witnesses, defence counsel or an unrepresented accused should be advised of that information as soon thereafter as practicable.

16 (a) Where disclosure of certain information has been delayed pursuant to paragraph 8(b) Crown counsel must disclose the information as soon as the justification for the delay in disclosure no longer exists. The fact that some disclosure is being delayed should be communicated to the defence without jeopardizing the reason for the delay. When the delayed disclosure is made Crown counsel must then advise the defence of the fact that the disclosure was delayed and, where feasible, the basis for that decision.

(b) Where Crown counsel does not permit inspection of the investigative agency's entire file, pursuant to paragraph 14, and where disclosure of certain information from the investigative file is withheld on the grounds that it is not relevant, Crown counsel shall advise the defence of the nature of this information in his or her possession which is not disclosed. Detailed summaries are not required. In particular, a detailed description of the withheld information should be avoided. This paragraph does not require Crown counsel to review the entire police investigative file as a matter of course.

(c) Where disclosure of certain information is withheld pursuant to paragraph 8(a), Crown counsel shall advise the defence of that decision but without saying anything that would reveal the identity of an informer, jeopardize anyone's safety or subject them to harassment, or reveal police investigative techniques. Crown counsel should advise the defence of the importance of any such withheld information;

(d) Upon request, Crown counsel shall take any other steps reasonably necessary to facilitate a review by the trial judge of any decision not to

disclose, should defence counsel decide to bring such an application. This does not preclude Crown counsel from bringing such an application to seek the direction of the Court.

17 Nothing herein precludes defence counsel from making further requests to Crown counsel for disclosure of information in the possession of Crown counsel or the investigating authorities. Defence and Crown counsel are strongly encouraged to narrow and define the issues to assist Crown counsel in determining whether information is relevant.

18 Information in the possession of bodies, such as boards, social agencies, other governmental departments, rape crisis centres, women's shelters, doctors' offices and mental health and counselling services, is not in the possession of Crown counsel or the investigative agency for disclosure purposes. Where Crown counsel receive requests for information not in their possession or the possession of the investigative agency, the defence should be so advised in a timely manner in order that they may take such other steps to obtain the information as they see fit.

19 The Crown may require written acknowledgement from defence counsel or an unrepresented accused of disclosure received.

20 Names and addresses of witnesses may be supplied to the defence, pursuant to paragraph 12(c)(v), by the Crown or investigative agency, subject to paragraphs 8 and 14. When communicating with any witness the Crown and the police should be guided by the following principles when giving advice to the witness about a possible interview by the defence. The witnesses may be informed that there is no property in a witness and that the defence is entitled to seek an interview, but that they are not required to grant an interview; it is strictly their decision. Care must be taken, however, to ensure that the witnesses are not left with the impression that they should not grant the defence an interview.

21 In Provincial Offence prosecutions, upon request, the defendant in a minor part one offence will be provided with a copy of the certificate of offence and a copy of the notes of the police officer and witnesses if any.

For more serious part one offences, upon request, the defendant will be provided with the above plus a copy of any accident reports or other documents to be utilized in the prosecution.

For part three offences, upon request, the defendant will be provided with a copy of the information, police officer or witness notes and any documents to be utilized in the prosecution.

For photo-radar offences, the defendant will be provided with a copy of the certificate of offence, a copy of the notes of any police officer and an opportunity to view the photograph. If the defendant wishes a copy of the

photograph, he or she can make arrangements with the police authority to secure a copy at the defendant's cost

Any additional materials such as the radar manual should be the subject of an application to a court.

MARTIN REPORT (REPORT OF THE ATTORNEY GENERAL'S ADVISORY COMMITTEE ON CHARGE SCREENING, DISCLOSURE, AND RESOLUTION DISCUSSIONS, ONTARIO, 1993)

RECOMMENDATIONS AND OPINIONS

CHARGE SCREENING

The Threshold Test for Commencing or Continuing a Prosecution

1 The Committee recommends that for the purposes of a threshold test regarding the screening of charges by the prosecutor, the test of a 'reasonable prospect of conviction' be adopted for all offences.

2 The review to determine whether the threshold test has been met should include an assessment of the probative value of the evidence, including some assessment of the credibility of witnesses.

3 The review to determine whether the threshold test has been met should include consideration of the admissibility of evidence. The threshold test will not be met where evidence necessary to the prosecution is clearly or obviously inadmissible.

4 The review to determine whether the threshold test has been met should include a consideration of any defences, for example alibi, that should reasonably be known, or that have come to the attention of the Crown.

5 The same threshold test applies for commencing, continuing, or discontinuing a prosecution.

The Threshold Test and the Public Interest

6 The Committee recommends that public interest factors should only be considered after the threshold test has been met, and then should only be used to refrain from commencing, or to discontinue a prosecution.

Various Public Interest Factors that May be Relevant

7 The Committee recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should consider the charge or charges that best reflect the gravity of the incident

8 The Committee recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should not

consider any political consequences for the government flowing from the prosecution.

9 The Committee recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should consider the circumstances and attitude of the victim. The attitude of the victim is now, however, decisive.

10 The Committee recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should consider the entitlement of the victim to compensation, reparation, or restitution if a conviction is obtained.

11 The Committee recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should not consider the status in life of either the accused or the victim.

12 The Committee therefore recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should consider the need to maintain public confidence in the administration of justice, and the effect of the incident or prosecution on public order.

13 The Committee recommends that the agent of the Attorney General should take into account the national security and international relations in determining whether a prosecution is in the public interest.

14 The Committee recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should consider the availability and efficacy of alternatives to prosecution.

15 The Committee recognizes that the factors specifically discussed above are not an exhaustive enumeration of the considerations that may be relevant to an assessment of the public interest in a prosecution.

The Threshold Test and Policies, Directives and Guidelines in General

16 The Committee recommends that guidelines regarding the threshold test and what factors are included in the term 'public interest' should be published by the Attorney General.

17 The Committee recommends that directives from the Attorney General to his or her agents should be few and far between.

18 The Attorney General should instruct his or her agents through the use of guidelines, which formally permit the exercise of discretion in their application.

19 Such guidelines and the rare directives which may issue should not be taken into account by agents of the Attorney General until they are published or otherwise made known to the public.

Charge Screening in Ontario

20 The Committee recommends that there exist in Ontario a system of charge screening by agents of the Attorney General.

21 The Committee recommends that there exist in Ontario a system of post-charge screening by agents of the Attorney General.

22 The Committee recognizes the long standing tradition in Ontario of police consultation with the Crown in matters of difficulty at the pre-charge stage of the investigation. The Committee encourages this tradition of co-operative consultation to continue where, in the judgment of senior police officers, consultation is warranted. Where warranted, such consultation need not be limited to matters of evidence, but should also pertain to the various public interest factors that may affect the course of the prosecution apart altogether from the evidence.

The Mechanics of Post-Charge Screening

23 The Committee recommends that the Attorney General's agents be required to conduct their post-charge review prior to setting a date for a preliminary hearing or trail.

24 The Committee recommends that the investigators should provide to Crown counsel for the purposes of screening charges, all information necessary to ascertain if the threshold test for conducting a prosecution has been met, and all information necessary to assess the impact of any relevant public interest factors in the prosecution. This material will necessarily include, but will not be limited to, that which is required for disclosure.

25 The Committee recommends that the Attorney General require his or her agents to be duly diligent in making efforts to obtain all information that relates to a case for purposes of screening and disclosure.

DISCLOSURE

General Recommendation with Respect to Disclosure

Disclosure Recommendations Pertaining to Investigations

26 The Committee recommends that the Attorney General request that the Solicitor General issue to all police officers emphasizing the importance of taking careful, accurate, and contemporaneous notes during their investigations. (The statement should emphasize that disclosure

requirements after *Stinchcombe* cannot be thwarted by making less accurate or less comprehensive notes).

27 The Committee recommends that, upon request, copies of relevant original notes should be disclosed, subject to editing or non-disclosure where the public interest requires it, including editing or non-disclosure, where necessary, to protect confidential informants, the existence of ongoing investigations, and the integrity of police investigative techniques.

28 The Committee recommends that statements of suspects or accused persons taken at the police station or wherever such persons are detained be video taped or audio taped, preferably video taped. It is recognized that this may not always be practical or technically feasible.

Ethical and Legal Obligations Relating to Disclosure

The Police

29 The Committee recommends that s. 1(c)(viii) of the Code of Offences, a Schedule to Regulation 791 under the Police Services Act, R.S.O. 1990, c. P-15, be amended to read as follows:

> 1 Any chief of police, or other police officer or constable commits an offence against discipline if he is guilty of
>
> (C) NEGLECT OF DUTY, that is to say, if he, …where a charge is laid fails to disclose to the officer in charge of the prosecution or the prosecutor any information that he or any person within his knowledge can give for or against any prisoner or defendant.

Crown Counsel

30 The Committee recognizes that it is a serious disciplinary offence for the Crown to fail to disclose to the defence as required.

31 The Committee recommends that it is inappropriate for Crown counsel to limit or refuse disclosure in a case, unless defence counsel agrees to limit a preliminary inquiry so as to ensure efficient use of court time. This does not preclude counsel from agreeing to shorten or waive a preliminary inquiry.

32 The Committee recommends that it is inappropriate for the Attorney General to withhold disclosure, unless defence counsel gives an undertaking not to share the information with his or her client.

Defence Counsel

33 The Committee acknowledges that, at present, there is no obligation upon the defence to disclose any part of its case before trial. The Committee makes no further recommendation in this respect.

34 The Committee is of the opinion that it is inappropriate for any counsel to give disclosure materials to the public. Counsel would not be acting responsibly as an officer of the Court if he or she did so.

35 The Committee is of the opinion that defence counsel should maintain custody or control over disclosure materials, so that copies of such materials are not improperly disseminated. Special arrangements may be made between defence and Crown counsel, with respect to maintaining control over disclosure materials where an accused is in custody, and where the volume of material disclosed makes it impractical for defence counsel to be present while the material is reviewed.

Disclosure and Summary Conviction Offences

36 The Committee recommends that the nature and extent of disclosure should not vary based on whether the charge was prosecuted by way of indictment, summary conviction procedure, or prosecuted under the Provincial Offences Act.

37 The Committee recommends that in all summary conviction matters under the Criminal Code which are commenced by a private complainant, the Crown should intervene to either withdraw the charge or to conduct the prosecution. If the Attorney General intervenes and conducts the prosecution disclosure should be made in the same way as any other prosecution. Nothing herein is to be construed as precluding the Attorney General from assuming carriage of prosecutions under the Provincial Offences Act in appropriate cases, for example, under the Environmental Protection Act.

Other Recommendations

38 The Committee recommends that the Attorney General should require reasonable efforts from his or her agents to determine the sufficiency of disclosure. It is recognized that the obligation to provide disclosure is on-going.

39 The Committee recommends that all accused persons be advised of their right to disclosure, and where disclosure may be obtained, by written notice on all release forms or summonses.

40 As a general rule, the Committee is in favour of disclosure in writing.

Recommendations Relevant to a Proposed New Disclosure Directive

41 The Committee recommends that the Attorney General issue a new Directive on Disclosure, based upon the following recommendations and principles.

Purpose and General Principles of Disclosure

1 The purpose of disclosure is to assist in guaranteeing the accused's common law and constitutional rights to a fair trail and to make full answer and defence.

2 Timely and full disclosure by Crown counsel, where diligently utilized by the defence, benefits both the accused and the administration of justice as a whole. Among the benefits are:

(a) the resolution of non-contentious and time-consuming issues in advance of the preliminary hearing or the trial, which ensures the most efficient use of court time;
(b) the waiver or shortening of preliminary hearings and the shortening of trials; and
(c) early resolution of cases, including, where appropriate, the entry of pleas of guilty or the withdrawal of charges.

3 The governing principle is that Crown counsel is under a duty to disclose all information in his or her possession relevant to the guilt or innocence of the accused, unless the information is excluded from disclosure by a legal privilege. Crown counsel's duty to disclose any relevant information in his or her possession, whether favourable or unfavourable to the accused, extends to any information which is not clearly irrelevant. All decisions by Crown counsel not to disclose on grounds of either privilege or relevance are reviewable by the trial judge.

4 Part of Crown counsel's obligation to disclose all relevant information in his or her possession includes the disclosure of information in his or her possession which is relevant to the prosecution's case, thus enabling the accused to know the case that he or she must meet. Crown counsel must not withhold such information for the purpose of cross-examining on it. This paragraph does not require pre-trial disclosure of reply evidence tendered by Crown counsel in response to issues raised by the accused at trial where the relevance of that evidence first becomes apparent during the course of the trial itself.

5 Crown counsel's obligation to disclose is a continuing one and disclosure of additional relevant information must be made when it is received. Even

after conviction, including after any appeals have been decided or the time for appealing has lapsed, Crown counsel must disclose information which he or she realizes shows an accused is innocent or which raises a doubt as to the accused's guilt.

6 An accused is entitled to disclosure, but where an accused is represented by counsel this right is triggered by a request for disclosure made by counsel. It is recommended that such disclosure requests be made in writing. Where there has been a timely request by defence counsel, disclosure must be made before plea or election. Defence counsel who wish disclosure have a responsibility to make a timely request for it. Where the request is not timely, disclosure must be made as soon as reasonably practical and, in any event, before trial. However, even in the absence of a request, Crown counsel must specifically advise the defence before trial, whether the accused is represented or not, of any information in his or her possession that is obviously exculpatory or which Crown counsel realizes is exculpatory of the accused. Disclosure must be provided or waived prior to any resolution discussions.

7 Where the accused is not represented by counsel, the Court or Crown counsel must inform the accused of the right to disclosure and how to obtain it. The accused should be advised of the right to disclosure and how to obtain it as soon as he or she indicates an intention to proceed unrepresented. Unless the unrepresented accused clearly indicates that he or she does not wish disclosure, it must be provided before plea or election, so as to enable the accused sufficient time before plea or election to consider the information disclosed. Disclosure must be provided or waived prior to any resolution discussions.

8 Crown counsel has a discretion, reviewable by the trial judge:

(a) to withhold disclosure where he or she has reasonable cause to believe withholding is necessary to preserve the identity of an informant, to preserve the solicitor-client privilege, or to preserve investigation techniques; and

(b) to delay disclosure where he or she has reasonable cause to believe delay is necessary to protect the safety or security, which includes protection from harassment, of persons who have supplied information to the Crown, or to complete an investigation. Any delays in disclosure to complete the investigation should, however, be rare.

9 (a) Defence counsel should not leave disclosure material in the unsupervised possession of an accused person.

(b) An unrepresented accused is entitled to the same disclosure as the represented accused. However, if there are reasonable grounds for concern that leaving disclosure material with the unrepresented

accused would jeopardize the safety, security, privacy interests, or result in the harassment of any person, Crown counsel may provide disclosure by means of controlled and supervised, yet adequate and private, access to the disclosure materials. Incarcerated, unrepresented accused persons are entitled to adequate and private access to disclosure materials under the control and supervision of custodial authorities. Crown counsel shall inform the unrepresented accused, in writing, of the appropriate uses and limits upon the use of the disclosure materials.

10 Dialogue between Crown and defence counsel before and after disclosure and, in any event, prior to setting a date for a preliminary inquiry or trial, is strongly encouraged. Crown counsel and defence counsel, as officers of the Court, will usually be able to resolve disputes with respect to disclosure. If they are unable to resolve a dispute, the trial judge must resolve it.

11 The principle of disclosure applies to prosecutions for indictable offences, summary conviction offences and prosecutions under the Provincial Offences Act. In all such prosecutions, the Crown, or the private prosecutor, is required to provide complete disclosure in accordance with these recommendations, save where they are inapplicable.

Particular Requirements

12 The accused, pursuant to the foregoing principles, is entitled to complete disclosure. Without limiting the generality of the foregoing, the Crown is required to provide the following information unless clearly irrelevant

(a) a copy of the charge or charges contained in the information and indictment;
(b) an accurate synopsis of the circumstances of the offence alleged to have been committed by the accused, as prepared by the investigating agency;
(c) All statements obtained from persons who have provided relevant information to the authorities should be produced, even though Crown counsel does not propose to call them as witnesses. Statements of any co-accused (whether made to a person in authority or not) should also be produced. Crown counsel shall provide to the accused:

(i) copies of any written statements;
(ii) copies of any will-say summaries of anticipated evidence, and copies of the investigator's notes or reports from which they are prepared, if such notes or reports exist;
(iii) a reasonable opportunity, in private, to view and listen to the original or a copy of any audio or video recordings of any statements made by a potential witness other than the accused. This does not preclude Crown counsel in his or her discretion, from providing copies of any video or audio recording or a transcript thereof, where applicable;
(iv) Where statements or recordings do not exist, copies of the investigator's notes, in relation to the persons who have provided relevant information to the authorities, must be provided. If there are no notes, then all relevant information in the possession of Crown counsel that the person could give should be supplied, subject to Crown counsel's discretion to delay disclosure.
(v) In addition to the foregoing, Crown counsel may, upon request by the defence, also provide the name, address, and occupation of any person who has relevant information to give, subject to Crown counsel's discretion to delay or withhold such disclosure.
(vi) Any discretion exercised by the Crown with respect to disclosure of the foregoing is reviewable by the trial judge.

(d) information regarding the criminal record of the accused and any co-accused;
(e) a copy of any written statement made by the accused to a person in authority, an, in the case of verbal statements, an accurate account of the statement attributed to the accused and copies of any investigator's notes in relation thereto, and a copy of, and a reasonable opportunity to view and listen to, any original video or audio recorded statement of the accused to a person in authority. All such statements or access thereto must be provided whether or not they are intended to be introduced in evidence.
(f) a copy of any police occurrence reports and any supplementary reports;
(g) as soon as available, copies of any forensic, medical, and laboratory reports which relate to the offence, including all adverse reports, except to the extent that they may contain irrelevant or privileged information;
(h) where reasonably capable of reproduction, and where Crown counsel intends to introduce them into evidence, copies of

documents, photographs, audio or video recordings of anything other than a statement by a person, and other materials should normally be supplied to the defence. The defence may be limited to a reasonable opportunity, in private, to view and listen to a copy of any audio or video recording where Crown Counsel has reasonable cause to believe that there exists a reasonable privacy or security interest of the victim(s) or witness(es), or any other reasonable public interest, which cannot be satisfied by an appropriate undertaking from defence counsel.

(i) a copy of any search warrant relied upon by the Crown, the information in support, and a list of items seized thereunder, if any;

(j) if intercepted private communications will be tendered, a copy of the judicial authorization under which the private communications were intercepted;

(k) an appropriate opportunity to inspect any relevant items seized or acquired during the investigations of the offence which remain in the possession of the investigators, whether or not Crown counsel intends to introduce them as exhibits in court;

(l) upon request, information regarding criminal records of material Crown or defence witnesses that is relevant to credibility;

(m) upon request, any information in the possession of Crown counsel, for example, information regarding outstanding criminal charges or criminal convictions demonstrated to be relevant by the defence; and

(n) where identity is in issue, and the Crown relies in whole or in part on the visual identification of the accused as the person seen in the circumstances of the crime, all information in the possession of Crown counsel that has a bearing on the reliability of the identification must be disclosed to the accused.

13 Crown counsel is required to disclose any information in his or her possession relevant to the credibility of any proposed Crown witness. Without limiting the generality of the foregoing, Crown counsel is required, for example, to disclose:

(a) any prior inconsistent statements or subsequent recantations of that person;

(b) particulars of any promise of immunity or assistance given to that person with respect to a pending charge, bail or sentence, or any other benefit or advantage given; and

(c) any mental disorder that person is suffering from which may be relevant to the reliability of his or her evidence.

14 Subject to Crown counsel's discretion as to relevance, which is reviewable by the trial judge, counsel on behalf of the accused or an

unrepresented accused may, upon request, inspect the investigative agency's file in relation to the offence. The defence should, where possible, particularize their request to assist Crown counsel in exercising their discretion as to the relevance of undisclosed information in the investigative file. Any dispute arising from such a request should usually be resolved in discussions between Crown and defence counsel. This recommendation does not preclude Crown counsel from limiting the defence to access to photocopies of the file material wherever necessary to preserve the integrity of the originals, for example, where editing the originals would destroy their integrity, or taking other reasonable steps necessary to protect:

(a) the safety, security or freedom from harassment of people who have provided information to the Crown;
(b) the informer privilege;
(c) any other privilege; or
(d) on-going police investigations or investigative techniques.

15 Crown counsel generally need not disclose any internal Crown counsel notes, memoranda, correspondence, or legal opinions. Where, however, Crown counsel learns of additional relevant information in the course of interviewing Crown witnesses, defence counsel or an unrepresented accused should be advised of that information as soon thereafter as practicable.

16 Crown counsel shall advise the defence of any decision made not to disclose information in his or her possession that should otherwise be disclosed, and the importance of that information. Crown counsel shall also advise the defence of the specific nature of the information in his or her possession which is not disclosed, unless disclosure of the nature of the information withheld would reveal the identify of an informer, jeopardize anyone's safety or security or subject them to harassment, compromise an on-going investigation, or reveal police investigative techniques. Upon request Crown counsel shall take any other steps reasonably necessary to facilitate a review by the trial judge of any decision not to disclose.

17 Nothing herein precludes defence counsel from making further requests to Crown counsel for disclosure of information in the possession of Crown counsel of the investigating authorities. Defence and Crown counsel are strongly encouraged to narrow and define the issues to assist Crown counsel in determining whether information is relevant.

18 Information in the possession of bodies, such as boards, social agencies, and other governmental departments, is not in the possession of Crown counsel or the investigating agency for disclosure purposes. Where Crown

counsel receive requests for information not in their possession or the possession of the investigative agency, the defence should be so advised in a timely manner in order that they may take such other steps to obtain the information as they see fit.

19 The Crown may, in its discretion, require written acknowledgement from defence counsel or an unrepresented accused of disclosure received.

20 Where the names and addresses of witnesses are supplied to the defence by the Crown or investigative agency, the witnesses may be informed that there is no property in a witness and that the defence is entitled to interview them, but that they are not required to grant an interview: it is strictly their decision. Care must be taken, however, to ensure that the witnesses are not left with the impression that they should not grant the defence an interview. There should be a standard form of providing this advice where it is given.

Implementing Disclosure

42 The Committee recommends that the Solicitor General co-ordinate with federal authorities and that both issue such directives as are necessary, to require all police forces operating within the province of Ontario to be aware of and comply with the Attorney General's Directive on Disclosure in their relations with Crown prosecutors. These directives should also make clear that the police and other investigators

(a) are bound to exercise reasonable skill and diligence in discovering all relevant information, even though such information may be favourable to the accused;
(b) are under a duty to report to the officer in charge or to Crown counsel all relevant information of which they are aware, including information favourable to the accused, in order that Crown counsel may discharge the duty to make full disclosure; and that
(c) a failure to disclose all relevant information as required is a disciplinary offence.

43 The Committee recommends that the police should bear all production costs including labour, equipment, and material costs associated with the preparation and delivery to the Crown of the Crown Brief, photographs, and other exhibits or material used in the prosecution of a case in court. The Ministry of the Attorney General will bear the actual material costs needed to produce second or subsequent copies of Crown Briefs intended for disclosure purposes to defence counsel or to the accused person.

44 The Committee recommends that an accused person should not have to pay for basic disclosure.

Disclosure and Accused Persons in Custody

45 The Committee recommends that the Attorney General recommend to Cabinet and the federal Minister responsible for penitentiaries that procedures and facilities be set up for controlling disclosure materials for accused who are in custody while, at the same time, providing the accused supervised, yet full and private, access to these materials.

RESOLUTION DISCUSSIONS

46 The Committee is of the opinion that resolution discussions are an essential part of the criminal justice system in Ontario, and, when properly conducted, benefit not only the accused, but also victims, witnesses, counsel, and the administration of justice generally.

Recommendations Relating to the Conduct of Resolution Discussions

47 The Committee recommends that Crown counsel should not accept a plea of guilty to a charge where he or she knows that the accused is innocent.

48 Where Crown counsel knows that the prosecution will never be able to prove a material element of the case, Crown counsel has a duty to disclose this to the defence.

49 The Committee recommends that Crown counsel can accept a plea of guilty where he or she is aware that the prosecution will never be able to prove a material element of the offence provided this state of affairs is fully disclosed to the defence.

50 The Committee recommends that the Attorney General should require all of his or her agents conducting resolution discussions to ensure that the Crown's position on sentence not be formulated simply for reasons of expediency, and not otherwise bring the administration of justice into disrepute.

51 The Committee recommends that the Attorney General should require his or her agents conducting resolution discussions to consider the nterests of victims. The Attorney General should require his or her agents conducting resolution discussions to consult with any victims, where appropriate and feasible, prior to concluding such discussions.

52 The Committee recommends that the Attorney General emphasize to his or her agents that a plea of guilty is a circumstance in mitigation of sentence, and when the plea of guilty is offered at the first reasonable opportunity it is particularly mitigating.

53 The Committee recommends that, as a general rule, counsel must honour all agreements reached after resolution discussions. However, on rare occasions, it is appropriate for senior Crown counsel, after reviewing an agreement made by the Crown, to repudiate that agreement if the accused can be restored to his or her original position, and if the agreement would bring the administration of justice into disrepute.

Recommendations Concerning Courtroom Practice Following Resolution Discussions

54 The Committee recommends that, as a general rule, open to some exceptions, Crown counsel should state on the record in open court that resolution discussions have been held and that an agreement has been reached.

55 The Committee recommends that where a plea of guilty is entered, the trial judge should question the accused to ensure:

(a) that they appropriate the nature and consequence of a plea of guilty;
(b) that the plea is voluntarily made; and
(c) that they understand that an agreement between the Crown prosecutor and defence counsel does not bind the court.

56 The Committee recommends that the Attorney General seek an amendment to the Criminal Code requiring a sentencing judge to question the accused as set out above, whether the accused is represented by counsel or not.

57 The Committee recommends that it is improper for the Crown to withhold from the court any relevant information in order to facilitate a guilty plea. In cases where not all matters are admitted, the Crown should advise the Court of the allegations and then proceed upon the admitted facts. In such cases, the Court will sentence on the admitted facts only.

58 The Committee is of the opinion that a sentencing judge should not depart from a joint submission unless the proposed sentence would bring the administration of justice into disrepute, or is not otherwise in the public interest.

59 The Committee observes that Crown counsel at trial cannot bind the Attorney General's discretion to appeal. The Committee recommends that where Crown counsel at trial agrees to a joint submission which the sentencing judge accepts, the Attorney General should appeal only where the sentence is so wrong as to bring the administration of justice into disrepute.

Procedural Aspects of Resolution Discussions

60 The Committee is of the opinion that Crown and defence counsel have a professional obligation to meet prior to trial where appropriate to resolve issues. The Committee is of the opinion that both Crown and defence counsel have a professional obligation to act responsibly in arranging meetings and responding to initiatives aimed at resolving criminal cases as early as possible. This will reduce demand for court time and ensure that court time schedules is used efficiently.

61 The Committee recommends that, apart from cases in which the accused is in custody, or lengthy or complex cases, the Attorney General should require the completion of disclosure and the conduct of resolution discussions before the setting of a date for a preliminary hearing or trial.

62 The Committee recommends that, absent exceptional circumstances, there should not be resolution discussions at the trial courtroom door rather than at an earlier stage in the proceedings.

Pre-Hearing Conferences

63 The Committee endorses pre-hearing conferences as a very useful and necessary aspect of the administration of criminal justice in Ontario. Participation by the judiciary in pre-hearing conferences is, in the Committee's view, both proper and just, and can contribute greatly to the early and fair resolution of many cases. The Committee encourages the judiciary to convene and participate in such conferences where appropriate.

64 The Committee recognizes that the procedure for conducting pre-hearing conferences varies throughout the province depending on local circumstances. The Committee supports this sensitivity to local conditions, and recommends that there be no uniform and province-wide manner of conducting pre-hearing conferences put in place. The Committee does, however, endorse some basic principles as necessary for an effective pre-hearing conference.

65 The Committee recommends that a pre-hearing conference should not take place until disclosure has been either obtained or waived.

66 The Committee recommends that a pre-hearing conference should take place as soon as possible after all participating counsel have had a reasonable opportunity after disclosure to familiarize themselves with the particular case.

67 The Committee recommends that all counsel participating in the pre-hearing conference must be fully familiar with the case, and must be in a position to make admissions or agreements on behalf of the Crown or the client, as the case may be.

68 The Committee recognizes that it is always open to the presiding judge, for reasons which seem sufficient to that judge, to record part of all of a pre-hearing conference.

69 The Committee recommends that any agreement reached, or position taken (such as decisions on admissibility of evidence, or what Charter issues will be raised), excluding any position taken on the issue of sentence, should be recorded in writing by the pre-hearing conference judge.

70 The Committee recommends that a pre-hearing conference may cover the entire range of issues in a case, including plea and sentence.

71 The Committee recommends that the pre-hearing conference must be scheduled so as allow sufficient time to fully discuss the case.

72 The Committee recommends that all parties participating in a pre-hearing conference must be afforded a fair opportunity to state their positions and participate in the discussions.

73 The Committee is of the opinion that a judge presiding at a pre-hearing conference should not be involved in plea bargaining in the sense of bartering to determine the sentence, or pressuring any counsel to change their position. The presiding judge may, however, assist in resolving the issue of sentence by expressing an opinion as to whether a proposed sentence is too high, too low, or within an appropriate range.

74 The Committee recommends that if everyone is agreed on the suggested range of sentence, and is content with the practice, there is no difficulty with the pre-hearing judge going on to hear the plea of guilty. However, the pre-hearing judge should not hear the plea of guilty, or any contested proceedings in the same prosecution other than adjournments or attendances to set dates, unless all parties consent.

75 The Committee recommends that, during a plea and sentencing following a pre-hearing conference, it is important to create a full record in open court, including sufficient detail about the circumstances of the offence, the offender, and, where appropriate, the victim.

76 The Committee recommends that the Attorney General request of the federal government that s. 625.1 of the Criminal Code be amended to read as follows:

s 625.1(1) Subject to subsection (2), on application by the prosecutor or the accused or on its own motion, the court before which, or the judge, provincial court judge or justice before whom, any proceedings are to be held, may order that a conference between the prosecutor and the accused or counsel for the accused, to be presided over by the court, a judge, or a provincial court judge or justice, be held prior to the proceedings to consider such matters as will promote a fair and expeditious hearing, including, where just and appropriate, final resolution of the charges in issue in the proceedings. The judge, provincial court judge or justice who presides over such a conference shall not preside over the trial, a plea of guilty, or any contested proceeding other than adjournments or attendances to set dates in the same matter without the consent of the prosecutor and the accused.

(2) In any case to be tried with a jury, a judge of the court before which the accused is to be tried shall, prior to the trial, order that a conference between the prosecutor and the accused or counsel for the accused, to be presided over by a judge of that court, be held in accordance with the rules of court made under section 482 to consider such matters as will promote a fair and expeditious hearing, including, where just and appropriate, final resolution of the charges in issue in that case.

77 The Committee is of the view that, absent exceptional circumstances, it is inappropriate to engage in resolution discussions with the trial judge in Chambers.

78 The Committee is of the view that, as a general rule, open to some exceptions, any resolution discussions that do take place with the trial judge in Chambers should be recorded.

79 The Committee recommends that the Attorney General issue such public guidelines as are appropriate to implement the Committee's recommendations with respect to resolution discussions.

CONCLUDING RECOMMENDATION

80 The Committee recommends that the Solicitor General and the Attorney General take appropriate steps and commit sufficient resources to provide instruction, training and continuing education for police officers and Crown counsel as to the Committee's recommendations and views.

LOCKE REPORT (CRIMINAL JUSTICE REVIEW COMMITTEE, ONTARIO, 1999)

MODEL DISCLOSURE INDEX/CHECKLIST

Regina vs._____

I. MATERIALS FOR ALL CHARGES

	For Police Completion Page No N/A Ordered
Meaningful Synopsis including a description of offence [with evidence sources set out in brackets] and a summary of each witness' evidence	
Synopsis of Related federal or Criminal Code charges	
Information/Indictment	
Court calendar showing witness' availability	
Officers notes	
Witness statements [written, reduced to writing, audio or video]	
Witness credibility information • particulars of any promises made by persons in authority • mental disorder information • criminal record • other relevant information	
Accused statements [written, reduced to writing, audio or video]	
Victim Impact Statements	
Search warrants	
Information sworn to obtain search warrant	
Grounds for Warrantless Search or Detention	
Copy of any seized document that will be used at trial	

	For Police Completion Page No N/A Ordered
Occurrence Report	
Supplemental Reports	
CPIC Criminal Record and Outstanding Charges	
Record of arrest, including Synopsis	
Show cause documents	
Release forms	

II. MATERIALS COMMON TO SPECIFIC OFFENCES

A. Drug Charges

	For Police Completion Page No N/A Ordered
Property Reports	
Value of seized money/property	
Copy of debt lists	
Weight of exhibits	
Quantitative analysis of drug exhibit for PFTP charges	
Witness statements identifying suspects by name	
Agent disclosure • signed statement • notes • agreement with police that discloses all benefits provided to agent • criminal record • record of outstanding charges	
Civilian statements used to establish residence	
Copies of seized documents and copies of driver's licence that establish suspect's residence	

B. Impaired/Over 80

	For Police Completion Page No N/A Ordered
Breath Technician's check sheet & record	
Certificate of Analysis & Notice of Intention to use at trial	
Notice of Increased Penalty	
MVC Record	
Video of Impaired Person	
Medical Reports	

C. Driving While Disqualified

	For Police Completion Page No N/A Ordered
Certified copy of prohibition order	
Certified copy of MTO order	
Proof that notice of intention and a certified copy of the order were served on accused (investigator/affidavit)	

D. Breach of Probation/Recognizance/Undertaking/Peace Bond/Fail to Comply/Fail to Appear

	For Police Completion Page No N/A Ordered
Certified copy of relevant order	
Notice of Intention under Canada Evidence Act to use certified copy at trial	
Proof that notice of intention and certified copy of the order were served on the accused (investigator/affidavit)	
Certificate of non-attendance	

E. Willful Damage/Mischief to Property

	For Police Completion Page No N/A Ordered
Repair estimate/invoices/other expenses	
Goods value/extent of loss	

F. Theft (Retail)

	For Police Completion Page No N/A Ordered
Store security report	
Goods value/extent of loss	

G. Assault

	For Police Completion Page No N/A Ordered
Photos	
Consent to release medical records	
Doctor/hospital records	

III. SPECIALIZED MATERIALS

	For Police Completion Page No N/A Ordered
Medical reports	
Lab reports	
Forensic Reports: • fingerprint analysis; • hair and fiber analysis; • blood typing; • DNA analysis; • Other (describe)	
Fingerprint lifted	
Incidental property damage reports	
Print/laser photocopies of photographs of suspects if identity likely to be in issue	
Audio/video tape	
Wiretap authorisation	
Identification information	
Print/laser photocopies of line-up sheets	
Copy of cheques (front and back)	
Business records/government records/ bank records, with affidavit attesting to same	
Notice that records will be adduced in evidence together with proof of service (section 50)	
Copy of NSF notice	
Statement of person accepting cheque	
Accused's bank records/affidavit	
Affidavit of no account	

V. OTHER INFORMATION REQUESTED BY DEFENCE

	For Police Completion Page No N/A Ordered

VI. DISCLOSURE REFUSED

To be completed where information has been withheld

A. Nature of Information Withheld

B. Reasons for Withholding Information

C. Name of Crown and supervisor who approved withholding information and date

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