

'Recent official Reports have exposed a crisis in disclosure which threatens a fair trial and risks further miscarriages of justice. What has gone wrong and where do the remedies lie?'

A recent inspection of the disclosure of unused material¹ found continuing failings in the way disclosure operates in criminal proceedings, despite a welter of judicial, procedural and legislative fixes over the years. Such problems and the reaction to them is not new², and recommendations for improvement echo those that went before them³.

What is new is that HMIs found the prosecution's approach to disclosure too narrow. Institutions are working around issues rather than fixing the cause of the problem. The 'golden rule'⁴ of disclosure has become tarnished. Investigation and prosecution authorities are over prioritising available resource on achieving deadlines and targets rather than treating disclosure as an essential element of the overriding objective, and necessary for a fair trial⁵. Problems associated with disclosure may be more fundamental and go to the root of the criminal justice system and its culture.

Problems with the disclosure of unused material have persisted for years⁶. Numerous miscarriages of justice being attributed to non-disclosure and suppression of evidence⁷. Far from curing the problem, reaction and counterreaction have resulted in a lack of stability, fragmented structures, and deficient accountability. It is argued that that much more fundamental shift now needs to occur if miscarriage of justice is to be avoided.

An abundance of evidence points to non-disclosure as a potent source of injustice. Raising serious issues of prosecutorial failure, the question remains whether it is realistic to expect the police to deal fairly and objectively with issues of disclosure.

If there was ever a salutary tale for those charged with responsibilities for prosecution disclosure, it is that of 'the Cardiff Three'⁸, which involved the wrongful conviction for murder in 1988 and subsequent exoneration on the appeal of three innocent men. The subsequent pursuit of the officers who allegedly suppressed evidence from disclosure at the initial trial ended in another failed criminal prosecution for misfeasance in a trial itself typified by non-disclosure of relevant

¹ HMICPSI/HMIC (2017) Making It Fair: a joint inspection of the disclosure of unused material in volume crown court cases p4

² Plotnikoff J. and Woolfson R., "A fair Balance?" Evaluation of the Operation of the Disclosure Law, RDS Occasional Paper No 76, 2001 and Zander (2001) A Response to Lord Justice Auld's review of the Criminal Courts https://www.lse.ac.uk/collections/law/staff%20publications%20full%20text/zander/auld_response_web.pdf

³ LJ Gross and LJ Treacy (2012) Further review of disclosure in criminal proceedings: sanctions for disclosure failure. Available: https://www.judiciary.gov.uk/wp-content/uploads/.../disclosure_criminal_courts.pdf

⁴ Bingham LJ in R v H & C [2004] 2 AC 134

⁵ Criminal Procedure Rules SI 2005 and No 384

⁶ The Review of the Criminal Courts in England and Wales ("the Auld Report"), 2001

⁷ R v Ward [1993] 1 WLR 619

⁸ R v Paris Abdullah and Miller [1993] 97 Cr App R 99

documents by the Crown⁹. The DPP at the time - Keir Starmer - is quoted as saying “the prosecution will stand or fall on the quality of disclosure, and failings can leave the court with no choice but to acquit defendants who have a case to answer”¹⁰. We still await the promised reforms that were pronounced to be necessary to prevent a further miscarriage of justice.

Coinciding recently with the HMIs’ report into ‘wholly inadequate disclosure practices’ by police and CPS, Richard Horwell QC’s review of the disclosure issues in the prosecution of the officers cites a lack of resources, an inappropriate mindset, and inexperience of those charged with disclosure as being paramount bring about failings. He described the ‘Cardiff Three’ case as one of the worst miscarriages of justice, albeit due to human error, not corruption¹¹.

At the heart of the problem lies the prosecution's monopoly over the creation, collection, evaluation, and disclosure of material. The risk of distortion is never greater than when the principles of equality of arms conflict with the right to a fair trial¹². Disclosure rules seek to level the playing field but, in practice, disclosure is undertaken in imperfect conditions.

Prosecuting authorities are under a duty of fairness¹³. Acting as candid 'minister of justice,' the goal is to secure a fair trial as opposed to a conviction at all costs. Following the 'golden rule' of disclosure, ensures full disclosure of any relevant material¹⁴. A straightforward application of the rules of natural and open justice¹⁵ appears not to be so simple in practice. The real controversy here concerns the precise boundaries and content of the prosecution’s duty to disclose.

Reform of statute, common law, and guidance on disclosure has struggled to strike a balance between openness and practicality; between the burdens of the prosecution to analyse, evaluate and select material for disclosure and the rights of the defence to have access to material which may support their case.

Ensuring that disclosure is effected comprehensively and fairly requires a highly focused, often time-consuming, expensive and methodical search for material. If fairness demands disclosure, a way of ensuring that disclosure is made must be found¹⁶.

Realistically, however, a framework that balances economy and effectiveness, that is both fair and workable, may be both challenging and expensive to achieve. We are nonetheless at the stage

⁹ R v Mouncher & others (2011) reported in The Independent 7 July 2011

¹⁰ Murder Case a Thorn in the Side of South Wales Police *Western Mail*. Cardiff. 15 March 2014 accessed at <http://www.highbeam.com/doc/1G1-361695717.html>

¹¹ Horwell R (2017) The Mouncher Investigation Report of the House of Commons HC 292

¹² Article 6(3)(b) of the ECHR

¹³ section 3 of the Human Rights Act 1998

¹⁴ Randall v the Queen [2002] 1 WLR 2237

¹⁵ Lord Taylor of Gosforth, in R v Keane [1994] 99 Cr App R 1

¹⁶ Lord Hope in R v Brown (Winston) [1998] 1 Cr App Rep 66

where the cost of non-disclosure is becoming prohibitive regarding the continuing risk of a miscarriage of justice and loss of public confidence in the criminal justice system.

There is a problem as to where the interpretative boundaries lie. For instance, the pursuance of all reasonable lines of inquiry is only reasonable in the context of the particular case. Although investigators are obliged to record and retain all information which may be relevant to the investigation - even negative information¹⁷ - it is not part of the prosecution's duty to conduct a word-by-word examination of material to be alert to anything which might conceivably or speculatively assist the defence.

The new disclosure test under section 3 CPIA is far narrower than 'all material for or against the accused.' Moreover, relevance does not imply disclosure of material that is either neutral in effect or adverse to the accused¹⁸. Rather, whether documents are material will depend upon the circumstances of the defence case. Even then, if the material does not fulfil the disclosure test, there is no requirement to disclose.

Nevertheless, where they become aware of, or their attention is drawn to its existence, the prosecution is obliged to disclose if the material could reasonably be considered capable of undermining the prosecution or assisting the accused. Unsurprisingly, officers typically find it difficult to apply the test consistently, particularly in large and complex cases.

Moreover, the police's disclosure duty requires analysis as to whether something may affect the outcome of the trial. What may appear exculpatory to defence counsel at trial may seem only tangentially relevant to police or prosecutors at an earlier stage.

Disclosure is, therefore, only as good as the person doing it and, even then, that person must have all the material before them. Currently, that will most likely be a police disclosure officer who must filter what is relevant from all material available.

The problem of accurate interpretation is magnified when considering circumstantial evidence – particularly when isolated facts when taken together may have probative value - upon which a jury may be asked to draw inferences. Adequate disclosure of such fragments of evidence requires the disclosure officer to undertake some complex mental gymnastics to anticipate what may or may not be relevant, inevitably increasing the opportunity for interpretational error.

Once revealed, the prosecutor is then required to assess material from a defence perspective; in other words, to empathise with his opponent. Though prosecutors are only expected to anticipate what material might undermine their case or strengthen the defence on the basis of the information available the time, this is a 'moving feast.' Hence the importance of the continuing duty of disclosure as the case develops.

¹⁷ CPIA code of practice para 3.1, 3.6 and 4.4

¹⁸ Lord Bingham in R v H and C

To understand the causes of erroneous disclosure, we must go beyond individual sources of error to explore how societal forces, institutional logic, and erroneous human judgement come together to produce an opportunity for miscarriage of justice.

A fair trial depends upon the fairness and integrity of the police from the moment an investigation begins. Nevertheless, the police service operates on the basis of pragmatism. A detective's perception of the case is informed through regular contact with people who lie or distort the truth. Police training reinforces the primary focus on attaining a conviction through the application of professional investigative processes and good faith as opposed to dwelling upon the causes and prevention of error that might curtail the risk of a miscarriage of justice¹⁹.

The dangers of potentially misleading assumptions embedded within occupational culture and practice are amplified within the choices that are made when constructing a case. A one-dimensional focus on the needs of the victim and pressure to obtain a conviction, has the potential to skew the interpretation, selection, reformulation, and in some cases creation of evidence to build a case that achieves an organisationally defined outcome. In this context, detective work is typified by working around rather than breaking the rules, where evidential standards are often open to interpretation²⁰.

Underlying cultural issues within the police service and the CPS may contribute to non-disclosure due to the reluctance of investigators to reconcile the dichotomy between the desire to convict and respect the due process rights of the accused²¹.

Investigators and prosecutors are additionally under pressure, both internally and externally, to achieve results, do a public duty and fulfil organisational expectations, which conflicts with the requirement for impartiality. Given the pressures, it is perhaps inevitable that, subject to the frailties of human judgement, some unconscious filtering occurs primarily based upon predominant beliefs and cultural expectations rather than what may be surmised of the defence case. A system so open to discretion is inherently open to distortion.

Combined with an increasingly managerial approach to criminal justice - with its emphasis on reaching targets and convicting the guilty - it is unavoidable that a practical application of the rules prevails over the presumption of innocence in the order of priorities. The potential for error or omission in the recording, analysis, and evaluation of material, coupled with budget constraints, increases the risk of corners being cut.

Complexity of major crime investigation creates further challenges. The collection of vast amounts of material, often overloaded with misinformation, quickly outstrips resources to deal with it.

¹⁹ Niblet, J. (1997) *Disclosure in Criminal Proceedings*. London: Blackstone

²⁰ Innes, M. (2003) *Investigating Murder*. Oxford: OUP

²¹ Taylor, C. (2005) Advance Disclosure and the Culture of the Investigator: The Good Idea That Never Quite Caught On? *International Journal of the Sociology of Law, Int J Soc L* 33 (2005) 118-131.

Regrettably, information management system seems not to have alleviated the disclosure officer's burden as the material still must be analysed and evaluated. Genuine mistakes may be expected.

Primary responsibility for ensuring that all relevant exculpatory material is disclosed remains with the disclosure officer who continues to work with a minimum of training and supervision²². Although the CPIA²³ emphasises the importance of the officer in charge of an investigation overseeing disclosure, in practice the role is often assigned to less experienced and often untrained officers and civilian support staff. Hence, unsupported officers are routinely failing to comply with scheduling of unused materials and tend to confuse what constitutes relevant unused material.

Notwithstanding intensive regulation and scrutiny, successful operation of disclosure procedures continues to depend on the open-mindedness, intelligence, efficiency and conscientiousness of investigators and prosecutors to get it right. Specialist training for the role is minimal. In contrast to current levels disclosure training, the reforms introduced post-PACE were implemented during a time of unprecedented police budgets, allowing extensive re-training to be undertaken while not unduly prejudicing other priorities. The same cannot be said for training post-CPIA, and the situation is worsening. Since the introduction of the College of Policing in 2012, as funding for training now comes from individual force operational budgets rather than a central grant, means that specialist training, if available, is effectively rationed.

The Home Secretary's response to the HMI's findings on disclosure was to refer the recommendations to Chief Constables and Senior Prosecutors for action, yet no provision is being made for the inevitable cost and resources necessary to fix the problems. With austerity affecting every part of the Criminal Justice System, the Police Service and CPS are having to deal with ever more complex and sophisticated challenges and regulatory expectation with resources effectively trimmed back to that of 1985²⁴. Austerity has had such an impact that HMIC recently issued an unprecedented warning that a shortage of detectives amounts to a national crisis²⁵. Without sufficient resources, the required cultural shift needed to make disclosure work seems unlikely.

Structurally, institutional separation of disclosure functions between police, CPS, and prosecuting counsel is viewed as a strength of the English prosecution system²⁶; however, the difference in operating cultures and working remotely from each other creates gaps and opportunity for error.

There appear to be three options to avoid, mitigate or reduce the risk of a miscarriage of justice caused by failed disclosure. First, avoid prosecution evaluation of material entirely by giving the defence everything. Second, introduce an integrated prosecution model, expanding the powers of

²² CPS Disclosure Manual para 10.1 available at http://www.cps.gov.uk/legal/d_to_g/disclosure_manual

²³ Code of Practice para 23.1

²⁴ BBC Radio 4 Today programme, 22 September 2017 accessed at www.bbc.co.uk/news/uk-41356593

²⁵ <https://www.justiceinspectorates.gov.uk/hmicfrs/news/news-feed/hmic-raises-warning-flag-as-forces-strive-to-cope-with-increased-demand>

²⁶ LJ Gross (2011) Review of Disclosure in Criminal Proceedings

the CPS to take responsibility to review all the material in existence to decide what is disclosable. Third, any doubt as to relevance or discloseability should be resolved in favour of disclosure.

Full disclosure is the key to rebalancing the equality of arms between parties, enabling equal access to material sufficient to enable adversarial debate. Sharing evidence reduces delay and cost by allowing resolution of more cases earlier in the process. Appropriate access to all available material in a case also dramatically reduces the opportunity for legal challenge; thus, potentially increasing the reliability of outcomes and public confidence in the criminal justice system. In short, full disclosure drives enhanced judicial efficiency.

Moreover, the exchange of all evidence removes subjectivity and promotes fairness and accuracy in disclosure. Taking disclosure out of the hands of interested parties, such as the police and prosecutors, lays the foundations for reciprocal and cooperative disclosure. If initiated as early as practicable, a more open and extended disclosure allows for fairer and more accurate analysis of information to adequately prepare for trial. Amendment of Criminal Procedure Rules may allow for the exclusion of anything that had not been disclosed for use in trial proceedings. Accordingly, open disclosure improves procedural transparency and ensures both fairness of both the trial process and the outcome. While accepting that cost may be a factor - potentially weighing more significantly upon the defence - the next best option is to integrate the existing prosecution model.

Integrated disclosure decision-making would allow the CPS, within its existing statutory functions, to refine and professionalise the disclosure process, consequently reducing the opportunity for error and improving accuracy. Removing the evaluative role from the police in the disclosure process gives the CPS the central and directing role in the coordination of all stages of case preparation. Notwithstanding that crown prosecutors' current workloads are already reported to be at unsustainable levels²⁷, a choice must be made, within any democracy that cherishes the rule of law, whether an adequately funded public prosecution service is an acceptable price to be paid to avoid injustice.

Lastly, even implemented in isolation of other reforms, the introduction of presumptive 'rules of thumb' may prevent many of the issues raised regarding disclosure. Borderline questions of relevance should result in the material concerned being scheduled, subject to sensitivity considerations. Likewise, any doubts about whether to disclose particular material or not should be resolved in favour of disclosure and not deferred for later consideration of counsel. The positive duty to disclose is the essential foundation for any system of fair disclosure.

In conclusion, the current system of disclosure is fractured along institutional lines, creating an unassailable opportunity for error that potentially jeopardises the fairness of the criminal trial process. Without a real shift in thinking, disclosure will continue to cause both operational difficulties and risk of miscarriages of justice.

²⁷ HMICPSI (2017) Annual Report 2016-2017 Available at https://www.justiceinspectorates.gov.uk/hmcpsi/wp-content/uploads/sites/3/2017/07/HMCPSI_CJAR_2016-17_rpt.pdf

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