

IS THE ‘GOLDEN RULE’ OF FULL PROSECUTION DISCLOSURE A MODERN ‘MISSION IMPOSSIBLE’?¹

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It is almost universally acknowledged that the prosecutor’s modern role with respect to the disclosure of relevant material in its possession must be that of the candid ‘minister of justice’ in line with the ‘golden rule’ of disclosure, which requires full disclosure of any relevant material. Accordingly, the real controversy in relation to disclosure concerns the precise boundaries and content of this duty. This article charts the issues that have arisen since the landmark case of *R v Ward* [1993] 1 WLR 619 raised serious issues of prosecutorial obligations for disclosure in England. In particular this article asks whether it is realistic to expect the police and/or the prosecuting lawyer to deal fairly and objectively with issues of disclosure. It is clear that the prosecution’s disclosure obligations must be framed within a formal disclosure regime. Despite the major problems of principle and practice that have arisen in England, it is, nevertheless, still possible to offer some suggestions about the framework of a formal system of disclosure that is both fair and workable. Considering the effective incorporation of the English system of disclosure into Australia law with *R v Mallard* (2005) 224 CLR 125, such a framework is appropriate for both England and

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Australia. Disclosure may be both difficult and expensive to achieve 'but the costs of non-disclosure are now prohibitive.'²

I INTRODUCTION – THE 'GOLDEN RULE'

It is widely recognised that there is a paramount need for fairness to an accused in the criminal justice system and, by necessary implication, with a system of disclosure.³ This means that in pursuit of fairness, the modern prosecutor must resist adversarial or tactical temptation and ensure that all relevant material in the prosecution's possession is revealed to the defence.⁴ As Lord Bingham stated in *R v H*,⁵ 'The golden rule is that full disclosure of such material should be made.'⁶ If prosecution counsel should fail to conform to the 'golden rule' of full disclosure of all relevant material then it is all too easy for the prosecuting lawyer to act not 'as a minister of justice, but as a minister of injustice.'⁷

² Robert Frater, 'The Seven Deadly Prosecutorial Sins' (2002) 7 *Canadian Criminal Law Review* 209, 216.

³ The term 'disclosure' will be employed in this article in preference to the term 'discovery'. 'Disclosure' is used to denote the positive duty of the Crown to act of its own volition without any pressure or request from the accused to make available to the defence both the evidence which it is proposing to adduce at trial and any other relevant material, so called 'unused material', which might tend to establish a defendant's guilt or innocence. 'Discovery' is used in this article in a similar context to its use in civil litigation. In criminal procedure it refers to less an obligation on the Crown and more of a right of the accused to demand access prior to trial to the evidence and the relevant material pertaining to the case in its possession. See also Howard Shapray, 'The Prosecutor as a Minister of Justice: a Critical Appraisal' (1969) 15 *McGill Law Journal* 124, 135.

⁴ See, eg, *R v Jannison and Kennedy* (1982) 62 CCC 93d 481, 486-7; *R v Livingstone* [1993] Crim LR 597.

⁵ [2004] 2 AC 134.

⁶ [2004] 2 AC 134, 147.

⁷ Aaron Beard, 'DA will be Disbarred,' *Chicago Sun Times*, 17 June 2007. This description was used by counsel for the North Carolina Bar Association in disciplinary proceedings brought against a District Attorney called Nifong arising from Nifong's high profile prosecution in 2006 of three white college students for the alleged rape of a black woman. Nifong was found to not only have knowingly concealed from the defence exculpatory DNA evidence that

Niblett argues that '[d]isclosure rules must be capable of effective observance and they must be fair – to the investigator, the prosecutor and the defence practitioner; but principally to the accused.'⁸ This focus on the need for fairness to the accused led Lord Bingham in *R v H* to highlight that the duty on the prosecution requires disclosure of material 'not relied on as part of its formal case against the defendant', irrespective of whether it strengthened or weakened the prosecution case.⁹

The formulation of the 'golden rule' of disclosure is unsurprising. The importance to the course and outcome of a criminal trial of the manner in which the prosecution discharges its duty of disclosure cannot be overestimated. It is difficult to conceive how any criminal trial can be regarded as fair if the accused is not provided with significant material in the prosecution's possession that supports the defence case or undermines the prosecution case.¹⁰ The importance of frank disclosure by the prosecution of relevant material to the defence cannot be exaggerated.¹¹ It is a natural application of the

exonerated the defendants, but to have lied when he denied in court that he knew about such evidence. Nifong was facing re-election and it seems that both his high profile prosecution of the students and his concealment of the evidence that undermined his case were designed to boost his profile and enhance his prospect of re-election: see Duff Wilson, 'Prosecutor in Duke Case is Disbarred for Ethics Breaches,' *New York Times*, 16 June 2007. The prosecution non-disclosure of exculpatory material is far from unusual in the United States and has emerged as one of the principal causes of wrongful convictions: see Susan Kuo and Chris Taylor, 'In Prosecutors We Trust: UK Lessons for Illinois Disclosure' (2007) 38 *Loyola University Chicago Law Journal* 695, 704-707. This even extends to capital murder cases: see Hugo Bedau and Michael Radelet, 'Miscarriages of Justice in Potentially Capital Case' (1987) 40 *Stanford Law Review* 21, 56-57.

⁸ John Niblett, *Disclosure in Criminal Proceedings* (Sweet & Maxwell, 1996) 36.

⁹ [2004] 2 AC 134, 147. This test should be contrasted with the current statutory test in England under s 3 of the CPIA which requires the disclosure of material 'which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused.'

¹⁰ See, eg, *R v Ward* [1993] 1 WLR 619, 645, 674, 692.

¹¹ See *Ragg v Magistrates' Court of Victoria* (2008) 179 A Crim R 568; David Plater, 'The Development of the Prosecutor's Role in England and Australia with Respect to Disclosure: Partisan Advocate or Minister of Justice?' (2006)

prosecutor's wider role in the criminal justice process as an impartial 'minister of justice' to assist the court in arriving at the truth of the matter in dispute,¹² both before and at trial.¹³ In an adversarial criminal process where the police and prosecutors control the investigatory process, 'an accused's right to fair disclosure is an inseparable part of his [or her] right to a fair trial.'¹⁴

A Disclosure in Context

In both England and Australia, the prosecution's modern duty of disclosure is mandated by a complex combination of statute,¹⁵ professional guidelines,¹⁶ prosecutorial guidelines,¹⁷ practice

25 *University of Tasmania Law Review* 111, 152-5 for an overview of the various rationales for the modern duty of disclosure.

¹² See, eg, *R v Berry* [1992] 2 AC 364, 374-6; *R v O'Connor* (1995) 130 DLR (4th) 235, 284; *R v Bunting* (2002) 84 SASR 378, 384; *R v TSR* (2002) 5 VR 627, 650; *R v Tailefer* (2004) 233 DLR (4th) 227, 257; *Ragg v Magistrates' Court of Victoria* (2008) 179 A Crim R 568, 586-7.

¹³ See *R v Lucas* [1973] VR 693, 705; *R v Regan* (2002) 161 CCC (3d) 97, 157. This is a crucial point in practice as, contrary to the impression gained from fictional legal drama, the bulk of the 'work' in a criminal case happens 'outside' court as opposed to 'inside' court. See Sir Robin Auld, *Review of the Criminal Courts of England and Wales* (HMSO, 2001) Ch 10, [1]; John Baldwin and Michael McConville, *Courts, Prosecution and Conviction* (Clarendon Press, 1981) 10.

¹⁴ See *R v Winston Brown* [1994] 1 WLR 1599, 1606. The importance of frank disclosure to the right of a fair trial is recognised under both under the common law (see, eg, *R v WK* [2002] WASC 176, [12]-[13]; *R v Easterday* (2003) 143 A Crim R 154, 188; *Ragg v Magistrates' Court of Victoria* (2008) 179 A Crim R 568, 589) and international human rights law (see, eg, *Jespers v Belgium* (1981) 27 DR 61, [51]-[56]; *Kaufman v Belgium* (1986) 50 DR 98, 115; *Rowe and Davis v UK* (2000) 30 EHRR 1, [60]; *Ragg v Magistrates' Court of Victoria* (2008) 179 A Crim R 568, 579-5).

¹⁵ See, eg, the *Criminal Procedure and Investigations Act* 1996 (Eng) ss 3, 7, 9; the *Criminal Procedure Act* 1986 (NSW) ss 141, 147; the *Director of Public Prosecutions Act* 1986 (NSW) s 15A; the *Summary Procedure Act* (SA) s 104; the *Criminal Code* 1899 (Qld) s 590AB, ss 590AH-AL; the *Criminal Procedure Act* 2009 (Vic) ss 41-42, 110-1, 185, 416; the *Criminal Procedure Act* 2004 (WA) s 95.

¹⁶ See, eg, the *New South Wales Barristers' Rules*, rr 66, 66A; the *New South Wales Solicitors' Rules*, rr A66, A66A; the *South Australian Barrister Rules*, rr 9.8, 9.9; the *Victorian Bar Inc Practice Rules Rules of Conduct and*

directions¹⁸ and judicial decision.¹⁹ In practice, the performance of this duty has proved problematic. The editors of *Archbold* noted in 2006 that this ‘is an area of law which has developed rapidly in recent years. It is also notoriously difficult.’²⁰ A former South Australian Director of Public Prosecutions observed, ‘There is no more contentious an area for a prosecutor than disclosure.’²¹ Disclosure will continue to prove one of the most demanding duties for prosecution lawyers. In 2007, the former Commonwealth Director of Public Prosecutions observed:

Professional Education, r 141; the *Australian Bar Association Model Rules*, rr 66, 66A.

¹⁷ See, for England, the *Attorney-General’s Guidelines on Disclosure* 2005 (Eng), *CPS Code for Crown Prosecutors*, the *CPIA Codes of Practice*, the *Police/CPS Joint Operational Instructions* (JOPI). See, for Australia, the *Guidelines for Prosecutors* (ACT) g 6; the *Prosecution Policy of the Commonwealth*, g 8; the *Disclosure Policy* (Cth), <<http://www.cdpp.gov.au/Publications/DisclosurePolicy/>>; the *Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales*, g 18; the *Prosecution Guidelines* 2005 (NT) gg 8.1, 8.4(ii); the *Director’s Guidelines* (Qld) g 27; the *Statement of Prosecution Policy and Guidelines* (SA) g 9; the *Prosecution Policy and Guidelines* 2010 (Vic) gg 1.7, 5.0, 5.2.1, 5.2.20; *Statement of Prosecution Policy and Guidelines* 2005 (WA) 20, [111]-[112] (police) 20, [113]. See also Martin Hinton, ‘Unused Material and the Prosecutor’s Duty of Disclosure’ (2001) 25 *Criminal Law Journal* 121, 123-8. Tasmania surprisingly does not appear to have any such official policy and the *Prosecution Guidelines* (Tas) make no mention of disclosure.

¹⁸ See, eg, *Disclosure: a Protocol for the Control and Management of Unused Material in the Crown Court; Protocol for Control and Management of Heavy Fraud and Other Complex Criminal Cases* <<http://www.westerncircuit.org.uk/Documents/CPS/Disclosure%20protocol%20Feb%202006.pdf>>.

¹⁹ See, eg, *R v Stinchcombe* (1991) 68 CCC (3d) 1; *R v Ward* [1993] 1 WLR 619; *R v Keane* [1994] 2 All ER 478; *R v Gray* (2001) 184 ALR 593; *R v Mallard* (2005) 224 CLR 125.

²⁰ James Richardson QC (ed), *Archbold: Criminal Pleading and Practice* (2006 ed) (Sweet & Maxwell, 2006) 460, [4.273].

²¹ Paul Rolfé QC, ‘Disclosure by Both Sides’ (Paper presented at the Australian Institute of Criminology Conference, Melbourne, 11 April 1996) 1, <<http://www.aic.gov.au/events/aic%20upcoming%20events/1996/~media/conferences/prosecuting/rofe.pdf>>. See also David Calvert-Smith QC, ‘The Prosecuting Authority’s Role: Making the *Criminal Procedure and Investigations Act* work to Facilitate Fair Trials and Just Verdicts,’ Conference Paper, ‘Disclosure under the *Criminal Procedure and Investigations Act* 1996,’ (British Academy of Forensic Sciences, 1999).

The continuing obligation to disclose relevant material in the possession of the Crown (investigators/prosecutors) is one of the most contentious areas of work of prosecutors today. I say contentious because of the potential for tensions between prosecutors, the police, the defence, the accused and the Courts that this developing obligation causes... I see this as one of the truly testing areas in the evolution in the role of prosecutors in the 21st century.²²

The modern prosecutorial role in this area is now that of the minister of justice and not partisan advocate.²³ However, though there is no place in the modern criminal process for the informal approach to disclosure of the past,²⁴ it has proved difficult to devise a formal system of disclosure that is effective, efficient and fair, notably to the accused.²⁵ The attempt in England to do so through legislative reform in the shape of the *Criminal Procedure and Investigations Act 1996* (the *CPIA*)²⁶ has resulted in 'widespread and endemic lack of confidence' by all parties in the *CPIA*.²⁷ As noted by Justice

²² Damian Bugg QC, 'The Independence of the Prosecutor and the Rule of Law,' (Speech at the 'Rule of Law: the Challenge of a Changing World' conference, Brisbane, 31 August 2007)

<<http://www.cdpp.gov.au/Director/Speeches/20070831db.aspx>>.

²³ See Frater, above n 2, 216; Niblett, above n 8, 13; Plater, above n 11, 152-5.

²⁴ See, eg, Marilyn Warren (Chief Justice), 'The Duty owed to the Court – Sometimes Forgotten,' (Keynote Address to the Judicial Conference of Australia Colloquium, Melbourne, 9 October 2009) 17-18, <<http://www.jca.asn.au/attachments/2009OriginalKeynoteAddress.pdf>>; *R v Taillefer* (2004) 233 DLR (4th) 227, 236. See further David Corker, *Disclosure in Criminal Proceedings* (Blackstone Press Ltd, 1997) 24; Niblett above n 8, 61; Plater, above n 11, 121-9; Shorter Trials Committee, *Report on Criminal Trials* (AIJA, 1985) 90, as to the operation of the informal 'Old Boys Act' disclosure regime.

²⁵ See, eg, the view of the Home Office Minister in 1995, quoted by Sir Alexander Butterfield, *Review of Criminal Investigations and Prosecutions conducted by HM Customs and Excise* (HMSO, 2003) 250.

²⁶ See Sir Peter Gross, *Review of Disclosure in Criminal Proceedings* (Judiciary of England and Wales, 2011) 16-32, for an overview of both the *CPIA* and the complex operation of the present disclosure regime in England.

²⁷ David Corker and Stephen Parkinson, *Disclosure in Criminal Proceedings* (Oxford University Press, 2009) 20, [1.61]. See also David Ormerod, 'Improving the Disclosure Regime' (2003) 7 *International Journal of Evidence and Proof* 102, 102-3; Joyce Plotnikoff and Richard Woolfson, *A Fair*

Butterfield, ‘the *CPIA* was intended ... to put the genie back in the bottle. In my view the attempt has failed and prosecutors and courts are now faced with the worst of all possible worlds.’²⁸

Given that the modern system of disclosure was in operation in England for at least a decade before the landmark Australian High Court decision in 2005 in *R v Mallard*,²⁹ it is appropriate to consider if any lessons can be applied from the English experience to Australia. This article will address the problems that have emerged in England in the two decades since the ‘golden rule’ was formulated under the following six headings:³⁰

- Who constitutes the prosecution for the purposes of disclosure;
- The extent of the prosecution’s duty of disclosure;
- The practical implications of the duty of disclosure;
- Involvement of the defence in disclosure;
- Is the duty of disclosure ‘a charter for the criminal’³¹ to exploit the system;
- Disclosure of third party material.

The extent of the unresolved issues and tensions with the various models of disclosure that have emerged in England cannot be underestimated. Disclosure obligations have proved burdensome on

Balance? Evaluation of the Operation of the Disclosure Law (RSD Occasional Paper No 76) (Home Office, 2001) 141.

²⁸ Butterfield, above n 25, 256, [12.28]. It was noted as recently as 2008 that, ‘Many aspects of disclosure remain problematic’: see Her Majesty’s CPS Inspectorate, *A Thematic Review of the Duties of Disclosure of Unused Material* (HMCPSI, 2008) i.

²⁹ (2005) 224 CLR 125. This decision effectively confirmed the incorporation of the English system of disclosure into the Australian common law. See further Plater, above n 11, 152.

³⁰ The prosecutorial role with respect to claims of public interest immunity has proved problematic: see Ormerod, above n 27, 116-8, 125; but the problems in respect of public interest immunity and the prosecution’s role and duty of disclosure in this context are too broad to be included in this article.

³¹ Corker and Parkinson, above n 27, 15, [1.48].

the prosecution.³² Nevertheless, it is suggested that recommendations can be made about the broad framework of a system of disclosure that is both fair and practical. This article suggests that the prosecutorial role in this area must be that of a minister of justice and this principle must find practical expression in a comprehensive and formal duty of prosecution disclosure.

There can be no place in a modern criminal justice system in either England or Australia for a return to the prosecutorial role of a partisan advocate able to resort to ‘trial by ambush’ or the informal ‘Old Boys Act’ approach dependent upon professional etiquette and personal practice. The Crown acts as ‘the trustees of information, not its monopoly owners, if we are to make any progress. The only question for debate should be the terms of that trusteeship.’³³

II WHO IS THE PROSECUTION FOR THE PURPOSE OF DISCLOSURE?

The issue of who constitutes the prosecution for the purposes of disclosure has never been fully resolved. As Niblett observes, the concept of what constitutes the prosecution ‘has always been ambiguous, allowing the courts a degree of elasticity in particular cases.’³⁴ It is simple to say that any prosecuting lawyer (whether directly employed or instructed by the prosecuting agency) and the

³² See Peter Goldsmith QC, ‘Attorney-General’s Speech to Whitehall Prosecutors Conference 2005’ (London, 4 October 2005) 4, <http://www.attorneygeneral.gov.uk/attachments/04_10_05_speech_WPC_delivered.doc>, noting that in ‘heavy cases’ up to 80% of the time of prosecution lawyers was taken up by viewing and sorting out unused material. See also John McGuinness QC et al, *The Effectiveness of the Current Disclosure Regime and in Large and Complex Cases* (Criminal Bar Association, 2005) [44], quoting the view of Treasury counsel that he routinely spent about 70% of his time in complex cases dealing with issues of disclosure.

³³ Patrick O’Connor, ‘Prosecution Disclosure: Principle, Practice and Justice’ [1992] *Criminal Law Review* 464, 476.

³⁴ Niblett, above n 8, 42.

office of the Director of Public Prosecutions are part of the prosecution. But what of material in the possession of the police that is never, whether wittingly or unwittingly, furnished to the prosecuting lawyers?

A *The Police*

The courts have insisted on a number of occasions in both Australia³⁵ and England³⁶ that the police are part of the prosecution for the purposes of disclosure. It is no answer for the prosecution to assert that they cannot disclose something of which the police have never made them aware.³⁷ ‘In those circumstances, while the prosecuting authority as such may not have failed in their duty, the total apparatus of [the] prosecution has failed to carry out its duty to bring before the court all the material evidence.’³⁸ Furthermore, despite any previous practice to the contrary, the police cannot decide the relevance of items in the prosecution’s possession or whether it is covered by public interest immunity.³⁹ Such an assessment must be made, in the first instance at least, by the DPP.⁴⁰

³⁵ See *R v Bradshaw* (Unreported, West Australian Court of Criminal Appeal, 13 May 1997, No 970228, Supreme Court Library, Transcript) 9-11; *R v Gray* (2001) 184 ALR 593, 599-600; *R v Button* [2002] 25 WAR, [58]; *R v Mallard* (2005) 224 CLR 125, 132-3; *R v Lipton (No 2)* [2011] NSWCCA 247.

³⁶ See *R v Birmingham Crown Court, ex parte Richetts* [1991] RTR 105, 108; *R v Taylor and Taylor* (1994) 98 Cr App R 361, 366.

³⁷ See, eg, *R v Liverpool Crown Court, ex parte Roberts* [1986] Crim LR 622; *R v T (LA)* (1993) 84 CCC (3d) 90; *R v McCarthy*, *The Times*, 21 October 1993; *R v Oliver* (1995) 143 NSR (2d) 134, [36]; *R v McNeil* [2009] 1 SCR 66, [24]. Though it is unclear how far the prosecution’s duty of disclosure extends to material in the prosecution’s possession but relating to another case or investigation.

³⁸ *R v Boton Justices; ex parte Scally* [1991] 2 All ER 619, 633 (Glidewell LJ).

³⁹ See *R v Ward* [1993] 1 WLR 619, 632-3; *R v Solomon* (2005) 92 SASR 331, [115]; *R v West* [2005] EWCA Crim 517; *R v Lipton (No 2)* [2011] NSWCCA 247.

⁴⁰ See *R v Ward* [1993] 619, 632-3; *R v West* [2005] EWCA Crim 517; *R v Lipton (No 2)* [2011] NSWCCA 247. All three cases confirm that the ultimate decision as to whether an item is covered by public interest immunity is for the court alone. The previous practice, in New South Wales at least, that the DPP abstained from making claims of public interest immunity but rather left it to

The logic of classifying the police as part of the ‘total apparatus of the prosecution’ is demonstrated by a number of cases in which the investigators withheld from the defence and even the prosecution lawyers vital material that undermined the Crown case.⁴¹ Several leading cases support this and further have held that even an independent expert witness retained and instructed by the prosecution is part of the prosecution for the purposes of disclosure.⁴² If the courts were prepared to overlook the non-disclosure of significant material by the prosecution on the basis that the police or prosecution expert witness had never made the prosecuting lawyer aware of such material, it would not encourage a climate of candour and transparency, and would undermine the modern insistence on frank disclosure of the prosecution case.⁴³

B *State Authorities*

It may be simple to classify the police or an expert witness as part of the prosecution but it is unclear how far the ‘total apparatus of the prosecution’ doctrine extends. In the 1996 case of *R v Blackledge and Others*⁴⁴ arising from the alleged illegal shipment of military equipment to Iraq, the English Court of Appeal offered the startling

the police to ‘instruct’ the Crown Solicitor to appear on its behalf to argue such claims now appears doubtful in light of *R v Lipton (No 2)* [2011] NSWCCA 247.

⁴¹ See, eg, *R v Ward* [1993] 1 WLR 619; *R v Taylor and Taylor* (1994) 98 Cr App R 361; *R v Early and Others* [2003] 1 Cr App R 19; *R v Mallard* (2005) 224 CLR 125; *R v Maxwell* [2011] 1 WLR 1837.

⁴² See, eg, *R v Ward* [1993] 1 WLR 619, 674-5; *R v Maguire* [1992] 1 QB 936; *R v Clark* [2003] 2 FCR 447. Such classification should strictly be unnecessary as any expert witness should regard him or herself as a wholly independent player in the proceedings whose role is to provide objective and unbiased assistance to the court uninfluenced as to form or content by the exigencies of the litigation or the interests of the party instructing the witness: see *Whitehouse v Jordan* [1981] 1 WLR 246.

⁴³ But the courts may be prepared on occasion to overlook non-disclosure of relevant material through applying the test advanced by the House of Lords in *R v Pendleton* [2002] 1 WLR 72 that, despite the non-disclosure, the conviction remains ‘safe’. See, eg, *R v Kenedy (Hamidi)* [2008] EWCA Crim 2817, [23]; *R v Pomfrett* [2009] EWCA Crim 1939.

⁴⁴ [1996] 1 Cr App R 326.

proposition that the Crown is a ‘single indivisible entity’ for the purposes of disclosure.⁴⁵ Any material held by an agency or department of the State or Crown was deemed to be in the possession of the prosecution; therefore the prosecuting lawyers were under a duty to disclose such unused material even if they are ignorant of the existence of such material.⁴⁶

Following this doctrine, it would be nearly impossible to identify just where the Crown ended and began for the purposes of disclosure. The proposition in *Blackledge* is arguably explicable by the particular facts of that case.⁴⁷ It is also significant that prosecution counsel conceded the point without argument. *Blackledge* has been overruled by statute in England.⁴⁸ Subsequent cases have qualified the notion of the indivisibility of the Crown for the purposes of disclosure.⁴⁹ The Supreme Court of Canada in a recent unanimous decision rejected the proposition that all state authorities constituted ‘a single indivisible Crown entity’ for the purposes of disclosure.⁵⁰ The court observed that this view found ‘no

⁴⁵ [1996] 1 Cr App R 326, 337.

⁴⁶ This was the situation in *Blackledge* where prosecution counsel instructed by the Department of Trade and Industry (the DTI) had assured the trial judge that there was no unused material in the case that supported the defence contention that the British authorities had turned a blind eye to the illegal military exports to Iraq with which the defendants were charged. Though prosecution counsel had personally checked the relevant files held by the DTI he had not been shown the files of other government departments and agencies which did contain material that supported the defence case. The Court of Appeal accepted that prosecution counsel had acted in ‘good faith’ but the collective failure of the ‘prosecution’ to disclose the relevant information to the defence amounted to a ‘material irregularity’ and the convictions were quashed. See also *R v Dunk and Others* [1995] Crim LR 137.

⁴⁷ This view of *Blackledge* was applied in *R v Thomas (No 4)* [2008] VSAC 107.

⁴⁸ Corker and Parkinson, above n 27, 91, [7.19].

⁴⁹ See *R v Bretton* (1996) 189 AR 60; *R v W (DD)* (1997) 114 CCC (3d) 506; *R v Stratford Magistrates Court, ex parte Johnson* [2003] EWHC Admin 353; *DPP v Wood*, *The Times*, 8 February 2006, [2005] EWHC Admin 2986; *R v Murphy* [2006] EWHC Admin 1735; *R v Thomas (No 4)* [2008] VSAC 107.

⁵⁰ [2009] 1 SCR 66, [13].

support in law and, moreover, is unworkable in practice.⁵¹ The court concluded that state entities other than the prosecuting Crown were to be treated as third parties under the disclosure regime.⁵²

C *Victims and Witnesses*

The question has been raised whether the victim or another party who is assisting the police or the prosecution is deemed to be part of the prosecution. This issue can occasion difficulty in practice but the general rule is that such parties are not deemed part of the prosecution for the purposes of disclosure and are treated as third parties to the proceedings.⁵³

D *Recommendations*

It is suggested that disclosure should be confined to material in the possession of the prosecuting lawyers, the investigatory agency, and any expert witnesses retained by them. While a firm definition of what constitutes the ‘prosecution’ for the purposes of disclosure may be elusive, the ‘single indivisible entity’ notion from *Blackledge* is inappropriate. If there is significant material held by another government agency, department or party then the solution is to treat it as a third party to the proceedings and to make it subject to the usual rules governing access by summons or subpoena for third party material.⁵⁴

⁵¹ [2009] 1 SCR 66, [13]. The notion of the Crown as one single entity for the purpose of disclosure is particularly unworkable in a federal system of government: see *R v Gingras* (1990) 120 AR 300, [14].

⁵² Though his proposition was qualified by the Supreme Court that the prosecutor’s role as a minister of justice extended to the prosecutor in an appropriate case inquiring further and obtaining known relevant material held by a third party ‘if reasonable feasible’ [2009] 1 SCR 66, [49]. See further below the discussion in Part VI.

⁵³ See, eg, *Morris v Director of SFO* [1993] ch 372. See further below the discussion in Part VI.

⁵⁴ See *R v Mokbel (Ruling No 1)* [2005] VSC 410, [39]-[41]; *R v Mokbel (Ruling No 2)* [2005] VSC 502, [13]. Subpoenas serve a ‘powerful means of obtaining

III TRUST AND THE EXTENT OF THE DUTY OF DISCLOSURE: CAN THE PROSECUTION BE TRUSTED?

A fundamental issue in an adversarial criminal process is whether it is appropriate to entrust to the prosecution the responsibility of determining what is relevant and should be divulged and what should not. It has been suggested that putting the prosecution in charge of disclosure is tantamount to ‘putting a fox in charge of a hen coop.’⁵⁵ It has been asserted that it is difficult to reconcile the prosecution’s duty of disclosure with its role as an active advocate within an adversarial criminal system.⁵⁶ It is often said that it is unrealistic to expect police officers or prosecution lawyers to discount adversarial or partisan factors.⁵⁷ It must be borne in mind that a prosecutor, whilst a ‘minister of justice’, also has a legitimate interest in seeking the conviction of the accused.⁵⁸ The ‘healthy tension’⁵⁹ or ‘ongoing schizophrenia’⁶⁰ between these potentially conflicting prosecutorial roles is a feature of the prosecutor’s function⁶¹ but this tension arises particularly in the responsibility of disclosure.⁶²

disclosure in a criminal case, especially in respect of material relevant to credit’: Rolfe, above n 21, 8. See further below the discussion in Part VI.

⁵⁵ Unnamed ‘senior barrister’ quoted by Ben Emmerson, ‘Prosecution in the Dock,’ *The Observer*, 14 November 1999.

⁵⁶ Jenny McEwan, *Evidence and the Adversarial Process* (Blackwell Business, 1992) 21.

⁵⁷ See Abbe Smith, ‘Can You Be a Good Person and a Good Prosecutor?’ (2001) 14 *Georgetown Journal Legal Ethics* 355, 390; Janet Hoeffel, ‘Prosecutorial Discretion at the Core: the Good Prosecutor meets *Brady*’ (2005) 109 *Pennsylvania Law Review* 1133, 1135-6, 1147-9.

⁵⁸ See, eg, *R v Savion* (1980) 52 CCC (2d) 276, 289; *R v Cook* (1997) 146 DLR (4th) 437, 446; Henry Bull, ‘The Career Prosecutor of Canada’ (1962) 53 *Journal of Criminal Law, Criminology and Police Science* 89, 96; Sir Patrick Devlin, *Trial by Jury* (University Paperback, 2nd ed, 1966) 122-3.

⁵⁹ Debrah MacNair, ‘Crown Prosecutors and Conflict of Interest: a Canadian Perspective’ (2002) 7 *Canadian Criminal Law Review* 257, 287.

⁶⁰ Kenneth Melilli, ‘Prosecutorial Discretion in an Adversary System’ [1992] *Brigham Young University Law Review* 669, 698.

⁶¹ See, eg, Stanley Fisher, ‘In Search of the Virtuous Prosecutor’ (1987) 15 *American Journal Criminal Law* 197, 217; Peter Henning, ‘Prosecutorial

The development of the prosecutor's duty of disclosure has exacerbated the tension in prosecutorial roles.⁶³ The assumption that the prosecution can discount the adversarial framework in which it operates is questionable.⁶⁴ Gardner, drawing on the unhappy experience of prosecution disclosure in the United States,⁶⁵ notes, 'Prosecutors can, in good faith, downplay or overlook exculpatory evidence because they have difficulty in acting as a "minister of justice" rather than a "zealous advocate".'⁶⁶

A *The Police*

It has been often asserted that the role of the police officer or other investigator is inconsistent with the objective resolution of issues of

Misconduct and Constitutional Remedies' (1999) 77 *Washington University Law Quarterly* 713, 727; Hoeffel, above n 57, 1141-2; Fred Zacharias, 'Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors do Justice?' (1991) 44 *Vanderbilt Law Review* 45, 104. Whether this tension in prosecutorial roles is ultimately reconcilable is beyond the scope of this article to resolve. Opinions on this question are divided: see, eg, on the one hand, Shapray, above n 6, 125-8; H Richard Uviller, 'The Neutral Prosecutor: the Obligation of Dispassion in a Passionate Pursuit' (2000) 68 *Fordham Law Review* 1695, 1697, 1713-4, 1718 (tension not reconcilable); see, eg, on the other hand, John Brooks, 'Ethical Obligations of the Crown Attorney – Some Guiding Principles and Thoughts' (2001) 59 *University of Brunswick Law Journal* 229, 236-7; Keith Turner, 'The Role of Crown Counsel in Canadian Prosecutions' (1962) 40 *Canadian Bar Review* 439, 452 (tension reconcilable).

⁶² See Alafair Burke, 'Revisiting Prosecution Disclosure' (2009) 84 *Indiana Law Journal* 481, 494-8; Glen Luther, 'The Frayed and Tarnished Silver Thread; *Stinchcombe* and the Role of Crown Counsel in Canada in Alberta' (2002) 40 *Alberta Law Review* 567, 569-72.

⁶³ See, eg, Hinton, above n 17, 134; *R v Preston* [1994] 4 All ER 638, 649.

⁶⁴ See Burke, above n 61, 496-7; Kuo and Taylor, above n 7, 727; Alec Samuels, 'Disclosure' (2000) 164 *Justice of the Peace Notes* 64.

⁶⁵ See, eg, Bennett Gersham, 'Prosecutorial Ethics and the Right to a Fair Trial: The Role of the *Brady* Rule in the Modern Criminal Justice System: Litigating *Brady v Maryland*; Games Prosecutors Play' (2007) 57 *Case Western Reserve Law Review* 531; Bedau and Radelet, above n 7, 56-7.

⁶⁶ Michael Gardner, 'An Affair to Remember: Further Refinements of the Prosecutor's Duty to Disclose Exculpatory Evidence' (2003) 68 *Missouri Law Review* 469, 480.

disclosure, and that it is unrealistic to expect the police to pursue a non-partisan investigation.⁶⁷ Ede and Shepherd conclude that ‘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.’⁶⁸ Many of the notorious historical⁶⁹ and modern⁷⁰ cases of wrongful conviction bear this out.

Given the notoriety of historical miscarriage of justice cases in England, one might have expected that the current comprehensive disclosure obligations imposed by both English common law and statute would reduce the incidence of prosecution non-disclosure.⁷¹

⁶⁷ See, eg, Roger Ede and Eric Shepherd, *Active Defence* (2nd ed) (Law Society Publishing, 2000) 1-2; Kuo and Taylor, above n 7, 725-7; McConville and Baldwin, above n 13, 190-2; Plotnikoff and Woolfson, above n 27, 121, 124-5; Hannah Quirk, ‘The Significance of Culture in Criminal Procedure Reform: Why the Revised Disclosure Scheme Cannot Work’ (2006) 10 *International Journal of Evidence and Proof* 42, 46-51.

⁶⁸ Ede and Shepherd, above n 67, 111.

⁶⁹ See, eg, *R v Mattan*, *The Times*, 5 March 1998 (Otherwise unreported, Court of Appeal, 24 February 1998, No: 9706415/S2, Transcript: Smith Bernal Reporting Limited) (hanged for murder); *R v Kiszko* (the second successful appeal is formally unreported but see Michael Horsnell, ‘Wrong Man Jailed for 1975 Killing,’ *The Times*, 18 February 1992, 5; and *R v Kiszko* (1978) 68 Cr App R 62 for the first appeal. See further Geoff Tibballs, *Legal Blunders* (Robinson, 2000) 249-54) (16 years in prison for murder); *R v Ward* [1993] 1 WLR 619 (17 years in prison for alleged terrorist crimes); *R v Maguire and Others* [1992] 1 QB 936 (seven accused sentenced to terms ranging from 4 to 14 years (one died in prison) for an alleged terrorist bomb factory); *R v Cooper and McMahon* [2003] EWCA Crim 2257 (both spent ten years in prison for murder); *R v Kelly and Connolly* [2003] EWCA 2957 (Kelly was hanged for murder and Connolly spent six years in prison for other offences arising from the murder); *R v Kamara* [2000] EWCA Crim 37 (20 years in prison for murder). See further John Epp, *Building on the Decade of Disclosure in Criminal Procedure* (Cavendish Publishing, 2001) 40-42; Niblett, above n 8, 19-24; O’Connor, above n 33, 465-9.

⁷⁰ See, eg, the references, below nn 83-4.

⁷¹ There are suggestions that the non-disclosure shown in high profile cases such as *Ward* was not atypical in this period: see, eg, Paul Sieghart, ‘A View from JUSTICE’ in John Williams (ed), *The Role of the Prosecutor: Report of the International Criminal Justice Seminar held at the London School of Economics and Political Science in January 1987* (Avebury, 1988) 95, 96-100; O’Connor, above n 33.

It is frequently suggested that there has been a ‘seachange’ in police and prosecution practices since the 1970s.⁷² However, such expectations have often proved fruitless. Major problems remain in England in relation to the information gathered by the investigators and their decision as to what material to even make the prosecuting lawyers aware of. The police in *R v Maxwell*⁷³ in 1997 and 1998, for example, in the case of a ‘professional criminal with a history of violent crime’⁷⁴ charged with murder, were found to have withheld from disclosure damning evidence of an ‘appalling history of misconduct’⁷⁵ and to have lied in the process to the prosecution and defence lawyers and even the courts.⁷⁶ As recently as June 2011,

⁷² See, eg, Charles Pollard, ‘A Case for Disclosure’ [1994] *Criminal Law Review* 42; Andrew Sanders and Richard Young, *Criminal Justice* (Butterworths, 2nd ed, 2000) 337.

⁷³ [2011] 1 WLR 1837.

⁷⁴ [2011] 1 WLR 1837, [61] (Lord Brown). Lord Brown further observed of the defendant, that ‘few of those urging upon the court a vindication of the rule of law could be less deserving of its benefits than this appellant...he is almost certainly guilty of the murder and the two robberies of which he was convicted...These were shocking offences indeed, callous attacks upon elderly reclusive brothers in their own home, the second involving injuries of such severity as to occasion the elder brother's death within the month. [His] tariff (in respect of his life sentence for murder, imposed concurrently with twelve-year terms for the robberies) was set at eighteen years. It was not a day too long’: *ibid*.

⁷⁵ [2011] 1 WLR 1837, [40] (Lord Rodger).

⁷⁶ Lord Brown provided a summary of the police misconduct and non-disclosure in the case: see [2011] 1 WLR 1837, [77]-[84]. He noted that a large number of police officers involved in the investigation and prosecution of the case, including several of very high rank, had engaged in a prolonged, persistent and pervasive conspiracy to pervert the course of justice. The police had colluded in conferring on a man called Chapman, a police informant and the main prosecution witness, a variety of wholly inappropriate benefits to secure his continued cooperation in the prosecution and trial. These benefits were described as ‘not just disturbing but quite frankly astonishing’ and were of a sexual, social, financial and criminal nature: see *R v Maxwell* [2011] 1 WLR 1837, [77] (Lord Rodger). Chapman had received various financial benefits and ‘gifts’ from police. Chapman had socialised with off duty police officers and when in custody had been taken to public houses and a brothel and had been permitted to consume illegal drugs. He had even formed an intimate relationship with a female police officer. The police had failed to investigate various serious offences of a violent and sexual nature allegedly committed in prison by Chapman and other alleged offences involving members of his

Lord Judge CJ, in quashing the convictions of 20 defendants in a high profile conspiracy case was driven to observe: ‘Something went seriously wrong with the trial. The prosecution’s duties in relation to disclosure were not fulfilled. The result was a trial in which elementary principles which underpin the fairness of our trial processes were ignored.’⁷⁷ In *R v Joof and Others*⁷⁸ the non-disclosure extended to both the police and the prosecution lawyers who had failed to reveal important material that undermined the prosecution case at the trial in 2008 of five men accused of murder.⁷⁹ The court described it as a ‘very bad case of non-disclosure’ and expressed the hope that ‘lessons will be learnt from this shocking episode’ and that ‘appropriate measures will be taken against those

family. The police had systematically lied and concealed all of this material from the prosecution lawyers, the defence and the court. The police had colluded in Chapman's perjury at the trial, intending that Chapman throughout his evidence should lie as to how he had been treated and as to what promises he had received for his co-operation. The police ensured that Chapman's police custody records and various other official documents presented a false picture of the facts, on one occasion actually forging a custody record when its enforced disclosure to the defence would otherwise have revealed the truth. The police even lied in their responses to enquiries made of the CPS after Maxwell's conviction and, in the case of the two senior police officers who gave evidence to the Court of Appeal, even perjured themselves so as to ensure that Maxwell's application for leave to appeal against his conviction got nowhere. Lord Brown concluded, ‘to describe police misconduct on this scale merely as shocking and disgraceful is to understate the gravity of its impact upon the integrity of the prosecution process. It is hard to imagine a worse case of sustained prosecutorial dishonesty designed to secure and hold a conviction at all costs. Scarcely less remarkable and deplorable than this catalogue of misconduct, moreover, is the fact that, notwithstanding its emergence through the subsequent investigation, not a single one of the many police officers involved has since been disciplined or prosecuted for what he did’: at [83]-[84]. Given the extent of the police misconduct and non-disclosure described by Lord Brown, it is perhaps unsurprising that the majority of the UK Supreme Court, despite the obvious gravity of the case, refused to sanction a retrial.

⁷⁷ *R v Barkshire and Others* [2011] EWCA Crim 1885, [1]. The prosecution had failed to disclose significant material relating to the questionable role and activities of an undercover police officer that would have supported both a defence abuse of process submission and the general defence case.

⁷⁸ [2012] EWCA Crim 1475.

⁷⁹ This material related to the credibility and integrity of the main prosecution witness and the police investigation.

responsible for what appears to be a serious perversion of the course of justice.’⁸⁰

These are not isolated examples of prosecution non-disclosure. Such cases are also not unknown in Australia⁸¹ and there have been suggestions that there remains in Australia a wider prosecution resistance to modern disclosure obligations on the basis that ‘it is not our job to help the defence.’⁸² However, it is in England in particular that there has continued to be worrying incidences of non-disclosure of significant material by the prosecution, especially by the investigatory agency. This is demonstrated by a series of modern English cases where convictions have either been quashed on appeal,⁸³ or where prosecutions have been stayed as an ‘abuse of

⁸⁰ [2012] EWCA Crim 1475, [38]-[39].

⁸¹ See, eg, *R v Easterday* (2003) 143 A Crim R 154; *R v Ulman-Naruniec* (2003) 143 A Crim R 531, 581; *R v Beamish* [2005] WASCA 62; *Western Australia v Narkle* [2006] WASCA 113; *Tasmania v Everett* [2008] TASSC 87, [16]; *R v Farquharson* [2009] VSCA 307; *R v Sonnet* [2010] VSCA 315; *R v AJ* [2010] VSCA 331, [21]-[30]; *Western Australia v JWRL* [2010] WASCA 179; *R v Bui* [2011] ACTSC 102, [48].

⁸² Martin Moynihan QC, *Review of the Civil and Criminal Justice System in Queensland* (Queensland Government, 2008) 93, highlighting in 2008 the ‘pervasive police culture’ in Queensland still resistant to the modern obligation of disclosure. See also Moynihan, above n 82, 95-7. A similar view was expressed in Western Australia: see Debbie Guest, ‘DPP backs greater access for media’, *The Australian*, 3 December 2010; *Western Australia v JWRL* [2010] WASCA 179, [91] (Martin CJ); see also John Dunford QC, *Report of the Inquiry into Alleged Misconduct by Public Officers in Connection with the Investigation of the Murder of Mrs. Pamela Lawrence, the Prosecution and Appeals of Mr. Andrew Mallard, and Other Related Matters* (Crime and Misconduct Commission, 2008).

⁸³ This long list includes *R v McCarthy*, *The Times*, 21 October 1993; *R v Taylor and Taylor* (1994) 98 Cr App R 361; *R v Fergus* [1994] 1 Cr App R 313; *R v Rasheed*, *The Times*, 20 May 1994; *R v Dunk and Others* [1995] Crim LR 137; *R v Browning* [1995] Crim LR 227; *R v Blackledge and Others* [1996] 1 Cr App R 326; *R v Liverpool Crown Court, ex parte Moss* [1996] EWHC Admin 223; *R v Glennon* [1999] EWCA Crim 1104; *R v Tandy*, Court of Appeal (Unreported, 18 January 2000, No 199905037/Z3); *R v Doubtfire* [2000] EWCA Crim 101; *R v Jackson* [2000] Crim LR 377; *R v Vasilou* [2000] Crim LR 845; *R v Osei-Bonsu*, [2000] EWCA Crim 3535; *R v Langley* [2001] Crim LR 651; *R v Heggert* [2001] 4 Archbold News 2; *R v Patel and Others* [2002] Crim LR 304; *R v Higgins* [2002] EWCA Crim 336; *R v Bourimech* [2002]

process' or otherwise collapsed,⁸⁴ owing to major shortcomings in prosecutorial disclosure. The reasons for non-disclosure in these cases have ranged from unwitting and almost comical administrative oversights⁸⁵ to deliberate suppression of important material.⁸⁶

EWCA Crim 2089; *R v Early and Others* [2003] 1 Cr App R 19; *R v Gell and Ors* [2003] EWCA Crim 123; *R v Hilton* [2003] EWCA Crim 761; *R v Guney* [2003] EWCA Crim 1502; *R v Weaver* [2003] EWCA Crim 2214; *R v Bishop* [2003] EWCA Crim 3682; *R v Cormack* [2004] EWCA Crim 1117; *R v Kassar* [2004] EWCA Crim 1812; *R v Smith and Others* [2004] EWCA Crim 2212; *R v Brady* [2004] EWCA Crim 2230; *R v West* [2005] EWCA 517; *R v Warren* [2005] EWCA Crim 659; *R v McIlpatrick* [2005] EWCA Crim 693; *R v Rogers* [2005] EWCA Crim 2590; *R v Alfrey* [2005] EWCA Crim 3232; *R v Hadley and Others* [2006] EWCA Crim 2544; *R v Adams* [2007] EWCA Crim 1; *R v O* [2007] EWCA Crim 2220; *R v Yilmaz and Others* [2007] EWCA Crim 308; *Tucker v CPS* [2008] EWCA Crim 3063; *R v Maxwell* [2011] 1 WLR 1837; *R v Joof and Others* [2012] EWCA Crim 1475. See also the recent cases of *R v Olu and Others* [2011] 1 Cr App R 33; *R v Malook* [2011] 3 ALL ER 373; where, although on the facts the convictions were upheld, in both cases the court was highly critical of the prosecution's failure to meet its obligations of disclosure.

⁸⁴ See, eg, *R v Ballack and Others* (Unreported, Isleworth Crown Court, 17 November 1999, No T1999060); *R v Humphreys and Others* (Unreported, Maidstone Crown Court, *The Times*, 12 February 2000): see also Editorial, 'Bubble Blowing' (2000) 150 *New Law Journal* 209; *R v El Treki* [2000] 8 *Archbold News* 3; *R v Woolwich Magistrates Court, ex parte DPP* [2001] EWHC Admin 898; *R v Uddin and Others* (Unreported, Southwark Crown Court, 25 May 2005, No T2002-7012); *R v Vocaturro* (Unreported, Nottingham Crown Court, 8 October 2007): see (2007) 157 *New Law Journal* 1670; *R v Oliver* [2007] EWCA Crim 220; *Swash v DPP* [2009] All ER (D) 39; *R v George and Others* (Unreported, Southwark Crown Court, 7 December 2009): see Alastair Osborne, 'Collapsed BA price-fixing trial places OFT and Virgin in the dock,' *The Telegraph*, 10 May 2010; *R v Chivers and Ors* (Unreported, Nottingham Crown Court, 10 January 2011): see Rob Evans and Paul Lewis, 'Mark Kennedy case: CPS accused of suppressing key evidence', *The Guardian*, 7 June 2011; *R v Taylor and Others*, Nottingham Crown Court, unreported: see Rob Evans and Paul Lewis, 'CPS in Crisis as allegations of suppressed evidence wreck trials', *The Guardian*, 18 July 2011; *R v Rees and Others* (Unreported, 11 March 2011): see further Vikram Dodd and Sandara Laville, 'Scotland Yard in spotlight as axe murder case collapses', *The Guardian*, 11 March 2011.

⁸⁵ See, eg, *R v Bourimech* [2002] EWCA Crim 2089; *R v Bishop* [2003] EWCA Crim 3682.

⁸⁶ See, eg, *R v Higgins* [2002] EWCA Crim 336; *R v Early and Others* [2003] 1 Cr App R 19; *R v Brady* [2004] EWCA Crim 2230; *R v Maxwell* [2011] 1 WLR 1837; *R v Joff and Others* [2012] EWCA Crim 1475.

A number of English studies support the view that widespread failings by the prosecution in discharging disclosure obligations continue to occur. Two surveys in 1999,⁸⁷ for example, revealed instances of prosecution non-disclosure that were ‘staggering in their numbers, in their breadth and in their implications,’ and that revealed ‘serious and fundamental failings of the police service and the CPS [Crown Prosecution Service] to operate the [*Criminal Procedure and Investigations*] Act’s provisions.’⁸⁸ These findings are supported by a more recent study by Taylor which argues that the police are still unable or unwilling to disclose relevant information and they continue to view the whole issue of disclosure through ‘tunnel vision.’⁸⁹ Taylor suggests that there is a desire to present cases as ‘winnable’ to the CPS (which is ultimately responsible for the decision whether or not to prosecute) and that information that does not fit the police investigation case theory may be downplayed, overlooked or even withheld from disclosure.⁹⁰

⁸⁷ Ede and Shepherd, above n 67. See Law Society, *CPIA 1996 Disclosure Provisions Survey* (Law Society, 1999); British Academy of Forensic Sciences and the Criminal Bar Association, *Survey of the Practising Independent Bar into the Operation in Practice of the Criminal Procedure and Investigation Act 1996 Disclosure Provisions* (BAFS, 1999).

⁸⁸ Ede and Shepherd, above n 67, 8. See also Auld, above n 13, ch 10, [163]-[165]; Her Majesty’s Crown Prosecution Service Inspectorate, *Report of the Thematic Review of the Disclosure of Unused Material* (HMCPS Inspectorate, 2000) ch 1, [1.6]; HMCPSI, above n 28, 5-9, 97-102; Plotnikoff and Woolfson, above n 27, 141; Quirk, above n 67, 50-1; John Binns and David Corker, ‘False Economies’ (2008) 158 *New Law Journal* 17 for similar criticisms.

⁸⁹ See Chris Taylor, ‘Advance Disclosure and the Culture of the Investigator: the Good Idea that never quite caught on?’ (2005) 33 *International Journal of the Sociology of the Law* 118. See further Chris Taylor, *Criminal Investigation and Pre-Trial Disclosure in the United Kingdom* (Edwin Meller Press, New York, 2006); Chris Taylor, ‘Advance Disclosure and the Culture of the Investigator: The Good Idea That Never Quite Caught On?’ (Paper presented at the 19th Conference of the Australian and New Zealand Society of Criminology Conference, Hobart, 7-9 February 2006) (‘Conference Paper’) <http://www.brad.ac.uk/acad/management/external/pdf/workingpapers/2006/Booklet_06-21.pdf>.

⁹⁰ Kuo and Taylor, above n 7, 725-7; Taylor, ‘Conference Paper’, above n 89, 11-2. In an extreme case such as *R v Maxwell* [2011] 1 WLR 1837 the material may even be deliberately suppressed.

Taylor asserts that these failings go beyond managerial or bureaucratic failings and are of an institutional and cultural nature.⁹¹

B *Prosecuting Counsel*

Opinions on whether similar criticism be directed at the prosecuting lawyer are divided. There is a view that the prosecutor can be trusted to deal impartially and fairly with questions of disclosure. Both the courts⁹² and Parliament⁹³ have seen fit to entrust the assessment of relevance and what falls for disclosure to the prosecutor (though from the pool of material which the police have provided to the prosecutor). Further, the notion of the objective prosecutor dealing fairly with disclosure is a central premise of the whole disclosure regime.⁹⁴ ‘The primary duty in relation to disclosure rests upon the Crown,’ as was noted by Phillips LJ in 1996, who added that ‘the Crown should be trusted to perform their duties properly.’⁹⁵ Simon Brown LJ in 1995 similarly urged defence lawyers to put aside their suspicions about the prosecution withholding relevant material and expressed the ‘hope that those representing the defendants will not too readily seek to challenge a responsible prosecutor’s assertion that documents in his [or her] considered view are not material.’⁹⁶ Furthermore it is difficult to identify who else would undertake the

⁹¹ Kuo and Taylor, above n 7, 725-7; Taylor, ‘Conference Paper’, above n 89, 11-12. See further Taylor, *Criminal Investigation and Pre-Trial Disclosure in the United Kingdom*, above n 89.

⁹² See *R v Bromley Magistrates’ Court, ex parte Smith* [1995] 4 All ER 146, 151-3; *R v Law*, *The Times*, 15 August, 1996; *R v B* [2000] Crim LR 50; the view of the Supreme Court of Ireland in *Ward v Special Criminal Court* [1999] 1 IR 60, 87. For a differing view see Part IV below.

⁹³ In the *Criminal Procedure and Investigations Act 1996* (Eng) in both its original and amended forms.

⁹⁴ See Goldsmith, above n 32, 23.

⁹⁵ *R v Laws*, *The Times*, 15 August 1996.

⁹⁶ *R v Bromley Magistrates’ Court, ex parte Smith* [1995] 4 All ER 146, 152.

task of assessing relevance. It is said that neither the court⁹⁷ nor the defence⁹⁸ are realistically in a position to do this.⁹⁹

Nevertheless, trust in the prosecution is far from universally shared. Grossman asserts that the tension between the prosecutor's roles of minister of justice and adversarial advocate is such that it is unrealistic to expect prosecutors to faithfully fulfill their disclosure obligations.¹⁰⁰ Such reasoning was the rationale of earlier curial decisions in respect of disclosure which questioned whether it was appropriate for the prosecution to determine the relevance of material in its possession.¹⁰¹ It is often asserted in England that the

⁹⁷ It is not the trial judge's task to trawl through the unused material to see if there is anything that the prosecution or defence might wish to use: see *R v B* [2000] Crim LR 50; *R v Howes* [2007] All ER (D) 99.

⁹⁸ In many adversarial systems the investigatory work carried out by the defence lawyer in preparation of his or her client's case is 'negligible,' see Kevin Kitching, 'Disclosure in the Irish Criminal Process: Justice and Informality' (1998) 6 *Irish Student Law Review* 17, n 18. See further below the discussion in Part VI.

⁹⁹ A simple step in England might be to demand that the roles of investigating officer and disclosure officer cannot be performed by the same individual to create at least some degree of distance and oversight as, for example, exists between the roles of the investigating officer and custody officer in England under the *Police and Criminal Evidence Act 1984*. This conflation of the role of prosecutor and investigator in relation to determining relevance is encouraged by the definitions employed by the *CPIA Codes of Practice* (see [2.1]), but this practice allows the investigator to decide issues of relevance and to omit ostensibly 'irrelevant' material from the unused material disclosure schedules that are provided to the prosecution and defence lawyers. This also ignores the fact that such material may later become 'relevant' depending on the conduct of the case or the defence advanced at trial.

¹⁰⁰ Barry Grossman, 'Disclosure by the Prosecution: Reconciling Duty and Discretion' (1988) 30 *Criminal Law Quarterly* 346, 348-9. This view has been expressed elsewhere: see, eg, *United States v Bagley* (1985) 473 US 667, 696-7 (Marshall J); Burke, above n 62, 496-7; Gross, above n 26, 36-37; Stephen Jones, 'The Prosecutor's Constitutional Duty to Disclose Exculpatory Evidence' (1995) 25 *University of Memphis Law Review* 735, 764-5, 778-9; Mike Redmayne, 'Criminal Justice Act 2003 (1) Disclosure and its Discontents' [2004] *Criminal Law Review* 441, 443; Uviller, above n 61, 1713-4, 1718.

¹⁰¹ See, eg, *R v Saunders and Others* (Unreported, 29 August 1988, Central Criminal Court, No T881630, Transcript) 6D; *R v Harper and Artry*

CPIA, and by implication the previous *Keane* model, ‘asks prosecutors to undertake a task for which, like the police, they are neither trained nor suited.’¹⁰² The CPS is often criticised, both for being too close to the police,¹⁰³ and for simply adopting the police view in a particular case and being unable or unwilling to exercise an impartial consideration of disclosure issues.¹⁰⁴ The assumption that the prosecutor will faithfully reveal material helpful to the defence is ‘questionable,’¹⁰⁵ if not ‘virtually impossible.’¹⁰⁶

C Recommendations

The prosecutor’s role within an adversarial criminal system is such that it is untenable to expect the prosecutor to deal with questions of disclosure on an impartial basis and to be able to effectively assess what may or may not assist the defence case.¹⁰⁷ Ultimately it is unwise to place the ‘fox in charge of the hencoop.’ However, this presents practical issues.

(Unreported, Belfast Crown Court, 6 December 1994, Transcript); *Ward v Special Criminal Court* [1999] 1 IR 60, 66 (High Court of Ireland).

¹⁰² Quirk, above n 67, 52. See further below the discussion in Part III.

¹⁰³ See Michael McConville, Andrew Sanders and Roger Leng, *The Case for the Prosecution* (Routledge, 1991) 124-47, 205-8; John Baldwin and Adrian Hunt, ‘Prosecutors Advising in Police Stations’ [1999] *Criminal Law Review* 521, 521-2. Though it is notable that commentators in other jurisdictions tend to regard ‘disquiet about cosy relations between police and crown prosecutors as a rather quaint English obsession’ and issues such as corruption or political partiality are regarded as more pressing: at 521, n 1.

¹⁰⁴ See, eg, Emmerson, above n 55; Plotnikoff and Woolfson, above n 27, 51, 125-6; Quirk, above n 67, 51-5. A particular problem is that overworked prosecutors simply do not have the time to deal properly with questions of disclosure. See Plotnikoff and Woolfson, above n 27, 125-6.

¹⁰⁵ Burke, above n 62, 494.

¹⁰⁶ Hoeffel, above n 57, 1136.

¹⁰⁷ See Quirk, above n 67, 52-53; Christopher Deal, ‘*Brady* Materiality Before Trial: The Scope of the Duty to Disclose and the Right to Trial by Jury’ (2007) 82 *New York University Law Review* 1780, 1803.

IV PRACTICAL ISSUES

A *Volume of Material*

Even if the prosecuting lawyer can be trusted to sift through a case with objectivity, it is necessary to consider the practical implications involved in the task. Both the mass of the material that may be in the possession of the prosecution and the difficulty in determining what is or not relevant may pose major practical problems. The sheer scale of a modern investigation cannot be overestimated. Cases highlight the demanding task of sifting through material to assess relevance on behalf of the defence; it becomes the proverbial ‘search for a needle in a very large haystack.’¹⁰⁸ Though few cases will exceed the dimensions of the celebrated fraud trial arising from the Guinness takeover of Distillers,¹⁰⁹ it is far from unusual in the modern age¹¹⁰ to encounter complex cases that place great strain on any system of disclosure.¹¹¹

¹⁰⁸ Gross, above n 26, 33. See, eg, *R v Browning* [1995] Crim LR 227. See generally Diane Birch, ‘Commentary [to *R v Browning*]’ [1995] *Criminal Law Review* 229; Gross, above n 26, 32-5; Pollard, above n 72, 42.

¹⁰⁹ *R v Saunders and Others* (Unreported, 29 August 1988, Central Criminal Court, No T881630, Transcript). The trial took 113 days and the preparation of defence counsel occupied some 1000 hours. The documentation in the case was so massive that had it been stacked up the pile would have been 50 feet high!

¹¹⁰ Advances in technology have accelerated the complexity of criminal investigations and the amount of material generated: see Goldsmith, above n 32, 8; Gross, above n 26. The growth in ‘proactive’ intelligence-led policing has also contributed to the complexity of modern criminal investigations: see Goldsmith, above n 32, 8-9; Kitching, above n 100, 17, n 1.

¹¹¹ The highly publicised case of *R v Huntley* (Unreported, Central Criminal Court, 5 November 2003) provides a similar example of the scope of a modern investigation and the sheer mass of unused material that can be produced. The police investigation into the murder of two young girls generated 6820 witness statements, 7341 exhibits and 24,000 documents. At the peak of the investigation 160 police officers were involved and there were nine officers who dealt purely with questions of disclosure. One of the two junior counsel involved in the case had to give up usual practice and worked almost full time at the police station in order to deal with issues of disclosure. See A Cresswell, *R v Huntley: CPS Enquiry* (Crown Prosecution Service, 2004).

A 2002 trial at Nottingham Crown Court¹¹² of several defendants charged as a result of an extensive murder investigation is illustrative. The trial judge, Newman J, observed that the investigation had generated ‘thousands of documents’ of unused material. This unused material included 30 files containing 15,000 pages, 12 files containing further documents and files with transcripts of some 700 hours of covert surveillance which had all been provided by the prosecution to the defence. There were also ‘many thousands’ of additional documents at the police station that had not been provided which had taken three defence representatives two weeks to go through.¹¹³ It is unsurprising that Newman J remarked, ‘If one wanted to find a paradigm case for demonstrating the difficulties [with unused material], this case illustrates the faults in the system.’¹¹⁴ There have been similarly complex criminal investigations and trials in Australia.¹¹⁵ Such cases are far removed from the comparatively simple cases of past times¹¹⁶ and technological advances and the deluge of electronic material now generated and capable of retrieval are likely to exacerbate this trend.¹¹⁷

Complex investigations and trials challenge the practical operation of any system of disclosure. The notion that the prosecution lawyer can only make disclosure decisions based on personal inspection and knowledge of all the material gathered in a complex case is unrealistic. This was acknowledged in *R v*

¹¹² *R v Sutherland and Others* (Unreported, Nottingham Crown Court, 29 January 2002, No T20027203, Transcript: Cater Walsh & Co).

¹¹³ *R v Sutherland* (Unreported, Nottingham Crown Court, 29 January 2002, No T20027203, Transcript: Cater Walsh & Co) 6.

¹¹⁴ *R v Sutherland* (Unreported, Nottingham Crown Court, 29 January 2002, No T20027203, Transcript: Cater Walsh & Co) 6.

¹¹⁵ See, eg, Janet Chin and Lynne Barnes, *The Price of Justice? Lengthy Criminal Trials in Australia* (Hawkins Press, 1995) 1-4, 13-20, 44-6.

¹¹⁶ See Shorter Trials Committee, above n 24, 1-2.

¹¹⁷ Gross, above n 26, 33. See also the *Supplementary Attorney General's Guidelines on Disclosure of Digitally Stored Material* 2011 which were designed to assist investigators and prosecutors in dealing with the ever increasing amount of stored electronic material.

*Siemens*¹¹⁸ by the Alberta Court of Appeal which held that while prosecution counsel bore ‘the ultimate responsibility for decisions regarding relevance and disclosure of evidence in the possession of the Crown,’¹¹⁹ this did not include a requirement that prosecution counsel must personally examine and catalogue every item that had been gathered by the police in the course of their investigation. Such a duty ‘would create an impossible situation’ and would cause ‘the system to grind to a halt.’¹²⁰ The court accepted that prosecution counsel might rely on information provided by police officers or others with the duty of distilling information and providing it to prosecution counsel.¹²¹ While this premise has been criticised as an abdication of the responsibilities of the prosecution lawyer,¹²² it is explicit in the operation of the English system of disclosure, which accords a prominent role to the police with determining relevance, and it is difficult, as accepted in *Siemens*, to insist upon prosecution counsel in a complex case examining each and every item of unused material. However, this problem could be overcome if the defence had access to all material gathered by the prosecution in the course of its investigation (excepting material genuinely attracting public interest immunity) and determined relevance on behalf of their client.¹²³

B *Tests for Disclosure: A Recipe for Confusion?*

The width of the various tests that have been suggested for determining what is relevant and falls for disclosure has compounded the difficulty of the prosecution task. This is the case in respect of all the tests formulated to date including the almost

¹¹⁸ (1998) 122 CCC (3d) 552.

¹¹⁹ (1998) 122 CCC (3d) 552, 562.

¹²⁰ (1998) 122 CCC (3d) 552, 562. See also to similar effect *R v Pearson and Others* [2006] EWCA Crim 366, [20], in the context of electronic material.

¹²¹ (1998) 122 CCC (3d) 552, 562-3. cf *R v Sansom* (1991) 92 Cr App R 115, 123.

¹²² See, eg, Luther, above n 62, 582-3.

¹²³ See Butterfield, above n 25, 260-1, [12.32]-[12.38]. See further below the discussion in Part IV.

unlimited ‘free for all’ contemplated by *Ward*,¹²⁴ the slightly narrower¹²⁵ test stated by the Court of Appeal in *R v Keane*¹²⁶ and even the test provided by the *CPIA*.

C *The CPIA Test*

Application of the *CPIA* involves a three stage process. In the first stage of ‘primary’ or ‘initial’ disclosure, the prosecution has to furnish to the defence any material in its possession that it considers¹²⁷ undermines the prosecution case along with a schedule listing all non-sensitive unused material in its possession. The next stage requires the defence to submit a defence statement that set out the proposed defence of the accused and identifies the portion of the prosecution case with which he or she takes issue. This document is intended to assist the prosecutor in complying with the third stage of ‘continuing’ disclosure.¹²⁸ This requires the prosecution to have regard to the contents of the defence statement and to disclose any item that might reasonably be expected to assist the defence case in

¹²⁴ *R v Ward* [1993] 1 WLR 619. See also Auld, above n 13, [10.124]; Hinton, above n 17, 132.

¹²⁵ The test in *Keane* while broad is not unlimited. See *R v Seymour* [1996] Crim LR 512 and *R v Winston Brown* [1994] 1 WLR 1599 (material going to the credibility of a defence witness outside duty of disclosure); *R v Cannon* (Unreported, Court of Appeal, 30 January 1995, Transcript: John Larkin) (prosecution cannot be expected to make exhaustive enquiries and cannot disclose that of which they are unaware); *R v Filmer* [2006] EWHC Admin 3450 (prosecution disclosure cannot cover every question or refinement of every material issue); *R v K* (1991) 161 LSJS 135, 140 (not ‘every speculative and scurrilous rumour’); *R v TST* (2002) 5 VR 627, 650 (not contents of whole prosecution file or every ‘interesting irrelevancy’).

¹²⁶ [1994] 2 All ER 478.

¹²⁷ The original subjective test was widely criticised as even an unreasonable prosecutorial view as to what did not undermine its case was permissible: see Sanders and Young, above n 72, 344. The present test now has an objective focus to disclose any material that ‘might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused’: see the present *CPIA* 1996 (Eng) s 3(1).

¹²⁸ The phrase ‘secondary’ disclosure’ was employed under the original statutory regime in 1996, which was significantly altered by the *Criminal Justice Act 2003* and the current term ‘continuing’ disclosure was inserted.

light of the contents of the statement. There is a further, broad obligation on the prosecution to make active enquiries of its own in relation to any material held by a third party that could be relevant to the case.¹²⁹

D *The Test in R v Keane*

The test in *Keane* has proved highly influential. Not only has this test arguably survived the introduction of the ostensibly more restrictive test of the *CPIA*,¹³⁰ but it has also proved influential in Australia.¹³¹ In *Keane*, the English Court of Appeal considered that material should be divulged to the defence, issues of public interest immunity aside, if on a ‘sensible’ appraisal by the prosecution it:

1. Was relevant or possibly relevant to an issue in the case;
2. Raised or possibly raised a new issue whose existence was not apparent in the evidence the prosecution proposed to use;
3. Held out a real (as opposed to a fanciful) prospect of providing a lead on evidence which went to either 1 or 2 above.¹³²

¹²⁹ See *Attorney General’s Guidelines: Disclosure of Information in Criminal Proceedings* (2005) [51] <[http://www.gmp.police.uk/mainsite/0/3C38A67CE2B2561F80257104004825E1/\\$file/AttorneyGeneralsGuidelines.pdf](http://www.gmp.police.uk/mainsite/0/3C38A67CE2B2561F80257104004825E1/$file/AttorneyGeneralsGuidelines.pdf)>. This last proposition can present difficulties in the context of defence efforts to seek material for use in cross-examination, especially as to a victim’s credibility, and raises issues of the proper regard to be had to the interests of victims and witnesses. See further below the discussion in Part VI.

¹³⁰ See *R v Makin* [2004] EWCA Crim 1607, [30]; Roger Ede and Anthony Edwards, *Criminal Defence: Good Practice in the Criminal Courts* (Law Society, 2nd ed, 2002) 159. Even the ostensibly narrower present test of disclosure under the *CPIA* is still notable for its ‘striking width’: see Gross, above n 26, 4. This has led to significant practical problems: see Gross above n 26, 32-5, 63.

¹³¹ See, eg, *R v Reardon* (2004) 146 A Crim R 117, 127; *R v Spiteri* [2004] NSWCCA 197, [17]-[20]; *R v Andrews* [2010] SASCFC 5, [19]; *Tasmania v Everett* [2008] TASSC 87, [14]-[15]; *R v Farquharson* [2009] VSCA 307, [213]; *R v Button* (2002) 25 WAR 382, 391; *R v WK* [2002] WASCA 176, [12]-[13].

¹³² [1994] 2 All ER 478, 484. The Court of Appeal adopted this test from an unreported first instance decision of Jowitt J: see *R v Melvin and Dingle*, Central Criminal Court, 20 December 1993. ‘Relevance’ under the *Keane* test

E *Criticisms of Keane and the CPIA*

Some lawyers and academics assert that the *CPIA*, and by implication the *Keane* model, ‘asks prosecutors to undertake a task for which, like the police, they are neither trained nor suited.’¹³³ Although the *CPIA* criteria of relevance are more restrictive than the threefold test in *Keane*, criticism of the *CPIA* continues. The *CPIA* was designed to simplify the procedures governing unused material and to limit the *Keane* requirements as to what the prosecution has to divulge. In both respects the *CPIA* has arguably failed to fulfil its legislative intent. As one prosecution lawyer commented: ‘We are spending many times longer over disclosure than we ever did before *CPIA*: but we are disclosing just as much as we ever did.’¹³⁴

F *Knowledge of Defence Case*

Even if trusted to sift through the available material with the necessary objectivity, is the prosecutor in a position to be able to accurately assess what is relevant to the accused? The prosecution may not know the broad defence that is to be mounted at trial, let alone the precise nature of such a defence or the finer cross-examination of a prosecution witness. One view is that the normal criminal case should present little difficulty for the prosecutor to be able to assume what defences are likely to be raised in any situation.¹³⁵ This view is not untenable. So-called ‘ambush’ defences which take the prosecution completely by surprise are rare in practice.¹³⁶ Research suggests that the majority of defendants who

is given a broad construction: see *R v Winston Brown* [1994] 1 WLR 1599, 1606-7 (Court of Appeal); [1997] 3 All ER 769, 775 (House of Lords).

¹³³ Quirk, above n 67, 52.

¹³⁴ Butterfield, above n 25, 258. See also Goldsmith, above n 32, 6-8; Plotnikoff and Woolfson, above n 27, 109-115.

¹³⁵ Editorial, ‘Unacceptable Disclosure’ (1992) 142 *New Law Journal* 1529.

¹³⁶ See Law Reform Commission (NSW), *The Right to Silence (Discussion Paper No 41)* (Law Reform Commission, 1998) [3.46], quoting English surveys on the issue that found only 1.5-5 % of defendants mounted ‘ambush’ defences.’ See further Roger Leng, ‘The Right to Silence Debate’ in David Morgan and Geoffrey Stephenson (eds), *The Right to Silence in Criminal Investigations* (Blackstone Press, 1994) 28-30; David Dixon, *Law in Policing: Legal*

exercise their right to silence in interview eventually plead guilty or are convicted after trial.¹³⁷ The risk of ‘the ambush defence may be more rhetorical than real.’¹³⁸

One might assume it should not be difficult for any competent prosecutor to anticipate any potential defences and determine the significance of any unused material. If the accused has volunteered his or her version of events in interview, which occurs in the ‘vast majority’ of criminal cases,¹³⁹ one might assume the prosecutor’s tasks will be even easier. Since the enactment in the *CPIA* in 1996 of the requirement that the accused divulge his or her intended defence and identify the issues he or she intends to challenge in the prosecution case, the English prosecutor should be in an informed position from which to assess what is relevant and will need to be

Regulation and Police Practices (Clarendon Press, 1997) 234; David Brown, *PACE Ten Years On: A Review of the Research* (Home Office, 1997) 184-5. The position in Australia appears similar: see, eg, Scrutiny of Acts and Regulation Committee, *The Right to Silence: Report* (Parliament of Victoria, 1999) [2.3.3]. cf Law Reform Commission (NSW), *The Right to Silence (Research Report No 10)* (Law Reform Commission, 2000) [3.64]-[3.65].

¹³⁷ See Steven Grier, ‘The Right to Silence, Defence Disclosure and Confession Evidence’ (1994) 21 *British Journal Law and Society* 102, 104-105; Scrutiny of Acts and Regulation Committee, above n 136, [2.3.3]; Leng, above n 136, 26-9. Leng even found that all the accused whom raised ‘ambush’ defences at trial were convicted: at 30.

¹³⁸ Geoffery Flatman QC, quoted by Scrutiny of Acts and Regulation Committee, above n 136, [2.3.3].

¹³⁹ Scrutiny of Acts and Regulation Committee, above n 136, [2.3.1]. See also Young and Sanders, above n 72, 257 (‘it appears few suspects exercise the right of silence in totality’); Leng, above n 136, 19, 22-8 (only 5% of defendants refused to answer questions); John Pearse and Gisli Gudjonsson, ‘Police Interviewing and Legal Representation: a Field Study’ (1997) 88 *Journal of Family Psychiatry and Psychology* 200-8 (majority of suspects in a survey where majority had been legally represented in interview not only answered all questions but even admitted their guilt); Law Reform Commission (1998), above n 136, [3.30], n 69. The position in Australia appears similar: see Law Reform Commission (NSW), *The Right to Silence (Report No 95)* (Law Reform Commission, 2000) [2.15] (noting ‘most’ suspects answered questions in interview and quoting three Australian studies showing only 4, 7 and 9% of suspects declined to answer questions: at [2.16]).

disclosed.¹⁴⁰ However, it is not always possible to anticipate what defence will be mounted at trial.¹⁴¹ A significant proportion of defendants in Australia¹⁴² and England¹⁴³ do not volunteer their version of events in interview and exercise their right, either wholly or partly, to refuse to answer police questions. It is also not uncommon for the defence to put the whole of the prosecution case to strict proof.¹⁴⁴ Such a course of action is unobjectionable.¹⁴⁵

¹⁴⁰ The issue of defence disclosure is ‘an area in which views are entrenched and passions run high,’ see Cosmas Moisisdis, *Criminal Discovery: From Truth to Proof and Back Again* (Sydney Institute of Criminology, 2008) 1. See further Law Reform Commission (NSW) (2000), above n 139, [3.85]-[3.125], for an overview of the arguments for and against defence disclosure. Though it is argued that a regime of reciprocal prosecution and defence disclosure ‘would enhance the truth seeking process of the adversarial criminal trial’, it is beyond the scope of this article to enter into the longstanding debate about defence disclosure: see Moisisdis, above n 140, 139.

¹⁴¹ An example of this was the recent trial of two of the individuals responsible for the foiled London terrorist bombing in July 2005 was delayed by nine months after they literally at the start of the original date fixed for trial came up with a completely new defence and, in the words of the trial judge, ‘attempted cynically to manipulate the process of this court,’ see Sir Brian Leveson, ‘Criminal Justice in the 21st Century’ (the Roscoe Lecture, St George’s Hall, Liverpool, 29 November 2010) <<http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/speech-by-leveson-Law Journal-roscoe-lecture-291110.pdf>>.

¹⁴² See Law Reform Commission (2000), above n 136, [2.12]-[2.18]. The Law Reform Commission’s research further suggested that ‘ambush’ defences were far from unknown: at [3.64]-[3.65]. When used, they contributed to the outcome of the trial: at [3.69]-[3.70].

¹⁴³ See, eg, Tom Bucke, Robert Street and David Brown, *The Right of Silence: The Impact of the Criminal Justice and Public Order Act 1994 (Home Office Research Study No 199)* (Home Office, 2000) 29-31; Ian Dennis ‘The Criminal Justice and Public Order Act: the Evidence Provisions’ [1995] *Criminal Law Review* 4, 11. This trend is apparently more pronounced in respect of suspects facing more serious crimes: see David Dixon, *Law in Policing: Legal Regulation and Police Practices* (Clarendon Press, 1997) 231, 235.

¹⁴⁴ See Advisory Committee on Criminal Trials, *New Approaches to Criminal Justice: Report of the Chief Justice’s Advisory Committee on Criminal Trials in the Superior Court of Justice* (Dept of Justice, 2006) [62]; Editorial, ‘Disclosing the Evidence’ (1995) 159 *Justice of the Peace Notes* 277; Brian Martin QC et al, *Working Party on Criminal Trial Procedure: Report* (Attorney-General’s Department, 1999) 70.

Further, even where the prosecutor might anticipate the broad defence to be raised at trial, the detail may remain unknown until trial. Common and straightforward defences can raise subtle and complex disclosure issues.¹⁴⁶

Then there are cases where every possible line of defence is pursued, even when there is a statutory requirement to notify the prosecution in advance of the intended defence.¹⁴⁷ As noted in 1995 by the editor of the *Justice of the Peace*:

The incident didn't happen and even if it did happen my client wasn't there. Even if my client was there he didn't do it. Even if he did do it, he didn't know that he was doing it. Even if you find against my client on those grounds, my client still has a number of defences to raise.¹⁴⁸

In such cases prosecutors will clearly have difficulty in assessing what is genuinely relevant to the accused. Wells notes, with some understatement, that: 'Defence statements have not been a success.'¹⁴⁹ It is not uncommon to encounter defence statements (assuming that one is even served)¹⁵⁰ that either replicate the

¹⁴⁵ See, eg, *R v Cassell* (2000) 201 CLR 189, 194-5 (Kirby J); *R v Petty* (1991) 173 CLR 95; *R v RPS* (2000) 199 CLR 620; *R v Azzopardi* (2001) 205 CLR 50; *R v Dyers* (2002) 210 CLR 285; emphasising that it is wrong to expect the defence to either give or call evidence and the accused is entitled to insist the prosecution establish its case beyond reasonable doubt.

¹⁴⁶ Colin Wells, *Abuse of Process: A Practical Approach* (Legal Action Group, 2006) 70.

¹⁴⁷ Such 'blanket' denials are not uncommon in practice, even under the *CPIA*: see Goldsmith, above n 32, 16. See also, Mark Aronson, *Managing Complex Criminal Trials: Reform of the Rules of Evidence and Procedure* (AIJA, 1992) 40, who described a defence statement that he saw as, 'Frankly it is a two page joke, in which all issues are kept open, all allegations denied, and for good measure, *mens rea* is specifically denied.'

¹⁴⁸ Editorial, above n 144, 277. See, eg, *R v Haig* [2006] 22 CRNZ 814, [123].

¹⁴⁹ Wells, above n 146, 57.

¹⁵⁰ The Attorney-General in 2005 claimed that the mandatory requirement to provide a defence statement in the Crown Court had come to be regarded as 'voluntary' and noted that at one Crown Court the defence failed to serve a defence statement in an astonishing 85% of cases: see Goldsmith, above n 32, 16.

scenario described above or are no more than a bare and bland denial of guilt.¹⁵¹ Plotnikoff and Woolfson found in their 1999 research that 54% of the surveyed defence statements either consisted of a bare denial of guilt or otherwise failed to meet the requirements of the *CPIA*.¹⁵² Later studies have found similar results.¹⁵³ Recent amendments have been enacted to the *CPIA* that are designed to tighten the requirements for meaningful disclosure of the defence case.¹⁵⁴ Whether they will have the desired effect remains to be seen.

G Observations

Scrutiny of the limited requirements that exist in Australia for the defence to notify the prosecution of the accused's intended defence¹⁵⁵ suggests that Australian defence lawyers are as resistant

¹⁵¹ See Auld, above n 13, ch 10, [158]; Goldsmith, above n 32, 16; Quirk, above n 67, 56-7; *Disclosure: A Protocol for the Control and Management of Unused Material in the Crown Court*, [34] <<http://www.westerncircuit.org.uk/Documents/CPS/Disclosure%20protocol%20Feb%202006.pdf>>. For a practical example of such a defence statement: see *R v Bryant* [2005] EWCA Crim 2079.

¹⁵² Plotnikoff and Woolfson, above n 27, xi-xii, 136.

¹⁵³ See HMCPSI, above n 27, 50, [8.14], which found that in 2008 43% of defence statements still failed to meet the statutory criteria. See also Quirk, above n 67, 42-59; Wells, above n 146, 59-60; Martin Zander, 'Mission Impossible' (2006) 156 *New Law Journal* 618.

¹⁵⁴ The first amendments through the *Criminal Justice Act 2003* (Eng) s 33 that came into operation on 4 April 2005 requires the accused to set out the nature of the defence in general terms, to indicate the matters upon which the accused takes issue with the prosecution case and to set out in relation to each such matter why issue is taken. The *CPIA* has now been even further tightened by s 60 of the *Criminal Justice and Immigration Act 2006* (Eng) that came into operation on 3 November 2008 and requires the defence to notify the prosecution of the particulars of any matters of fact on which the accused intends to rely on in his or her defence. There is an additional requirement for the defence to provide to the prosecution the names, addresses and dates of birth of any defence witnesses.

¹⁵⁵ See, eg, the *Crimes (Criminal Trials) Act 1993* and 1999 (Vic); the *Criminal Procedure Act 1986* (NSW) (introduced 2001) div 3; the *Criminal Code* (WA) (introduced 2002) ss 611B, 611C.

as their English counterparts to divulging the nature of their case.¹⁵⁶ The defence disclosure requirements in Australia have not been widely used in practice and have been frustrated by the general culture of combat rather than co-operation of the lawyers involved.¹⁵⁷ The English and Australian experience of defence disclosure demonstrates the difficulties that remain for the prosecutor in predicting the defence case and assessing the significance of any item of unused material. Even in England where there exists mandated defence disclosure, wide judicial powers to deal with disclosure issues¹⁵⁸ and a robust culture of case management¹⁵⁹ to enforce the statutory requirements of defence disclosure, the courts have proved at best reluctant,¹⁶⁰ and at worst unwilling,¹⁶¹ to ensure compliance. It is clear that a regime of mandated defence disclosure is not a 'quick fix or instant solution'¹⁶² to the prosecution's problems in meeting its modern duties of disclosure.¹⁶³

¹⁵⁶ See Chris Corns, *Anatomy of Long Criminal Trials* (AIJA, 1997) 62-5; Kathy Mack and Roach Anleu, *Pleading Guilty: Issues and Practices* (AIJA, 1995) 125; Moisisdis, above n 140, 76. The *Victorian Bar Inc Practice Rules Rules of Conduct and Compulsory Legal Education Rules*, Rule 153 makes it plain that defence counsel has no duty to divulge the nature of his or her client's defence.

¹⁵⁷ Kevin Dawkins, 'Defence Disclosure in Criminal Cases' [2001] *New Zealand Law Review* 35, 48-9. See also NSW Law Reform Commission (2000), above n 139, [3.31], n 17; Corns, above n 156, 38.

¹⁵⁸ These powers exist in both specific and general terms. For the specific: see the *CPIA* 1996, s 8 and the *Code of Practice* issued under Part II of the *CPIA*; the *Criminal Procedure Rules* 2010 (Eng) r 22.5; *Disclosure: a Protocol for the Control and Management of Unused Material in the Crown Court*, above n 151. For general terms see the *Criminal Procedure Rules* (2010) rr 1.1, 1.2(1), 3.2, 3.3, 3.10(a), which impose on a criminal court both the duty and the power to make such orders as are necessary to actively manage a criminal case justly, efficiently and expeditiously.

¹⁵⁹ See, eg, *R v Jisil* [2004] EWCA Crim 696, [14]-[116].

¹⁶⁰ See, eg, Auld, above n 13, ch 10, [144], [158]-[159]; Gross, above n 26, 74, noting in 2011 the 'undoubted room for judicial improvement in this area'.

¹⁶¹ See Stanley Fisher, 'The Prosecutor's Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England' (2000) 68 *Fordham Law Review* 1379, 1397, n 99; Goldsmith, above n 32, 16; Plotnikoff and Woolfson, above n 27, 72-3; Taylor (2005), above n 89, 125-6.

¹⁶² Gross, above n 26, 3.

¹⁶³ Though it is beyond the scope of this article to enter into the debate about defence disclosure, if mandated defence disclosure has not proved a

V DEFENCE INVOLVEMENT: UNAVOIDABLE NECESSITY?

A *Defence Access to Prosecution Material*

There is a strong argument for allowing the defence to access all the material gathered by the prosecutorial agencies in the course of their investigations, even where that material does not appear at first glance to be relevant to the defence case or might not be admissible at trial. Apparently irrelevant or inadmissible material may lead to lines of enquiry that are pertinent. It may be helpful for the defence to have access to all prosecution material, and for the defence to judge its potential relevance and make use of it as they deem fit. It does not follow that because an item is legally inadmissible it is not without value to the defence.¹⁶⁴

In *Ward* the Court of Appeal observed that ‘non-disclosure is a potent source of injustice’ and even with the benefit of hindsight it will often be difficult to say if an item not disclosed by the prosecution might have ‘shifted the balance or opened up a new line of defence.’¹⁶⁵ The Court of Appeal adopted a principle propounded by Lawton LJ¹⁶⁶ that those who prepare and conduct prosecutions owe a duty to ensure that ‘all relevant evidence of help to an accused’ was either led by them or made available to the defence.¹⁶⁷

resounding success in England, there may be little reason to think that it would work well in Australia.

¹⁶⁴ See Sybil Sharpe, ‘Disclosure, Immunity and Fair Trials’ (199) 63 *Journal of Criminal Law* 67, 71-6. See also *R v Preston* [1993] 4 All ER 630, 663, where Lord Mustill explained, ‘Often the train of inquiry which leads to the discovery of evidence which is admissible at trial may include an item which is not admissible.’

¹⁶⁵ [1993] 1 WLR 619, 642.

¹⁶⁶ *R v Hennessey* (1978) 68 Cr App R 419, 426.

¹⁶⁷ [1993] 1 WLR 619, 645 applying *R v Hennessey* (1978) 68 Cr App R 419, 426. See also *R v Gillard and Preston* (1999) 76 SASR 76, 93, *Western Australia v Christie* (2005) 30 WAR 514, 519; *Ragg v Magistrates’ Court of Victoria* (2008) 179 A Crim R 568, 598.

This gives rise to a tension between cost and responsibility. The Crown Prosecution Service Inspectorate in 2008 noted that:

Where there is a large amount of [unused] material which is potentially relevant, expense will always be incurred because someone has to examine it if disclosure is to be done properly. The only question is where that responsibility and corresponding expense should rest.¹⁶⁸

There is a respectable body of opinion to the effect that the only fair and workable solution is a system of ‘prophylactic open file discovery’¹⁶⁹ that allows the defence access to everything in the prosecution’s possession relating to the case with the exception of material that is genuinely sensitive and/or may attract public interest immunity.¹⁷⁰ This approach has been strongly attacked in some quarters.¹⁷¹ The Court of Appeal has asserted that handing the defence the ‘keys to the warehouse’ (as this approach is known) ‘has been the cause of many gross abuses in the past, resulting in huge sums being run up by the defence without any proportionate benefit to the course of justice.’¹⁷²

It has been suggested that passing the responsibility for assessing the relevance of unused material to the defence would involve an

¹⁶⁸ HMCPSI (2008), above n 28, 81, [15.3].

¹⁶⁹ Burke, above n 62, 481.

¹⁷⁰ See, eg, Burke, above n 62, 511-9; Butterfield, above n 25, 259, [12.32]; McGuinness, above n 32, [17]; Ormerod, above n 27, 106-16. Despite the *CPIA* and ever tighter restrictions, it is still routine for many prosecutors, including Treasury Counsel at the Central Criminal Court, to provide the defence, especially in complex or serious cases, with any non-sensitive unused material or to at very least allow them to inspect it, regardless of any assessment of relevance: see Butterfield, above n 25, [12.35]; HMCPSI, above n 28, 63, [11.12], 83, [15.10]-[15.11]; McGuinness, above n 32, [9]. This approach of ‘blanket disclosure’ has also been adopted in Australia: see Brian Martin QC, ‘Prosecution Issues’ (Speech delivered at the AIJA Conference, ‘Perspectives on White Collar Crime: Towards 2000,’ Melbourne, 27 October 1998) <<http://www.cdpp.gov.au/Director/Speeches/19980227bm.aspx>>.

¹⁷¹ See Goldsmith, above n 32, 14-5; *Protocol for Control and Management of Heavy Fraud and Other Complex Criminal Cases*, [4(iii)].

¹⁷² *Disclosure: A Protocol for the Control and Management of Unused Material in the Crown Court*, above n 139, [31].

abdication of prosecutorial responsibilities, and swamp the defence as opposed to the prosecution. ‘Without any filter to ensure that only relevant material is sent to the defence, there is a danger of producing a veritable rainforest of paperwork to no avail.’¹⁷³ However, the prosecution is in a less favourable position than the defence to assess what is significant to the defence, and both may take differing views as to what constitutes relevant information or evidence.¹⁷⁴ The defence will be better placed than the prosecution to assess relevance and the value to their case of an item of unused material. It should not be for the prosecutor, no matter how well intentioned he or she might be, to sift through what may well be a veritable mountain of material to identify what may be of relevance to the defence.

B *Recommendations*

The approach that is likely to avoid the pitfalls discussed above and to achieve maximum disclosure for the benefit of the defence is to notify the defence of all the items in the possession of the prosecution and, if it is impracticable to copy and provide them to the defence, to permit the defence to have access to them in order to assess their relevance.

VI DOES DISCLOSURE UNDERMINE THE ‘WAR ON CRIME’?

A *Undermining the ‘War on Crime’*

One of the traditional objections to disclosure has been that it would undermine the ‘War on Crime’ and lead to intimidation of witnesses. In 1965, Samuels made the following pessimistic prediction as to the

¹⁷³ A Mitchell, ‘Disclosure – Whose Responsibility?’ (1993) 137 *Solicitors’ Journal* 854.

¹⁷⁴ Gordon Hawkins, *Beyond Reasonable Doubt* (Australian Broadcasting Commission, 1977) 98.

consequences of imposing a wide duty of disclosure upon the prosecution:

The work of the police in the war against crime must not be hampered. The prosecution might be greatly burdened if copies of every statement taken in connection with an offence had to be supplied. The police cannot be expected to disclose everything to the 'underworld'. Statements might relate to other offences concerning third parties. People might be reluctant to make statements to the police if they knew that there would be no confidence observed and that the statements would be given to the defence. People who had originally made statements which were untrue might on entering the witness box be reluctant to change them to the truth for fear of having to meet a damaging cross-examination from the defence. The policeman might not bother to record a statement if he thought that it would not assist the prosecution, though this would seem to be a rather imaginary fear.¹⁷⁵

This raises the question whether these fears have been realised since the development of the modern duty of disclosure in England in the early 1990s. Some of Samuels' fears have proved illusory or misguided.¹⁷⁶ There is no contemporary evidence that untruthful witnesses have felt compelled to adhere to their initial false accounts to avoid being impugned in cross-examination. Nevertheless, some concerns raised by Samuels are pertinent. Specifically, the experience of disclosure in England suggests that the prosecution's duty of disclosure has provided a charter for defence lawyers to 'play the system' and abuse their newfound entitlements to frank disclosure, though there is a difference of opinion in this regard. On the one hand there is a body of opinion that defence lawyers have consistently misused their new found rights in respect of disclosure. On the other hand there is the view that the defence are entitled in an adversarial criminal process to take any legitimate point that might further the cause of their client.

¹⁷⁵ Alec Samuels, 'Prosecution Evidence for the Defence' (1965) *New Law Journal* 193. Samuels rejected the automatic disclosure of everything in the prosecution's possession as that 'would involve a fundamental departure from our practice in criminal cases'.

¹⁷⁶ The many wrongful convictions attributable to prosecution non-disclosure and the widespread non-compliance with the *CPIA* (see the discussion above in Part IV) suggest that the 'imaginary fear' noted by Samuels that an investigator might choose not to record an unhelpful piece of information may be very real.

B *Defence: Abusing the System*

The body of opinion that holds that disclosure in England since the early 1990s has been one of calculated and systematic abuse by defence lawyers, asserts that it is commonplace for defence lawyers ‘to manipulate the system to their advantage by requesting disclosure to delay trials, obfuscate issues and prejudice and embarrass the prosecutors.’¹⁷⁷ The Home Secretary, in 1996 declared that ‘it is professional criminals, hardened criminals and terrorists who disproportionately take advantage of, and abuse the present system [of disclosure].’¹⁷⁸ In 2005 Lord Goldsmith, the Attorney-General, declared that it was clear that the English disclosure system was not working as intended. Rather ‘it has been misapplied, misused and in some cases abused [by the defence]. It leads to huge sums of money being spent on fishing expeditions where the defence are searching for some “get out of jail free card”.’¹⁷⁹ Goldsmith expressed the fear that unless the misuse of disclosure tactics in serious crimes was checked, it could lead to a two tier criminal justice system, with defendants from ‘sink estates’ brought to justice but ‘white collar’ criminals able to evade prosecution.¹⁸⁰

It is an ‘undoubted fact that defence lawyers sometimes bombard the prosecution with requests for thousands of documents with little regard to their relevance’¹⁸¹ It is often asserted that both the common law and statutory duties of disclosure have allowed defendants to indulge in ‘fishing expeditions’ and raise dubious defences.¹⁸² It is

¹⁷⁷ Wells, above n 146, 52. See also the similar strong comments of Lord Templeman in *R v Chief Constable of West Midlands, ex parte Wiley* [1994] 3 All ER 420, 423-4.

¹⁷⁸ Quoted by Ben Fitzpatrick, ‘Disclosure: Principles, Process and Politics’ in Clive Walker and Keir Starmer (eds), *Miscarriages of Justice: a Review of Justice in Error* (Oxford University Press, 1999) 158.

¹⁷⁹ Goldsmith, above n 32, 3-4.

¹⁸⁰ *Ibid* 4.

¹⁸¹ *R v Winston Brown* [1994] 1 WLR 1599, 1609.

¹⁸² See *Disclosure: a Protocol for the Control and Management of Unused Material at the Crown Court*, [1]; Epp, above n 69, 78-80; Goldsmith, above n 32, 1-30; Home Office, *Disclosure: a Consultation Document* (HMSO, 1995).

clear that defendants and/or defence lawyers¹⁸³ since the expansion to the prosecution's duty of disclosure have shown on occasion an uncanny ability to pursue a defence that raises issues such as public interest immunity. A 1994 case noted that since *Ward* there had been an increased tendency for defendants to seek disclosure of the names and roles of police informants on the basis that such details were essential for their defence.¹⁸⁴ Assertions of duress or that the accused had been 'set up,' previously rare, had multiplied.¹⁸⁵ Accordingly, a need was identified for vigilance by trial judges in dealing with defence claims that disclosure of a sensitive item might be necessary for an accused's defence.¹⁸⁶ Despite such caution there have been cases where the prosecution has been compelled to abandon its case as a result of the insistence of the courts that sensitive unused material be disclosed.¹⁸⁷

It has been further suggested that disclosure obligations have contributed to the plethora of spurious claims that prosecutions should be stayed as an 'abuse of process.'¹⁸⁸ Issues of disclosure

¹⁸³ It is unlikely that the version of an accused is always his or her own unvarnished account and does not bear some hallmarks of 'suggestion,' if not outright manufacture, by his or her lawyers: see A Watson, 'Witness Preparation in the United States and England and Wales' (2000) 164 *Justice of the Peace Notes* 816, 822.

¹⁸⁴ *R v Turner* [1995] 3 All ER 432, 435 (Lord Taylor CJ).

¹⁸⁵ [1995] 3 All ER 432, 435. See, eg, *R v Stone* [2000] EWCA Crim 48.

¹⁸⁶ *R v Turner* [1995] 3 All ER 432, 435-6. See also *R v Stone* [2000] EWCA Crim 48, [28].

¹⁸⁷ See *R v Langford* [1990] Crim LR 653; *R v Agar* [1990] 2 All ER 442; *R v Vaillencourt*, *The Times*, 12 June 1992; *R v Reilly* [1993] Crim LR 279; *R v Yirtici* (Unreported, Court of Appeal, 12 July 1996, No 95/4882/Y2, Transcript Smith Bernal); *R v Baker* [1996] Crim LR 55 (orders made, or should have been made, by the trial judge that details of police informants be released in order to assist a tenable line of defence). In such cases the prosecution may choose to protect its confidential information than seek to secure the conviction of the accused. See also Pollard, above n 72, 42-3.

¹⁸⁸ For a discussion of the basis and scope of this principle see *Police v Sherlock* (2009) 103 SASR 147; *R v Dupas* (2010) 267 ALR 1. See further Andrew Choo, 'Halting Criminal Prosecutions: The Abuse of Process Doctrine Revisited' [1995] *Criminal Law Review* 864; David Corker and David Young, *Abuse of Process in Criminal Proceedings* (Butterworths, 2003).

have proved a fertile source for defence assertions of abuse of process. Justice Butterfield in 2003 remarked on the ‘burgeoning industry in this form of satellite litigation.’¹⁸⁹ Lord Woolf CJ spoke in strong terms of the routine practice ‘up and down the country’ for defence counsel to raise arguments of abuse of process.¹⁹⁰ Lord Woolf considered that such arguments wasted court time, distorted the already complicated trial process and that it ‘is irresponsible [for defence counsel] to add to that complexity by putting forward unnecessary allegations dressed up as abuse of process.’¹⁹¹

However, similar exhortations¹⁹² appear to have fallen on deaf ears. Claims of abuse of process have continued to proliferate. As Corker and Young noted in 2003, ‘Trial courts have largely been about as successful as King Canute in holding back the tide of applications.’¹⁹³ Not only is there a prevalence of such claims, the abuse of process challenges have proved surprisingly successful in practice.¹⁹⁴ ‘Despite clear judicial authority that the imposition of a stay should be an exceptional remedy seldom justified on the facts, the reality is that applications are successful on more occasions than might be expected.’¹⁹⁵ Indeed, more than one successful claim of an abuse of process due to prosecution non-disclosure has been discovered on further scrutiny to be groundless.¹⁹⁶

¹⁸⁹ Butterfield, above n 25, 283, [12.83].

¹⁹⁰ *R v Childs*, *The Times*, 30 November 2002. The modern ‘growth industry’ of claims of abuse of process was noted as early as 1990: see Richard Fox, ‘Criminal Delay as an Abuse of Process’ (1990) 16 *Monash University Law Review* 78-9.

¹⁹¹ *R v Childs*, *The Times*, 30 November 2002.

¹⁹² See, eg, *Environment Agency v Stanford* (Unreported, Divisional Court, 30 June 1998, No Co/4625/97); *R v Howell* [2003] EWCA Crim 486.

¹⁹³ Corker and Young, above n 188, 268.

¹⁹⁴ See Plotnikoff and Woolfson, above n 27, 101-4.

¹⁹⁵ Butterfield, above n 25, 269-70, [12.71].

¹⁹⁶ See, eg, *R v Doran* (Unreported, Bristol Crown Court, 6 July 1999). The trial judge, Turner J, stayed a retrial in a large scale drugs importation case as a purported ‘abuse of process’ owing to the serious alleged failures of the prosecution with respect to disclosure but it is clear that there was no justification for this order: see Butterfield, above n 25, Appendix 4, 300-3; *R v Togher and Others* [2000] EWCA Crim 111, [63]-[65]. See also Goldsmith, above n 32, 6, who cites a similar case where the trial judge stayed as an ‘abuse

C *Defence: Doing their Duty*

Nevertheless, whilst there have been occasions when the defence have abused their rights in respect of disclosure, one should not forget that the proper role of any defence lawyer is to ‘investigate the case fully on behalf of his client and to neglect no avenue of defence which may be open to him.’¹⁹⁷ After all, if the ‘silver thread’ of the criminal law is that the prosecutor must act as a minister of justice,¹⁹⁸ then the ‘golden thread’ remains that of the duty of the prosecution to establish the guilt of the accused beyond reasonable doubt.¹⁹⁹ This fundamental proposition is sometimes overlooked in the disclosure debate. If there is a legitimate line of enquiry to explore, then the defence should pursue that avenue.

The many wrongful convictions in England resulting from non-disclosure bear testimony to the need for diligence on the part of defence lawyers in preparing their client’s defence. An inevitable consequence of the fact that the defence is best positioned to judge what is relevant to its case is that defendants to whom disclosure is made will find weaknesses in the prosecution case.²⁰⁰ Accordingly, it is right and possible that the defence should pursue the fullest degree of disclosure possible. A defence lawyer should not be criticised for taking advantage of a system that has been put in place for the benefit of the accused. A defence lawyer, providing he or she does not stray outside his or her paramount duty to assist in the

of process’ the trial of an alleged drug dealer when the prosecution had failed within the time scale set by the judge to provide edited copies of a large amount of video surveillance even though it bore no relevance to the issues at trial.

¹⁹⁷ Editorial, above n 144, 277. See also Gross, above n 26, 72-3.

¹⁹⁸ *R v Pearson* (1957) 21 WWR (NS) 337, 348.

¹⁹⁹ *Woolmington v DPP* [1935] AC 462, 481.

²⁰⁰ Redmayne, above n 100, 444. See also Gross, above n 26, 72-3; Michael Zander, ‘Lord Justice Auld’s Review of the Criminal Courts: a Response’, November 2001, 49

<http://www.lse.ac.uk/collections/law/staff%20publications%20@full%20text/zander/auld_response_web.pdf>.

administration of justice as an officer of the court,²⁰¹ should not be criticised for pursuing and scrutinising prosecution material.

VII DISCLOSURE OF THIRD PARTY MATERIAL

An area of disclosure that ‘rears its head time and time again’²⁰² is the disclosure of material held by a third party such as a doctor, counsellor, school or social or community services department. The role of the prosecutor with respect to such material has proved problematic. There is ‘widespread confusion and dissent amongst practitioners’²⁰³ as to which party has the responsibility of seeking such third party material.

A *Prosecution and Defence Obligations*

The basic position is that a prosecution witness is a third party to the proceedings and is not to be treated as part of the prosecution for the purposes of disclosure.²⁰⁴ Material in the possession of such a witness is not disclosable unless it is also in the prosecution’s possession. There is no duty upon the prosecution to exercise its powers or goodwill to obtain third party material so that it is made available to the defence.²⁰⁵ However, there is likely to be an imbalance between the respective positions of the prosecution and

²⁰¹ See, eg, *Rondel v Worsley* [1967] 1 QB 443, 502 (Lord Denning MR) (Court of Appeal); [1969] 1 AC 191, 227-8 (Lord Reid) (House of Lords); *Giannerelli v Wraith* (1988) 165 CLR 543, 556 (Mason CJ). See further Warren, above n 24.

²⁰² Peter Rook QC and Robert Ward, *Sexual Offences: Law and Practice* (Sweet & Maxwell, 3rd ed, 2004) 603.

²⁰³ *Ibid* 620.

²⁰⁴ See Corker, above n 24, 138, n 16; Niblett, above n 8, 92; *Re Barlow Clowes Gilt Managers Ltd* [1991] 4 All ER 385, 393. cf *R v Skingley and Burdett* (Unreported, Court of Appeal, 17 December 1999, No 9903677 Z2/9904709/9903679, Transcript: Smith Bernal Report Ltd); *R v Alibhai and Others* [2004] EWCA Crim 681, [107].

²⁰⁵ See *Re Barlow Clowes Gilt Managers Ltd* [1991] 4 All ER 385, 392-94; *Morris v Director of SFO* [1993] Ch 372; *R v Maxwell* (Unreported, Court of Appeal, 9 February 1995, Transcript: John Larking).

defence.²⁰⁶ The prosecution is likely to occupy a privileged position and enjoy resources, powers and facilities²⁰⁷ in contrast to the defence where 'there is the battle to obtain criminal legal aid to resource a comprehensive analysis of the case, let alone investigation by a solicitor.'²⁰⁸ Typically defence cases are founded on manifest weaknesses in the prosecution case, rather than on investigations conducted in preparation of a client's case.²⁰⁹ The prosecution is able to pursue enquiries in respect of significant material that would not be open to the defence. In the present climate of tight public expenditure for legally aided defendants, it is arguably unrealistic to expect defence practitioners to be able to pursue the same enquiries as are open to the prosecution.²¹⁰ The defence lawyer is likely to be funded by legal aid and/or operating on a limited budget and may lack the ability to make enquiries of third parties or seek potentially relevant material in their possession.²¹¹

²⁰⁶ See *R v McKenny* (1991) 93 Cr App R 287, 291; Fitzpatrick, above n 178, 151-2.

²⁰⁷ See Zacharias, above n 61, 74-9.

²⁰⁸ Roger Ede and Eric Shepherd, *Active Defence: A Solicitor's Guide to Police and Defence Investigation and Prosecution and Defence Disclosure in Criminal Cases* (Law Society, 1st ed, 1997) 3.

²⁰⁹ *Ibid* 3-4; Sharpe, above n 164, 71.

²¹⁰ The administration of criminal justice has proved not immune over recent years from the principles of managerial efficiency and the desire to achieve 'value for money': see Alan Mackie, John Burrows and Roger Tarling, 'Preparing the Prosecution Case' [1999] *Criminal Law Review* 460. These financial pressures have extended to state financing of legal representation for eligible defendants in both England and Australia. See David Kirk, 'Toughness and the Cost of Legal Aid' (2006) 70 *Journal of Criminal Law* 363; P Rohan, 'Legal aid close to crisis, survey warns' (2003) 100 *Law Society Gazette* 1, 3; Michael Kirby QC, 'The Crisis in the Law Continued' (Speech delivered at the Law Society of New South Wales Annual Dinner, Sydney, 31 October 1996) <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_probono.htm>; Francis Regan, 'Rolls Royce or Rundown 1970s Kingswood? Australia's Legal Aid in Comparative Perspective' (1997) 22 *Alternative Law Journal* 225, 225-8.

²¹¹ See Corker, above n 24, 67; Michael McConville et al, *Standing Accused: the Organisation and Practices of Criminal Defence Lawyers* (Clarendon Press, 1994) 68. Given the acute pressures on legal aid funding over recent years, it is unlikely that this situation would have improved in either Australia or England

B *The Prosecutor as a Minister of Justice?*

Although the prosecution may not be under any strict duty to obtain relevant third party material with a view to potentially disclosing it to the defence,²¹² there is an argument that the prosecutor's role means that he or she cannot simply refuse as a matter of course to embark upon such a task.²¹³ In a number of cases third party material has proved significant to the outcome of a case.²¹⁴ There are a variety of situations in which material held by a third party is likely to be 'crucial'²¹⁵ or 'essential.'²¹⁶ For example, in one English case, the accused was charged with assaulting a child.²¹⁷ Material held by a third party, namely the local authority, was regarded by the Court of Appeal as cogent and undermining the complainant's assertion that she had been physically abused by the accused.²¹⁸ It is clear that there are cases where third party material can lead to the prosecution abandoning its case, or where such material will contribute to an acquittal.²¹⁹

since these studies: see eg, Harry Fletcher, 'The Criminal Justice System is in Crisis', *The Guardian*, 7 October 2008.

²¹² See *R v Alibhai and Others* [2004] EWCA Crim 681, [63]. In England this is subject to the *CPIA Code of Practice*, [3.4], that requires the investigator to pursue all 'reasonable lines of enquiry, whether these point towards or away from the suspect.' See further Corker and Young, above n 188, 95-7. This is supported by the *Attorney-General's Guidelines on Disclosure* 2005, [51]-[54], that encourages the prosecution to take 'reasonable' measures to acquire unused material held by a third party that is likely to be significant.

²¹³ See Corker, above n 24, 60, [4.35]; Rook and Ward, above n 202, 620-1.

²¹⁴ See, eg, *R v Clark* (1993) 171 LSJS 133; *R v K* [2002] EWCA Crim 2878.

²¹⁵ Rook and Ward, above n 202, 603.

²¹⁶ Joanna Glynn, 'Disclosure' [1993] *Criminal Law Review* 841, 848. Glynn describes the importance of social service records in alleged child sexual abuse cases. See also Diane Birch and Chris Taylor, "'People like Us": Responding to Allegations of Past Abuse in Care' [2003] *Criminal Law Review* 823, 827.

²¹⁷ *R v M* (Unreported, Court of Appeal, 5 November 1999, No 9803990/Y4, Transcript: Smith Bernal).

²¹⁸ The material undermined the complainant's assertion that she had been physically abused by the accused.

²¹⁹ Niblett gives the example of a rape case at the Central Criminal Court that was abandoned by the prosecution after third party medical notes undermined the victim's credibility (the notes revealed previous allegations of rapes, sometimes in bizarre circumstances): see Niblett, above n 8, 166-7.

There is a tenable argument that the prosecutor's role as a minister of justice extends to obtaining potentially relevant material from a third party.²²⁰ In *R v MacNeil*²²¹ the Supreme Court of Canada held that the prosecutor could not sit passively by if it became aware that a third party held relevant material. Rather the prosecutor's role of 'undivided loyalty to the proper administration of justice' required it to inquire further and to obtain such material if 'reasonably feasible.'²²²

C Issues

Placing third party disclosure obligations on the prosecution raises issues of the proper regard to be paid to the interests of victims and witnesses. There are strict rules governing access to third party information. In England, the courts are adamant that an approach cannot be employed as a disguised form of discovery intended to find information that might be solely of use in cross-examination on issues of credibility.²²³ The information must be both legally admissible and 'material' in a very real sense to the likely issues in the case. There is further authority that information sought or evidence adduced should be material to the proceedings in that it tends to support the case of the party seeking that information or the

²²⁰ In *R v M* (Unreported, Court of Appeal, 5 November 1999, No 9803990/Y4, Transcript: Smith Bernal) 5; the Court of Appeal suggested that the prosecution had been in error in not seeking third party material that undermined the victim's credibility. See also *R v McCann* (Unreported, Court of Appeal, 28 November 2000, Transcript: Smith Bernal) [59]. *M* and *McCann* highlight the dilemma confronting English defence lawyers in seeking to obtain third party material in that they are damned if they do and at risk of a wasted costs order and damned if they do not: see James Richardson QC, 'Comment', 27 *Criminal Law Weekly*, July 17 2000.

²²¹ [2009] 1 SCR 66.

²²² [2009] 1 SCR 66, [49].

²²³ See *R v Reading Justices, ex parte Berkshire County Council* [1996] 1 Cr App R 239; *R v M (Wasted Costs Order)* [1996] 1 FLR 750; *Re: a Solicitor (Wasted Costs Order No 1 of 1994)* [1996] 1 FLR 40; *R v Azmy* (1996) 7 Med LR 415; *R v Counsel (Wasted Costs Order No 5 of 1997)*, *The Times*, 7 September 1999; *Douglas Narayan and Partners v Khan* (1998) PNLR 535.

evidence of that witness.²²⁴ This narrow approach contrasts with the broader *Keane* and *CPIA* tests for disclosure applicable to information held by the prosecution.²²⁵

The issue of third party disclosure is most apparent with highly sensitive records, relating to victims of sexual or violent offences, held by third parties such as social services, medical practitioners, counsellors, and schools. There is evidence that the defence is likely to seek access to third party material in sexual assault cases where ‘the main strategy employed by defence barristers ... is to seek to undermine the personality of the complainant, to attack and preferably destroy her credibility.’²²⁶ This trend has been referred to with disapproval, as it has ‘become standard practice’ for the defence to seek such material.²²⁷ Many commentators have also expressed disquiet at the trend for the defence to seek confidential and private records held by third parties in order to find useful material to put in cross-examination.²²⁸ It is apparent that defence lawyers seek, and even expect, the prosecution to carry out enquiries into third party material.²²⁹ Disquiet about these practices has led to

²²⁴ See *R v Marylebone Magistrates Court, ex parte Gatting and Emburey* (1990) 154 JP 549.

²²⁵ See *R v Brushett* [2001] Crim LR 471 where the Court of Appeal sought to reconcile the two tests.

²²⁶ Jennifer Temkin, ‘Digging the Dirt: Disclosure of Records in Sexual Assault Cases’ (2002) 61 *Cambridge Law Journal* 26. See further Jennifer Temkin, ‘Prosecuting and Defending Rape: Perspectives from the Bar’ (2000) 27 *Journal of Law and Society* 219, 231-236.

²²⁷ *R v H* [1997] 1 Cr App R 176 (Sedley J). See also *R v Azmy* (1996) 7 Med LR 415; *R v Higgins* [1996] 1 FLR 137.

²²⁸ See Karen Busby, ‘Discriminatory Uses of Personal Records in Sexual Assault Trials’ (1997) 9 *Canadian Journal of Women and the Law* 148; Anne Cossins, ‘Tipping the Scales in her Favour: The Need to Protect Counselling Records in Sexual Assault Trials’ in Patricia Easteal (ed), *Balancing the Scales: Rape Law Reform and Australian Culture* (Federation Press, 1998) 94; John Dawson, ‘Production of Therapeutic Records to the Defence’ (1998) 5 *Psychiatry Psychology and Law* 63; Marilyn McCrimmon, ‘Trial by Ordeal’ (1996) 1 *Canadian Criminal Law Review* 31.

²²⁹ See James Richardson QC, ‘You can’t see anything, but you can say what you like,’ (Lecture delivered to the North Eastern Circuit, 6 October 2007) [28]-

the enactment of legislation in most Australian jurisdictions that restricts²³⁰ or precludes²³¹ defence access to such material.

The idea of the prosecutor acting at the behest of the defence in seeking material held by a third party that might undermine its case is curious. There are very real questions about the ethical position of a prosecutor seeking material of a highly sensitive nature about the victim or prosecution witnesses for use by the defence. It involves the prosecution obtaining material, which will either undermine the prosecution case or be used to attack the testimony or credibility of the victim or another prosecution witness. Such far reaching disclosure arguably infringes the legitimate interests and rights of victims and witnesses.²³² It may well discourage them from seeking counselling support, or reporting offences. In this regard it would also run counter to public interest, and the need for the modern prosecutor to be responsive to the welfare of victims and witnesses.²³³

[30] <<http://www.northeasterncircuit.co.uk/article.aspx?articleid=21>>; Fisher, above n 161, 1400, n 17.

²³⁰ See the *Evidence (Miscellaneous Provisions) Act* 1991 (ACT) ss 54-67; the *Criminal Procedure Act* 1986 (NSW) ss 295-306; the *Evidence Act* 1939 (NT), ss 56-56G; the *Evidence Act* 1929 (SA) ss 67D-67F; the *Evidence Act* 1906 (WA) ss 19A-19M.

²³¹ See the *Evidence Act* 2000 (Tas) ss 127A-127B.

²³² See, eg, *R v Combined Court at Stafford* [2006] EWHC Admin 1645; John Epp, 'Production of confidential records held by a third party via witness summons in sexual offence proceedings' (1996) 1 *International Journal of Evidence and Proof* 122, 124. This theme is especially pertinent to third party records such as medical, counselling or social service of victims in sexual cases: see Anne Cossins and Ruth Pilkinton, 'Balancing the Scales: The Case for the Inadmissibility of Counselling Records in Sexual Assault Trials' (1996) 19 *University of New South Wales Law Journal* 222; Therese Murphy and Noel Whitty, 'What is a Fair Trial? Rape Prosecution, Disclosure and the *Human Rights Act*' (2000) 8 *Feminist Legal Studies* 143-67. The right to confidentiality of medical records, especially about a sensitive condition such as HIV, has been recognised under the ECHR and any inroad of that right must not be undertaken lightly: see *Z v Finland* (1997) 25 EHRR 371.

²³³ See, eg, *R v Logiacco* (1984) 11 CCC (3d) 374, 379 (Cory J); Matthew Hall, 'The Relationship between Victims and Prosecutors; Defending Victim's Rights?' [2010] *Criminal Law Review* 31, 38-40; Ken MacDonald QC, 'Our System of Justice must enjoy public confidence', *The Independent*, 1 February

D *Recommendations*

There must be limits to the role of the prosecutor with respect to disclosure. One logical limit is where information is held by a third party. It is acknowledged that there may be unusual circumstances in which it may be prudent or advisable for the prosecution to seek such material.²³⁴ Though Richardson describes the suggestion that the defence should obtain third party material as ‘outmoded and wrong’,²³⁵ in the ordinary course of events this may be preferable to the prosecution performing the work of the defence. The prosecution should not be compelled to adopt the role of ‘private detective’ at the behest of the defence. The onus should lie with the defence to seek third party material by means of a subpoena if the third party is unwilling to release it. Any objection to its production can then be made by the third party, even if the material has already been given to the prosecution.²³⁶

Given the conflicting interests that the prosecution may well be subject to, and the fact that the third party is likely to be better placed than the prosecution to assert and explain any objection to the disclosure of the material,²³⁷ it is logical for the third party, and not the prosecution, to argue public interest immunity or other available objection to the production of the material.²³⁸ The Australian practice represents the best solution. This requires the defence, rather

2005 (the then English DPP highlighting the modern focus, especially for prosecutors, of ‘putting the victim at the heart of the criminal justice system’). See generally Geoffrey Flatman QC and Mirko Bagaric, ‘The Victim and the Prosecutor: The Relevance of Victims in Prosecution Decision Making’ (2001) 6 *Deakin Law Review* 238.

²³⁴ From personal prosecutorial experience one of the authors can recall several examples of alleged victims in uncorroborated sexual cases who had made so many bizarre prior allegations that the prosecution would have been amiss in its duty to determine if there was a realistic prospect of conviction unless it had checked the alleged victim’s credibility.

²³⁵ James Richardson, ‘Comment’, 27 *Criminal Law Weekly*, July 17 2000, [27].

²³⁶ See *R v Maxwell* (Unreported, 16 May 1995, Central Criminal Court). See also Corker, above n 24, 106, 173, [8.83].

²³⁷ *Ibid* 107, [6.15].

²³⁸ *Ibid*.

than the prosecution, to obtain a subpoena for third party material,²³⁹ and for such a subpoena to be granted, issues of privilege aside, if the material serves a ‘legitimate forensic purpose’.²⁴⁰

VIII CONCLUSION

A *The ‘Golden Rule’ in Practice: Mission Impossible?*

There is no place for adversarial or partisan tactics in an area as crucial to the integrity of the criminal process as disclosure. The issue of disclosure is too important to the fundamental right of an accused to a fair trial²⁴¹ to leave to informal personal arrangements and there can be no return to the ‘Old Boys Act’ approach.²⁴² There is an obvious need for a formal system of disclosure that is governed by the notion of the prosecutorial role as a minister of justice. However, it is acknowledged that even on an application of the minister of justice role, there are limits to the extent of the duty of full disclosure; there must ‘be reasonable practical limits to even a rule of full disclosure.’²⁴³ In Australia, Mason P emphasised that the duties of the prosecution with respect to disclosure, while broad were not unlimited:

Like the ‘reasonable man’ beloved of tort law, the prosecuting authority will not be assumed to have had ‘the courage of Achilles, the wisdom of

²³⁹ See, eg, the general practice of the Commonwealth DPP in notifying the defence of the nature and location of relevant material held by a third party. The DPP does not obtain that material for the defence. See the *Statement on Prosecution Disclosure* (Cth) [4.5]. See also Nicholas Cowdrey QC, ‘The Prosecutor’s Duty of Disclosure’ (Speech delivered to the Public Defenders’ Conference, 8 May 2004)

<<http://www.odpp.nsw.gov.au/speeches/Public%20Defenders%202004%20-%20Disclosure.htm>>.

²⁴⁰ See *Sankey v Whitlam* (1978) 142 CLR 1; *R v Saleam* (1989) 16 NSWLR 14. For an apparent relaxation in the approach in Australia to the issue of subpoenas in criminal cases: see *R v Spizziri* [2001] 2 Qd R 686; *Ragg v Magistrates’ Court of Victoria* (2008) 179 A Crim R 568.

²⁴¹ See *R v Winston Brown* [1994] 1 WLR 1599, 1606 (Steyn LJ).

²⁴² See Warren, above n 24, 17-8.

²⁴³ Mack and Anleu, above n 156, 89.

Ulysses or the strength of Hercules’...Nor will her or she have the ‘the prophetic vision of a clairvoyant.’²⁴⁴

Though the prosecutor’s duty may be onerous, the prosecutor is not expected to be ‘omniscient’.²⁴⁵ In essence, ‘the principle is that the prosecution should be scrupulously fair to the accused, but need not be quixotically generous.’²⁴⁶ The former English Director of Public Prosecutions, while recognising the need for sufficient disclosure to an accused to ensure a fair trial emphasised the need for balance in the disclosure process between prosecution and defence.²⁴⁷ The difficulty lies in identifying the point at which the prosecutorial duty of disclosure ends. One possible limit is with respect to third party material. As suggested earlier, the balance might shift in favour of the adversarial aspect of the prosecutorial role and the interests of victims and witnesses.

The formulation in England of a system of disclosure that is both fair and practical has proved elusive. In 2005, Lord Goldsmith, the British Attorney-General, asserted that notwithstanding significant problems there was no alternative to the English statutory model of disclosure, and so the *CPIA* had to be made workable.²⁴⁸ However, most commentators do not share Goldsmith’s confidence in the *CPIA*. On almost any definition the *CPIA* has not proved a success.²⁴⁹ The problem is that no scheme has yet been proposed that has managed to attract universal acclaim and uncritical acceptance.

²⁴⁴ *DPP (NSW) v Webb* (2001) 52 NSWLR 341, 349. One might speculate, given the extent of the demands placed on prosecutors in England by the post-*Ward* requirements of disclosure, whether Mason P’s confidence may prove to be misplaced.

²⁴⁵ *R v Cannon* (Unreported, Court of Appeal, 30 January 1995, Transcript: John Larkin) 5.

²⁴⁶ John Sprack, *A Practical Approach to Criminal Procedure* (Oxford University Press, 10th ed, 2004) 323.

²⁴⁷ Barbara Mills QC (Tom Sargeant Memorial Lecture, 28 November 1994) quoted in Niblett, above n 8, 30.

²⁴⁸ Goldsmith, above n 32, 29. See also the *Protocol for the Control and Management of Unused Material at the Crown Court*, [1]; the discussion in *R v K* [2005] EWCA Crim 724.

²⁴⁹ Corker and Parkinson, above n 27, 20.

Lord Justice Auld observed that while: ‘Reform is needed ... it is clear that there is no consensus as to what form it should take.’²⁵⁰

The difficulty in devising a system of disclosure that is fair, effective and efficient cannot be underestimated.²⁵¹ It is far from clear that the recent amendments to the *CPIA* tightening the requirements on all parties will improve the operation of the English disclosure system. The CPS Inspectorate observed in 2008, ‘We recognise that it is impossible to gain the whole hearted acceptance of all parties to the existing disclosure regime.’²⁵² Several other commentators have suggested that changes to formal procedure will not overcome underlying flaws in the system, particularly ingrained cultural attitudes.²⁵³ Zander argues that the formulation of a workable system of disclosure is ‘Mission Impossible’:

The problem is that the culture of each of the players – the police, the prosecutors and the judiciary – is fundamentally out of tune with the disclosure rules. The police don’t want to disclose, the prosecution lawyers have not got the raw material or the time to check closely what they get from the police,²⁵⁴ and the defendant has no interest in being helpful either to the prosecution or the smooth running of the system. As to the judge, securing compliance with the disclosure rules is likely to be beyond the powers of even the most enthusiastic case managing judge.²⁵⁵

Others have concluded that the adversarial nature of the criminal process, in particular the tension it places on the prosecutorial role,

²⁵⁰ Auld, above n 13, ch 10, [168].

²⁵¹ See Butterfield, above n 25, 251, [12.7].

²⁵² HMCPSI, above n 28, 9, [2.34].

²⁵³ See Quirk, above n 67, 57-9; Redmayne, above n 100, 461-2; Wells, above n 146, 51-75. Similar views have been expressed in an Australian context: see Ray Gibson, ‘The *Crimes (Criminal Trials) Act 1999 – a Radical Change*’ (1999) *Law Institute Journal* 50, 52-3.

²⁵⁴ One might add to this a continuing adversarial attitude by some prosecutors to questions of disclosure: see Quirk, above n 67, 52-3.

²⁵⁵ Zander, above n 153, 618.

will continue to frustrate the operation of any disclosure regime.²⁵⁶ The lack of confidence in the future operation of the *CPIA* and the continued problems should not, however, obscure the legacy of both the historical and recent experience in England of wrongful convictions due to prosecution non-disclosure. This disturbing history is such that the prosecution must make full disclosure to the defence of any relevant material in its possession.²⁵⁷

B *A Fair and Workable System of Disclosure*

Though it is not a simple task it is possible to suggest some general features of a fair and workable system of formal disclosure. The features on which to build a system of disclosure are as follow:

1. A workable definition of the Prosecution limited to the police, other investigators and any expert witnesses retained by them, excluding other agencies or departments of the State and third parties, victims or witnesses.
2. The police should be required to gather, retain and accurately list material gathered in the course of an investigation. They should not have a role in determining its relevance.
3. Recognise the limits to the prosecution's ability in making disclosure to determine issues of relevance for the defence objectively and completely.
4. Address the practical disclosure problems with the test of relevance, the possible scale of investigation, the reluctance of the defence to reveal the nature of the intended defence, and the fact that the prosecution may not know the precise, or broad, nature of the defence to be deployed at trial.
5. Recognise that though there is substance to the accusation that defence lawyers have abused disclosure entitlements, it cannot be forgotten that the defence has a duty to investigate and test the prosecution case fully on behalf of his or her client.
6. Acknowledge that the prosecutor should not be placed in the position of 'private investigator' for the defence where third party material is concerned.
7. Acknowledge prosecutorial duties to the administration of justice (which includes a public duty in an adversarial system to seek the

²⁵⁶ Chris Taylor, 'Disclosure Strategies and Dilemmas within Routine Criminal Case Construction by UK Detectives' (2007) 14, <<http://ssrn.com/abstract=995864>>.

²⁵⁷ *R v H* [2004] 2 AC 134, 147.

conviction of the accused),²⁵⁸ and to achieving a fair trial for victims and prosecution witnesses.²⁵⁹ Third party disclosure requirements should avoid conflict with this duty particularly where sensitive or confidential third party material could undermine the credibility of prosecution witnesses.

8. Recognise that for the purposes of relevance and disclosure it is most practical to afford the defence access to any material gathered by the prosecution in the course of its investigation.²⁶⁰ If the material is too voluminous to be provided to the defence,²⁶¹ the defence should be entitled to inspect it.

C *The Application of the English Disclosure Model to Australia*

In light of the English experiences one might have thought that any judge or legislator would have hesitated before importing the English law of disclosure to another jurisdiction such as Australia and if any such law was to be adopted, it would have only been after exhaustive judicial, legislative or executive deliberation. However, the developments in England ultimately proved persuasive in Australia and with the High Court's decision in *Mallard*, Australia has now effectively embraced the English law on disclosure. The need for importing the same requirements imposed upon English prosecutors to Australia might be questioned as Australia appears to have largely been spared the spate of wrongful convictions and successful appeals due to prosecution's non-disclosure that have occurred in England.²⁶² The Australian courts have long accepted

²⁵⁸ See, eg, Devlin, above n 58, 122-3; Richard Du-Cann, *The Art of the Advocate* (Penguin Books, 1964) 38, 57-8.

²⁵⁹ It is now widely accepted that victims and witnesses have a legitimate interest in the conduct and outcome of criminal proceedings: see *Attorney-General's Ref (No 3 of 1999)* [2001] 2 AC 91, 118 (Lord Steyn).

²⁶⁰ This is apart from any material that might genuinely attract a claim of public interest immunity.

²⁶¹ With technological advances it may well be possible to provide the unused material, even in a complex case, in an electronic format: see Epp, above n 69, 70-1.

²⁶² See Hinton, above n 17, 123. It may be that such wrongful convictions have not been uncovered in Australia to the same extent as in England or the United States: see Linda Weathered, 'Does Australia need a Specific Institution to Correct Wrongful Convictions?' (2007) 40 *Australian and New Zealand Journal of Criminology* 179, 188. However, one cannot ignore such Australian

that some parts of English criminal procedure might be ill-suited to the very different circumstances of Australia.²⁶³ Decisions of even the highest English courts are no longer of more than persuasive value in Australia.²⁶⁴ While it could be argued that it was unnecessary to import the English model of disclosure, it would be naïve to assume that the Australian criminal justice system possesses a degree of infallibility that is lacking in other jurisdictions.²⁶⁵ It would be similarly naïve to argue in light of the all-too-regular revelations of police misconduct in Australia,²⁶⁶ that Australian investigators possess a degree of objectivity and transparency that is lacking in their English counterparts. The partisan approach to disclosure adopted in *Mallard* by not only the police, but arguably by prosecution counsel,²⁶⁷ supports this proposition.

The basic principle must now be firmly accepted: modern judicial authority²⁶⁸ supports an accused's entitlement to knowledge of the details of the prosecution case against him or her.²⁶⁹ There can be no

cases as *R v Button* (2002) 25 WAR 382, *R v Beamish* [2005] WASCA 62; *R v Mallard* (2005) 224 CLR 125.

²⁶³ *R v Farrell and Others* NSW Select Cases (Dowling 1828-1844) 136, 148. In the context of disclosure, even the Privy Council in *R v Berry* [1994] AC 364, 376, accepted that what may be applicable in England may be ill suited in another common law jurisdiction and is 'best left to, and devised by, the legislature, the executive and the judiciary which serves that community and are familiar with its problems.'

²⁶⁴ See *R v Parker* (1963) 37 ALJR 3; *R v Viro* (1978) 141 CLR 85; *Scott v Scott* (1986) 162 CLR 376, 390; the *Australia Act* 1986 (Cth).

²⁶⁵ See Weathered, above n 262, 180-1, 187-8; Niblett, above n 8, 207.

²⁶⁶ See the the frank discussion of the High Court in *R v Kelly* (2004) 218 CLR 216, 225 (Gleeson CJ, Hayne and Heydon JJ) 246-50 (McHugh J) and, in particular, the catalogue of official reports in Australia detailing police malpractices: at 249, n 94 (McHugh J) 262 (Kirby J).

²⁶⁷ See Dunford, above n 82, xxiv, [60], xxiv, [61], 122, [541], 122, [543], 123, [549], 124, [550].

²⁶⁸ See *R v Mallard* (2005) 224 CLR 125, 151 (Kirby J).

²⁶⁹ The importance of comprehensive prosecution disclosure to also ensure 'equality of arms' between the prosecution and the defence has emerged from consideration of international human rights law: see, eg, *Jespers v Belgium* (1981) 27 DR 61, [51]-[56]; *Kaufman v Belgium* (1986) 50 DR 98, 115; *Rowe and Davis v UK* (2000) 30 EHRR 1, [60]; *Ragg v Magistrates' Court of Victoria* (2008) 179 A Crim R 568, 579-85. This principle has also, not

escape from an open and formal system of disclosure.²⁷⁰ As one barrister aptly observes, ‘Proper and timely disclosure is the lynchpin of our criminal justice process ... It is the foundation of a fair trial.’²⁷¹ The accused is entitled to any material in the possession of the prosecution that may be relevant in the proceedings.²⁷² The argument in favour of such a comprehensive system of formal disclosure in both England and Australia is irresistible. There is a clear need for a formal and structured regime. There are significant problems of principle and practice involved in devising a system of disclosure that is acceptable to all. A system that takes account of the rights of third parties, the tensions within the prosecutorial role and the adversarial criminal justice system, would have the capacity to operate effectively, efficiently and fairly, notably to the accused. A formal system of disclosure that meets these requirements has proved elusive to achieve but cannot be avoided. ‘The costs of non-disclosure are now prohibitive.’²⁷³

coincidentally, emerged from common law jurisdictions that the prosecution’s duty of disclosure is necessary to redress the imbalance that typically exists between the resources of the State and the accused: see *R v McKenny* (1991) 93 Cr App R 287, 312; *R v C and Others* [2006] SASC 158, [45].

²⁷⁰ Indeed, the prosecution in the performance of all its functions must now act in a spirit of openness and under public scrutiny and exposure: see, eg, Morris Rosenberg, ‘The Attorney-General and the Prosecution Function and the Twentieth Century’ (2009) 34 *Queens Law Journal* 813, 817; Keir Starmer QC, ‘Outdated Crown Prosecution Service should be modernised, says DPP,’ *The Guardian*, 30 November 2009.

²⁷¹ Moynihan, above n 82, 85.

²⁷² Subject to any material genuinely attracting public interest immunity.

²⁷³ Frater, above n 2, 216.