

Prosecution Disclosure: are the problems insoluble?

Ian Dennis
Emeritus Professor of Law, UCL

Paper for the Assize Seminar in Cambridge on 27 April 2018. Please note that this paper is a work in progress and should not be cited without the permission of the author

Introduction

Prosecution disclosure has been problematic for many years.¹ There is a history of notorious cases of miscarriage of justice arising from non-disclosure.² The subject has generated more official reviews than any other topic in the law of criminal process.³ The reviews have largely agreed on the diagnosis of the problems and have come up with very similar recommendations. Despite these prescriptions, and despite the plethora of official guidance on the law and practice of disclosure,⁴ the problems persist. In recent months several collapsed prosecutions have attracted extensive publicity, including the case of Liam Allan⁵ in which disclosure failings led to a public apology from the Director of Public Prosecutions.⁶

This paper revisits the problems associated with prosecution disclosure and discusses the approach which the two most recent official reviews adopted to the problems. The paper argues that while there is much of value in these reviews they were insufficiently probing as to the underlying causes of the problems they identified. In particular they failed to address the issues of police and prosecution culture posed by Quirk in an important article some years ago.⁷ The recent cases not only highlight some of these cultural issues but give rise to additional concerns. The paper asks

¹ As Redmayne commented, “Disclosure has always been a problem and very probably always will be, whatever regime is adopted.” See M Redmayne, “Criminal Justice Act 2003(1): Disclosure and its Discontents” [2004] Crim LR 441, 461. My paper does not deal with defence disclosure which has different rationales from prosecution disclosure and raises different issues.

² *Maguire* [1992] QB 396; *Stefan Kiszko, The Times*, 19 February 1992; *Judith Ward* (1993) 96 Cr App R 1; *Taylor and Taylor* (1994) 98 Cr App R 361; *Sally Clark* [2003] EWCA Crim 1020. The Criminal Cases Review Commission has stated (*Annual Report and Accounts 2015/16*, para 5) “In the past twelve months this Commission has continued to see a steady stream of miscarriages. The single most frequent cause continues to be failure to disclose to the defence information which could have assisted the accused.”

³ Report of the Royal Commission on Criminal Justice (Cm 2263, 1993) Ch 6; Crown Prosecution Service Inspectorate, *The Inspectorate’s Report on the Thematic Review of the Disclosure of Unused Material* (CPSI, London, 2000); Lord Justice Auld, *Review of the Criminal Courts of England And Wales* (TSO, 2001) the Auld Review) pp 444-476; J Plotnikoff and R Woolfson, “A Fair Balance?” *Evaluation of the Operation of Disclosure Law*, RDS Occasional Paper No 76 (Home Office, London, 2001); *Review of Criminal Investigations and Prosecutions Conducted by HM Customs and Excise by the Hon Mr Justice Butterfield* (2003) Ch 12; Lord Justice Gross, *Review of Disclosure in Criminal Proceedings* (2011); Lord Justice Gross and Lord Justice Treacy, *Further Review of Disclosure in Criminal Proceedings: Sanctions for Disclosure Failure* (2012); HM Crown Prosecution Service Inspectorate and HM Inspectorate of Constabulary, *Making It Fair, A Joint Inspection of the Disclosure of Unused Material in Volume Crown Court Cases* (2017).

⁴ The duties of disclosure set out in the Criminal Procedure and Investigations Act 1996 (CPIA) are supplemented by the CPIA Code of Practice 2015, the Attorney-General’s Guidelines on Disclosure 2013, the Judicial Protocol on the Disclosure of Unused Material in Criminal Cases 2013, the Criminal Procedure Rules 2015 and the revised CPS manual, *The Disclosure Manual* (2018).

⁵ *The Times*, 15 December 2017. This case, and a number of the others, are discussed further below.

⁶ *The Times*, 16 December 2017.

⁷ H Quirk, “The significance of culture in criminal procedure reform: why the revised disclosure scheme cannot work” (2006) 10 E & P 42.

whether it is still sufficient to call, as the reviews did, for police and prosecutors to do their jobs more efficiently and for changes in their occupational culture. It is appropriate to ask whether the time has come to consider more radical measures, including some limited alteration of the institutional arrangements for disclosure. The recent cases suggest that disclosure problems are particularly pressing in sexual offence cases, especially if they involve, as many do, credibility contests between complainants and defendants. I argue that there would be advantages in outsourcing disclosure decisions in such cases to an independent judge or lawyer. He or she could act as an authoritative reviewer, relieving some of the burden on the police and the CPS, and providing independent and impartial conclusions on what the disclosure process requires.

Section A of the paper summarises the legal framework relating to disclosure. Section B discusses the review carried out by Lord Justice Gross in 2011 and the joint review of the Crown Prosecution Service Inspectorate (HMCPIS) and the Inspectorate of Constabulary (HMIC) in 2017. Section C examines the issues of credibility of complainants revealed by the most recent cases. Section D develops this discussion by reference to the roles, culture and skills of the police and CPS, and comments on how far the recent reviews have addressed the cultural issues that disclosure presents. Section E considers recommendations for measures to improve the disclosure process and concludes that a limited pilot scheme for outsourcing disclosure in cases involving credibility contests in sexual offence cases may be worth trying. The paper does not rehearse the reasons why disclosure is important. I take it as beyond controversy that arguments founded on constitutional principle, human rights and public interest provide compelling reasons for regarding proper disclosure as fundamental for criminal justice.⁸

A: The legal framework

We may begin by distinguishing between disclosure failings in relation to *evidence* which forms part of the prosecution case at the accused's trial and failings in relation to *unused material*. The latter is material acquired during a police investigation which the prosecution do not intend to rely on as part of their case. Such material may well be very extensive. The prosecution have duties to disclose all the *evidence* on which they intend to rely, but late disclosure of prosecution evidence is a common problem in both Crown Court and magistrates' court cases. Some of the evidence may not be served until just before the trial starts, or even when it is under way. This may happen despite repeated defence requests for the evidence, and in breach of timetables set as part of judicial case management under the Criminal Procedure Rules.⁹ We will return later to the causes of late disclosure and the recommendations of the reviews for improvements in practice. At this stage it is worth noting the measures available to deal with late disclosure of evidence. They include an award of costs against the prosecution, an adjournment of the trial to allow the defence time to consider the evidence, exclusion of the evidence in question and staying the prosecution as an abuse of process. The last of these is a drastic sanction, available only where it has become impossible for the accused to receive a fair trial, or where it would offend the court's sense of justice and propriety to try the accused in the circumstances of the case.¹⁰ The review by Lord Justices Gross and Treacy of sanctions for disclosure failures¹¹ declined to recommend any further new measures, saying that the

⁸ I have summarised these arguments in Dennis, *The Law of Evidence* (6th ed, 2017) Ch 9, paras 9-001 – 9-003 and 9 – 006.

⁹ For a recent example see *Boardman* [2015] 1 Cr App R 33.

¹⁰ *R v S(D) and S(T)* [2015] 2 Cr App R 27, citing the judgement of Lord Dyson in *Maxwell (Paul)* [2011] 2 Cr App R 31 at para 13.

¹¹ See n 3 above.

existing powers were quite sufficient to sanction any such failures. It is hard to fault their cogent analysis, particularly the telling point that making greater use of awards of costs against the prosecution will achieve nothing beyond moving money from one public purse to another.¹²

Late disclosure is an issue also in relation to *unused material*, and there is no distinction in principle as regards the application of the sanctions regime in such cases.¹³ An even greater problem is non-disclosure of material that might undermine the prosecution case or assist the defence. The miscarriage of justice cases concern material that came to light only after the accused's conviction, in some cases many years later.¹⁴

The statutory regime for disclosure is set out in the Criminal Procedure and Investigations Act 1996 (CPIA). Under s 3 the prosecutor has an initial duty of disclosure. Subsection (1) provides that the prosecutor must:

- “(a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution or of assisting the case for the accused, or
- (b) give to the accused a written statement that there is no material of a description mentioned in paragraph (a).”

The initial duty is supplemented by a duty under s 7A of continuing disclosure. This duty arises irrespective of whether the defence has complied with its own duty under s 5(5) to give a defence statement to the court and the prosecutor. The test set out in s.3 is an objective test of material that might *reasonably* be considered capable of undermining the prosecution case or of assisting the case for the accused. Two implications should be noted. Where the prosecution know what the defence is likely to be (for example, from the police interview or a prepared statement) any unused material tending to support the defence is disclosable in advance of the defence statement, even if it does not undermine the prosecution case. Any material that could reasonably be considered capable of undermining the prosecution case must be disclosed, even if the prosecutor thinks it does not. It will not matter at this stage that the defence may be unknown or not apparent from the prosecution papers. There is an exception from the duty of disclosure for material that it is not in the public interest to disclose,¹⁵ and the prosecutor must not disclose material the disclosure of which is prohibited by s.56 of the Investigatory Powers Act 2016 (relating to the product of intercepted communications).¹⁶

The procedure for disclosure of unused material starts with the police. A designated disclosure officer, who may or may not be an investigating officer of the offence in question, is required to prepare schedules of the unused material.¹⁷ The schedules are divided between non-sensitive and sensitive material. The non-sensitive material should be listed separately and in sufficient detail to enable the prosecutor to decide whether he or she needs to inspect the material before deciding whether to disclose it to the defence.¹⁸ In addition, the disclosure officer must prepare a report

¹² Para 69.

¹³ See *R v S(D) and S(T)* [2015] 2 Cr App R 27 at para 42.

¹⁴ The well-known case of Judith Ward provides the most extreme example: she served 18 years in prison before her conviction was quashed.

¹⁵ CPIA s 3(6).

¹⁶ CPIA s 3(7).

¹⁷ CPIA Code of Practice paras 6.2 and 6.10.

¹⁸ CPIA Code of Practice para 6.11.

identifying to the prosecutor any material in either schedule which the officer believes to satisfy the CPIA test for disclosure.¹⁹ The officer should submit the schedules and the report to the prosecutor as part of the case submission process.²⁰ On receipt of the schedules the prosecutor should review them thoroughly and identify any relevant material which may exist and has not yet been revealed.²¹ The prosecutor is expected to challenge substandard schedules and insist that a fully compliant schedule is produced.²² The prosecutor must then decide how far to endorse the schedules with respect to what material is to be disclosed or withheld.

B: The recent reviews

The review by Lord Justice Gross in 2011 was carried out at the request of the Lord Chief Justice and was “prompted by concerns as to the operation of the disclosure regime contained in the Criminal Procedure and Investigations Act 1996, as amended.” It was a practical and partial report, in the sense that it was not a Law Commission-style re-examination of all aspects of disclosure in general. Instead the report addressed a number of specific concerns raised by judges and practitioners about disclosure. It began by stating that its particular focus was on cases generating a substantial amount of documentation, whether in paper or electronic form. Although the review was not confined to cases of serious fraud, those cases were said to lie at the heart of the concerns expressed about disclosure.

As the report proceeded, however, it shifted its attention somewhat from serious fraud to revisit some more general issues it identified about disclosure. In summary these were the burden placed on investigators by the width of the relevance test for the duty to record and retain material at the investigatory stage,²³ the burden on the police of scheduling unused material, the burden in terms of cost and time involved in examining large quantities of material, especially electronic material, for the purposes of disclosure, the plethora of guidance about the disclosure regime, and the need for more robust case management by the judiciary.²⁴

The response of the report, broadly speaking, was that everyone should do their existing jobs better. The report did not recommend any changes to the law on disclosure, or to the institutional arrangements for investigation, prosecution and trial of crimes in general or serious fraud in particular. It proposed better training for police officers on disclosure issues, more common sense in scheduling, with less detail and greater use of block listing in document heavy cases, adoption of CPS suggestions for the introduction of tailored “disclosure management documents” and prosecution case statements, greater consistency in the use of case management powers, and consolidation of some, but not all, of the guidance on disclosure into a single document.²⁵

It is instructive to turn now to the joint review by HMCSI and HMIC published in July 2017. This examined compliance with the disclosure process in volume Crown Court cases. It thus started with a broader focus than the Gross review and its methodology was different. The review had a

¹⁹ CPIA Code of Practice para 7.2.

²⁰ CPIA Code of Practice para 7.1B.

²¹ Attorney-General’s Guidelines on Disclosure para 29.

²² Attorney-General’s Guidelines on Disclosure para 30.

²³ The CPIA Code of Practice imposed (and still imposes) a duty to record and retain material which may have “some bearing” on the investigation unless it is incapable of having any impact on the case. See paras 2.1, 4.1 and 5.1

²⁴ The review also dealt with concerns about defence disclosure which are outside the scope of this paper.

²⁵ Namely the earlier versions of the Attorney-General’s Guidelines (2005 and 2011) and the Judicial Protocol (2006).

substantial empirical base, inspecting 146 Crown Court case files originating from various police teams, both specialist and non-specialist. Those case files were selected from two distinct sub-categories: 90 were a random selection of recently finalised case files (the Theme 1 cases), while the other 56 were finalised case files that were identified on the CPS computer system as unsuccessful outcomes or ineffective trials due to prosecution disclosure failings (the Theme 2 cases). The cases in both file samples were all contested and required the police to provide schedules of unused material and a supporting Disclosure Officer's Report.

The review supplemented the file examination with focus group discussions, and interviews with relevant staff in various roles and ranks within the police forces and CPS Areas as well as interviews with strategic leads from the CPS and police at both regional and national levels. There were also unannounced visits to Crown Court centres to view the disclosure process live, and surveys with prosecution and defence advocates to obtain further feedback on the disclosure process.

Given the full and painstaking nature of the inspection the conclusions of this joint review represent an authoritative judgement on the current state of the disclosure process. They make depressing reading. It is worth quoting paragraph 1.3 of the review's Summary in full:

"The inspection found that police scheduling...is routinely poor, while revelation by the police to the prosecutor of material that may undermine the prosecution case or assist the defence is rare. Prosecutors fail to challenge poor quality schedules and in turn provide little or no input to the police. Neither party is managing sensitive material effectively and prosecutors are failing to manage ongoing disclosure. To compound matters, the auditing process surrounding disclosure decision-making falls far below any acceptable standard of performance. The failure to grip disclosure issues early often leads to chaotic scenes later outside the courtroom, where last minute and often unauthorised disclosure between counsel, unnecessary adjournments and – ultimately – discontinued cases are common occurrences. This is likely to reflect badly on the criminal justice system in the eyes of victims and witnesses."

Some of the figures supporting these conclusions highlight the deficiencies. Taking the police first, only 18.9% of the Theme 1 cases contained police schedules of non-sensitive material judged to be fully compliant while 22.2% were "wholly inadequate". Of the 81.1% Theme 1 cases with police disclosure failings 67.1% contained poor descriptions of items and a further 21.9% had missing items. In almost all the Theme 2 cases (96.2%) the schedules of non-sensitive material had missing items or poor descriptions of items. In scheduling sensitive material the police met their disclosure obligations only partially in 21.9% of cases and in a further 28.8% of cases they did not meet them at all. In 33.3% of cases a Disclosure Officer's Report was either not supplied at all or was wholly inadequate in failing to highlight potentially disclosable material. Overall the police handling of unused material was rated as poor in 41.8% of all cases.

Turning to the CPS, in 16.7% of Theme 1 cases CPS endorsements of police schedules were found to be wholly inadequate and in a further 54.4% of cases the requirement for correct endorsement was only partially met. In 41.1% of Theme 1 cases prosecutors failed to deal with sensitive material adequately. In almost half the cases (48.9%) there was either no disclosure record sheet (the key document supposed to record all CPS decision-making on disclosure) or one that was wholly inadequate. Disclosure issues accounted for half the discontinued Theme 2 cases. Overall the CPS handling of unused material was rated as poor in 32.9% of all cases.

The joint review made a number of recommendations for urgent action to address the problems. They included another call for better training of police forces on disclosure issues, the establishment of “dedicated disclosure champions” in all police forces, better compliance by the CPS with the Attorney-General’s Guidelines on Disclosure, improved CPS auditing practice and more effective communication processes between the CPS and the police.

The authors of the review comment in their Foreword that “just as importantly as responding to each issue, is a need for change in attitude to ensure that disclosure is recognised as a crucial part of the criminal justice process and that it must be carried out to the appropriate standards. This will not be brought about by ‘top down’ pronouncements, but by the engagement of every single police officer and CPS prosecutor and paralegal officer involved in an investigation or prosecution to ensure that a common aim is achieved: a fair disclosure for a fair trial.”

This call for a change of attitude is repeated in the Summary which refers to the need for “a cultural shift that approaches the concept of disclosure differently, that sees it as key to the prosecution process where both agencies add value, rather than an administrative function.” In this respect the review echoes the similar plea made by Lord Justice Gross....However, neither review made any serious attempt to analyse the culture of police and prosecution that they impliedly find to be at fault. They simply claim that it has to change without considering how far it is feasible, or indeed desirable, to bring about fundamental change in deep-rooted conceptions of police and prosecutorial roles in an adversarial system of criminal litigation. I will explore this question further in Section D of the paper. First, I need to say something about the recent cases and the problems they reveal.

C: The recent cases²⁶

The first of a series of recent cases of disclosure failings concerned Liam Allan.²⁷ He was a 22 year old student, ironically of Criminology, charged with six counts of rape and six sexual assaults against the same complainant. He spent two years on bail. Three days into the trial the prosecuting barrister dropped the case after the police had handed over the download record of the complainant’s mobile phone. The download revealed that she had lied to the police about not enjoying sex with Allan and that she had continued to pester him for casual sex after he had terminated their relationship. The relevant messages clearly destroyed the complainant’s credibility. The investigating officer had previously assured CPS prosecutors and prosecution counsel that there was nothing relevant on the phone download. The CPS prosecutors had not probed or challenged this claim, and had not asked for the download to be scheduled as it should have been.

There followed a joint review of the disclosure process in this case by the Metropolitan Police Service and CPS London South Area. The key finding was that “there is no evidence that the phone download was withheld deliberately by the OIC [the police officer in charge of the investigation] or CPS prosecutors. The disclosure problems in this case were caused by a combination of error, lack of challenge and lack of knowledge”.²⁸

²⁶ In this section I am mostly and necessarily relying on press reports. However, I am not aware that any of the reports are false or misleading in any material particular.

²⁷ *The Times*, December 15, 2017.

²⁸ The review is available online at <https://www.cps.gov.uk/sites/default/files/documents/publications/joint-review->

The same OIC was involved in the case of Isaac Itiary.²⁹ The defendant was charged with offences of rape and sexual activity with a child aged 14 and 15 at the time of the offences. He spent four months in prison on remand. Despite repeated defence requests the police made late disclosure of the complainant's mobile phone records. The CPS dropped the case when the records revealed text messages showed that she had routinely posed as a 19 year old.

Samuel Armstrong³⁰ was charged with two offences of rape and two sexual assaults. More than a year later and eight days before the trial the police disclosed the complainant's phone and medical records. These contained evidence which the defence used to undermine her credibility.³¹ The jury acquitted of all charges.

Oliver Mears³² was charged with rape. He spent two years on bail. The Surrey police handed over relevant evidence, including social media material, just a few days before the trial. The CPS then reviewed all the evidence and dropped the case.

Connor Fitzgerald³³ was charged with rape. He spent three months in jail and lost his job before the police made late disclosure of text messages from the complainant in which she had threatened to destroy him. One message read "I'm not just going to mess his life up, I'm going to ruin it." The CPS dropped the case.

A juvenile aged 17³⁴ was charged with 14 counts of sexual offences, including rape. The police made late disclosure of numerous Facebook messages showing that the defendant's relationship with the complainant was consensual. After deciding to drop the case the CPS said that they had originally been told by the police that no relevant social media records existed.

The case of Petruta-Cristina Bosoanca³⁵ concerned a different type of offence. She was charged with trafficking a Romanian prostitute to Britain. She was pregnant when remanded in custody, and gave birth to her son while in prison for more than a year awaiting trial. Several days after the start of the trial the prosecution disclosed a medical record relating to the complainant and many social media messages undermining the complainant's account of being brought to Britain to work as a prostitute and becoming pregnant after being raped. The CPS admitted that its handling of disclosure had "fallen below the standard we expect".

These seven cases all concerned late disclosure of material that destroyed or significantly undermined the credibility of the complainant. None of the defendants suffered a miscarriage of justice in the sense of being wrongly convicted, but all had major disruption to their lives and sustained significant hardship, anxiety and distress. One other recent case I want to refer to did concern a conviction. It was a case not of late disclosure but non-disclosure that seems to have resulted from a failure of investigation. In *Kay*³⁶ D was charged with and convicted of rape of C. On

disclosure-Allan.pdf

²⁹ *The Times*, December 21, 2017.

³⁰ *The Times*, December 22, 2017.

³¹ The evidence is reported as including a history of mental health problems and the fact that she contacted a journalist hours after the alleged attack "to secure a 'sympathetic' write-up".

³² *The Times*, January 19 and 20, 2018.

³³ *The Times*, February 1, 2018.

³⁴ *The Times*, February 3, 2018.

³⁵ *The Times*, February 1, 2018.

³⁶ [2017] EWCA Crim 2214.

an appeal out of time more than two years later the Court of Appeal quashed his conviction on the basis of fresh evidence. This consisted of Facebook records of an exchange of texts between D and C after they had had sex. C had at some stage before the trial deleted a number of the messages with the result that the jury had been presented with a false and misleading version of the exchange. Further investigation after D had been convicted revealed an archive of the exchange on his computer which presumably could have been discovered before the trial. The full version significantly undermined C's account of rape and supported D's account of consensual sex.

It is clear therefore that issues of credibility in sexual and other offences are causing major problems for police investigation and prosecution disclosure. I now turn to consider the issues of roles, culture and skills which underlie these problems.

D: Roles, culture and skills

(a) Police investigations

In an adversarial system of criminal justice it is not surprising to find the development of an adversarial mindset on the part of the police. Empirical research some years ago on police attitudes and practices³⁷ revealed that the police see themselves as 'owning' an investigation. Their conception of their role is to identify a suspect for the offence under investigation and then to build a case against that suspect. If the case leads in due course to a conviction this is regarded as a 'result'. This point about police adversarial culture is not intended as a critical comment. It is a statement of reality, and moreover it can be justified in terms of public policy because this occupational culture incentivises the police to bring criminals to justice.

A potential problem then arises with evidence that may help the defence. If it eliminates the suspect altogether it is safe to assume that the police will abandon that line of inquiry. Absent malpractice it is in no-one's interest to pursue a person known to be innocent. But where the evidence does not go that far the danger is that it may be ignored or repressed or marginalised if it does not fit the police case or tends to undermine it. The CPIA Code of Practice requires an investigator to pursue all reasonable lines of inquiry, whether these point towards or away from the suspect.³⁸ If the police are aware of a possible defence (which might be revealed in a police interview or a later defence statement) there is a duty to investigate it. However, it may not be unduly cynical to wonder about the energy and resources likely to be committed to this, particularly if the defence is likely to be contested. Moreover, any obligation placed on the prosecution to disclose unused material inevitably involves the police in considering whether they have acquired material that could help the defence, and in making such material available. This sets up a potential conflict in that it requires the police to act in a way which is inconsistent with their occupational interest in building a case against the accused.³⁹

³⁷ M McConville, A Sanders and R Leng, *The Case for the Prosecution* (London, Routledge, 1991) Ch 4, esp pp 65-75. See also Quirk, n 7 above, 48-49.

³⁸ Para 3.5. See also PACE Code C para 11B and the Attorney-General's Guidelines on Disclosure paras 17 and 31, setting out the duty of prosecutors to advise investigators to pursue reasonable lines of inquiry pointed to by the defence statement.

³⁹ Quirk's research on police attitudes to disclosure confirmed a reluctance on the part of some officers to help the defence by giving potentially exculpatory evidence: n7 above, 48.

There are two further related issues to be considered. The first is the skills required to apply the test for disclosure of unused material. As explained above, this is material which might reasonably be considered capable of undermining the case for the prosecution or of assisting the case for the accused. The police disclosure officer is supposed to identify such material in the disclosure officer's report for the CPS. For this purpose the officer will have to act like a defence lawyer in assessing material which might provide the defence with ammunition to attack the prosecution case, and we should bear in mind that in this respect the defence will generally have only to raise a reasonable doubt in order to secure an acquittal. Will police officers always have the conscientiousness and the legal ability to apply the test accurately? In particular, leaving aside obvious matters like the previous convictions of the witnesses, will they be able to pick out material that might be used to attack the credibility of prosecution witnesses?

This question leads to the second issue. This concerns the policy whereby the police are currently instructed to believe the evidence given to them by complainants of sexual offences. The policy was introduced as part of the reforms of the criminal justice system to improve the treatment of victims of crime generally and to encourage other victims to come forward. Certainly such an attitude is better than the police scepticism that was often claimed to be the experience of complainants in the past, but the policy has proved controversial.⁴⁰ The danger of the policy is that it may lead to what psychologists call 'confirmation bias'. This is the tendency to ignore or devalue information that does not fit with what a person believes or wants to believe.⁴¹ If the police start from the position that a complainant is telling the truth there may well be a reluctance to investigate or take seriously sources of information that might cast doubt on the complainant's veracity. It seems fair to ask whether this might be part of the explanation for the problems of late disclosure in the recent cases. It might well have added to any reluctance the police felt to embark on the laborious task of scrutinising a mass of social media material.

(b) Prosecution disclosure

Prosecutors, like police officers, are part of the adversarial system. The danger of an adversarial mindset is generally less, in the sense that when prosecutors receive case files the investigations will ordinarily have been completed. There will not usually be the possible reluctance police may feel to pursue lines of inquiry that might be helpful to the defence. Nevertheless, Quirk's study noted that some CPS prosecutors demonstrated very adversarial attitudes and a dislike of having to provide material to the defence.⁴² The ideology of the prosecutor being a minister of justice requires the CPS to act fairly, but this duty may not prevent a tendency on the part of some prosecutors to interpret the disclosure test strictly⁴³ or to be disinclined to interrogate the police schedules. The latter

⁴⁰ It was criticised by Sir Richard Henriques in his report into the Metropolitan Police Service's handling of Operation Midland and other historic sex abuse inquiries (October 31, 2016). In the wake of the Liam Allan case the Head of the National Police Chiefs' Council called for a rethink of the policy: *The Times*, December 21, 2017.

⁴¹ The literature is extensive. See in particular R Nickerson, "Confirmation bias: A ubiquitous phenomenon in many guises" (1998) 2 *Review of General Psychology* 175; E Jonas et al, "Confirmation Bias in Sequential Information Search After Preliminary Decisions: An Expansion of Dissonance Theoretical Research on Selective Exposure to Information" (2001) 80 *Journal of Personality and Social Psychology* 557, suggesting that confirmation bias increases when information is presented and processed sequentially instead of simultaneously. In police inquiries information is generally acquired sequentially.

⁴² n 7 above, 53.

⁴³ The CPSI report in 2000 cited examples of cases where prosecutors had applied "an unreasonably strict interpretation of the test": n 3 above, para 4.117. Contrast a tendency noted in Lord Justice Gross's review for some prosecutors and some judges to take the 'easy' course of giving more rather than less disclosure, notwithstanding the clear provisions of the CPIA

tendency was noted by the joint HMCPSI/HMIC inspection which referred to a prevailing “culture of acceptance”. The report stated that “instead of challenging poor schedules, the file examination found a number of local practices which have emerged to try to work around the problems” and gave a number of examples. These included “blanket non-disclosure whereby prosecutors endorse items on the schedules as not to be disclosed in circumstances where the descriptions are plainly inadequate and the reviewing prosecutor could not have known what the item contained”.⁴⁴

Moreover, even assuming a conscientious attitude to the disclosure of unused material, issues may arise of whether prosecutors have the appropriate training, the requisite skills and the necessary resources to discharge their duties fairly. Quirk suggested that “prosecutors do not generally have defence or Crown Court experience and, accordingly, cannot be expected to know what might be useful to the defence at trial.” She also noted an increasing tendency for preparatory work to be undertaken by executive officers with no formal legal training. These points are largely not addressed in the recent reviews I discussed earlier. These reviews tend to focus instead on the need for the CPS to engage in earlier grasp of disclosure issues, more effective communication with police investigators on disclosure issues and improved audit processes.⁴⁵ The same recommendations are made in the MPS/CPS review of the disclosure process in the case of Liam Allan, along with calls for the appointment of more ‘Disclosure Champions’ in the CPS and the appointment in the MPS of ‘Disclosure Leads’ at senior level.

E: Where do we go from here?

It is very striking how similar are all the many reviews into the operation of the CPIA disclosure regime since its introduction. There is general agreement that the objective test for disclosure by the prosecution of unused material is satisfactory. There is equally broad agreement that the proper implementation of the regime has been patchy, to say the least, and that on many occasions there has been poor performance by the police and the CPS. The reviews have repeatedly called for better training of police disclosure officers and CPS prosecutors, for better leadership and supervision within both organisations on disclosure issues, for better communication between them and more efficient use of technological and human resources.

It is hard to quarrel with any of these recommendations. Within their own terms they are all sensible measures intended to improve the efficiency and fairness of the disclosure regime. However, we are surely entitled to ask why these recommendations are still having to be made more than 20 years after the CPIA regime came into force. The recent cases, the joint HMCPSI/HMIC inspection last year and a mass of anecdotal evidence all suggest that the disclosure process continues to operate erratically at best and dangerously badly at worst. It is far from clear that the suggested improvements to the working of the statutory regime have had or will have a significant beneficial effect.

Therefore in this last section of the paper I suggest that more far-reaching thought is needed about our institutional arrangements for investigation and prosecution, and the arrangements for dealing

(n 3 above, para 55).

⁴⁴ *Making It Fair*, n 3 above, paras 5.2 and 5.3.

⁴⁵ See the review by Lord Justice Gross, *Summary of Recommendations* paras 7 and 8; HMCPSI/HMIC report, *Summary of Recommendations* paras 2,5,7 and 9.

with prosecution disclosure in particular. Another striking feature of the reviews is the extent to which they have been unable or unwilling to consider more fundamental questions about the division of responsibilities between the police and the CPS. They have repeatedly ducked, for example, the question whether there is or should be a hierarchy of these organisations. This failure has been allied to a further failure to probe the adversarial cultures of these organisations and to analyse the skills and attitudes that the proper operation of the CPIA regime requires. The accumulated experience of two decades suggests that it is not enough simply to call for police and prosecutors to do their existing jobs better without addressing these broader and deeper issues. It seems to me that in considering solutions for the problems of prosecution disclosure it is essential to take these further issues into account, and this should lead us to examine other more radical possibilities.

One possibility that the Gross review did consider was turning the disclosure process over to the defence. This is the ‘keys to the warehouse’ approach. The defence has access to all the non-sensitive unused material with a view to discovering for themselves anything that might undermine the prosecution case or support the defence. This approach was deployed at one time⁴⁶ but was dropped some years ago following strong criticism in the first edition of the Judicial Protocol in 2006. The Protocol had described it as being “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”.⁴⁷ Its revival was suggested to Lord Justice Gross, but his review rejected it on a number of grounds.⁴⁸ One was economic: the review opposed any proposal which simply transferred expenditure from one public purse to another. Any savings in prosecution costs would be offset by increases in defence costs to be met by the legal aid budget. Secondly, there was the risk of duplication. “In principle, we find it difficult to see how a diligent prosecutor could rest content with the keys to the warehouse approach, without wishing to familiarise himself/herself with the same material.” The review went on to maintain that in the English adversarial system disclosure should be prosecution-led, and that “it would neither be appropriate nor realistic to anticipate that the defence will take the lead in disclosure”.⁴⁹

Assuming that this possibility continues to be ruled out, what other options are available? I suggested earlier that correct application of the disclosure test requires legal skills, including the ability to identify material that might be used to attack the credibility of a complainant. It also requires freedom from the risk of confirmation bias, where a policy is adopted of believing a complainant, and freedom from a mindset that grounds disclosure decisions in adversarial attitudes. These requirements all point to the need for involvement of an impartial lawyer with significant experience of the conduct of criminal litigation. If this is right, two possibilities are apparent. Both would entail relieving the police and CPS staff of the burden of trying to apply the disclosure test to a mass of unused material. One option would be to ask independent prosecution counsel to undertake the task. They do of course currently take some disclosure decisions, frequently at the last minute. How far it would be feasible to engage them at a much earlier stage of the process is not a question I can answer. There would have to be appropriate payment for what might in some cases be a time-

⁴⁶ See para 9 of the 2000 edition of the Attorney-General’s Guidelines.

⁴⁷ Para 31.

⁴⁸ Para 135.

⁴⁹ Para 137.

consuming task. However, the costs might be offset against savings in police and CPS time. If the response is that this is merely shifting money around different public budgets, we should say that this is a worthwhile exercise if the outcome is an improved disclosure process.

The other possibility is a form of outsourcing. I have in mind that the police might be able to call on the services of an experienced lawyer independent of both prosecution and defence. A retired circuit judge, for example, would have the seniority and the requisite skills to deliver an authoritative opinion on the application of the disclosure test. It seems to me that he or she might be particularly useful in cases involving credibility contests between complainants and defendants. As the recent abandoned prosecutions demonstrate, credibility issues in sexual offence cases have presented and will continue to present acute disclosure problems. An independent and impartial reviewer of unused material would not be subject to the risk of confirmation bias. If suitably experienced he or she could be expected to identify accurately any material that might reasonably be considered capable of undermining a complainant's credibility.

I should make it clear that I am not advocating the general introduction of examining magistrates into our current adversarial system. That is a separate debate raising complex issues, and it is far from clear that a complete transformation of the institutional arrangements for investigation and prosecution for volume crime is either feasible or desirable. The kind of reviewers I am proposing would not be fulfilling the role of an examining magistrate in the sense that they would not be directing the course of an investigation or undertaking interviews of interested parties. Their reviews might lead in certain cases to recommendations that prosecutions should not take place given what the unused material reveals. The decision whether to institute or discontinue a prosecution would, however, remain with the CPS. In conclusion a pilot scheme for sexual offence cases involving credibility contests may well be worth trying if we are serious about not treating disclosure problems as insoluble.