

## (The Lack of) Disclosure and the Constant Drive for Efficiency

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Following the *Auld Review* in 2001, the criminal justice process in England and Wales has seen a paradigm shift in its approach. Arguably, the traditional adversarial approach has been at best, diluted, or at worst, eroded. Adversarialism has been replaced with a managerial approach to justice and this is underpinned by the dual goals of efficiency and economy. The Criminal Procedure Rules 2015 (CrimPR) were the catalyst for such a deviation in an approach and the Rules provide the courts with an overriding objective of 'dealing with cases justly' (CrimPR Rule 1.1). This objective paved the way for a more efficient process but outlining that dealing with a case justly includes dealing with the case both 'efficiently and expeditiously' (CrimPR Rule 1.2(e)).

Until the mid 1940s, there was no duty to disclose any information prior to trial by either party. *R v Bryant and Dickson* ([1946] 31 Cr App R 146) is commonly regarded as the beginning of the process in which the courts began to impose a duty on the prosecution to disclose material that may lead to the acquittal of the defendant. Defence disclosure did not exist until the advent of the Criminal Justice Act 1967 and compelled the defendant to disclose evidence in support of an alibi for trials on indictment (s.11(1)). This remained the only element of defence disclosure until The Crown Court (Advance Notice of Expert Evidence) Rules (SI 1987/716) which provided that any statement in writing of any finding or opinion of an expert upon which a party intended to rely on had to be disclosed as soon as practicable after committal.

Both the disclosure of alibi and expert evidence is relatively uncontroversial and arguably in the interests of justice; the prosecution should have the ability to check the veracity of defence witnesses. However, the obligations of the defence case statement under the Criminal Procedure and Investigations Act 1996 (s.5) transformed the adversarial trial. The defence case statement was justified on the basis of a perceived imbalance which wasted time and resources. The significant disclosure obligations incumbent on the prosecution allowed the defence to conduct 'fishing expeditions' with the purpose of causing delays or finding information that may lead to the prosecution dropping the case (See R. Morgan, 'The Process is the Rule and Punishment is the Process' (1996) 59 MLR 306 and A.Owusu-Bempah, *Defendant Participation in the Criminal Process* (Routledge, 2017 in particular chapter 7). Yet, no equivalent existed for the defence. After its introduction, the defence case statement was compulsory only in the Crown Court and as such, merely voluntary in the magistrates' court (s.6). The CrimPR, via its Case Management provisions, effectively circumvented this statutory provision by requiring the early identification of the real issues

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(CrimPR Rule3.2(1)(2)(a)), ensuring evidence is presented in the shortest and clearest way (CrimPR Rule3.2(1)(2)(f)) discouraging delay (CrimPR Rule3.2(1)(2)(f)). As such, in practice a defence case statement is obligatory in the lower and higher criminal courts.

The disclosure regime is a pivotal part of the prevailing efficiency agenda; the more the defendant can tell the prosecution about the case, the quicker the case can be resolved and dealt with. Yet, despite the many potential sanctions for failure to disclose defence materials, few appropriate sanctions for failures concerning prosecution disclosure exist, despite evidence suggesting there have been a myriad of failures by the prosecution (See the Crown Prosecution Service Inspectorate thematic review of the disclosure of unused materials; J. Plotnikoff and R. Woolfson published, *A Fair Balance? Evaluation of the operation of disclosure law*, 2001 and H. Quirk 'The Significance of Culture in Criminal Procedure Reform: Why the Revised Disclosure Scheme Cannot Work' 10 *Evidence and Proof*, (2006), 42). Not only does this suggest an imbalance in terms of the equality of arms, but runs counter to the efficiency agenda. Without effective consequences, failures in prosecution disclosure will inevitably continue, disrupting the pursuit of swifter, surer justice.

On the 18<sup>th</sup> July 2017, the HMIC published their report into the disclosure of unused materials in Crown Court Cases (available here: [http://www.justiceinspectrates.gov.uk/cjji/wpcontent/uploads/sites/2/2017/07/CJJI\\_DSC\\_thm\\_July17\\_rpt.pdf](http://www.justiceinspectrates.gov.uk/cjji/wpcontent/uploads/sites/2/2017/07/CJJI_DSC_thm_July17_rpt.pdf)). The report highlights several fundamental flaws with the prosecution disclosure regime. The report acknowledged that prosecution non-compliance with disclosure is 'common knowledge ... and [it is] difficult to justify why progress has not been made in volume crime cases'. It goes on to say that 'until the police and CPS take their responsibilities in dealing with disclosure in volume crime cases more seriously, no improvement will result and the likelihood of fair trial can be jeopardised.' (para 11.4). As such, the ramifications go beyond merely slowing down the drive for efficiency – such problems endanger a fundamental human right. The handling of disclosure by the prosecution was not rated as 'excellent' in a single case, and good only in 23.3% of cases. In 20.5% of cases, poor disclosure meant a case was discontinued – this is clear and substantial impact, resulting from prosecutorial failings. That being said, it should be noted that in 30.8% of cases neither party disclosed in a timely fashion, so the issue does evidently affect (to some degree) both prosecution and defence.

Disclosure starts with the disclosure officer and they fared little better than the prosecution. In no cases was the quality of the handling of unused material by the police rated as 'excellent', and was considered 'good' in only 21.9% of cases. In fact, in the first instance, the scheduling by the disclosure officers was described as 'routinely poor', and was exacerbated the failure of prosecutors to challenge poor schedules. The communication between police and prosecution clearly needs vast improvement. This underpins the idea

that there needs to be ‘cultural shift’ in the way that disclosure is viewed and practiced. The disclosure regime needs to be regarded ‘as [a] key to the prosecution process ... rather than an administrative function.’ In order to kick-start this cultural shift, the authors of the report suggest make several recommendations, including:

- Immediately: the police or CPS must correctly identify all disclosure issues relating to unused material at the charging stage and this should be reflected fully in an action plan (para 3.3)
- Within six months: the CPS should comply with the Attorney General’s Guidelines on Disclosure requirements; ensure that every defence statement is reviewed by the allocated prosecutor prior to sending to the police; and that prompt guidance is given to the police on what further actions should be taken or material provided (paragraph 6.8).
- Within six months: all police forces should establish the role of dedicated disclosure champion; and ensure that the role holder is of sufficient seniority to ensure they are able to work closely with the CPS Area Disclosure Champions, using the existing meetings structure to ensure that disclosure failures are closely monitored and good practice promulgated on a regular basis (paragraph 10.15)

Further to the HMIC report, the Mouncher Investigation Report was also recently published (19<sup>th</sup> July 2017 available here:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/629725/mouncher\\_report\\_web\\_accessible\\_july\\_2017.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/629725/mouncher_report_web_accessible_july_2017.pdf)). The report centred on the ‘The Cardiff Five’ case where three men were convicted of the murder of a prostitute, Lynette White, in 1988. The Court of Appeal quashed the three convictions in 1992 as an incriminating confession was obtained by bullying, hostility and intimidation that was at ‘a level that had horrified the three Court of Appeal Judges.’ The report examines the failed prosecution of 13 police officers and two civilians which concluded the trial collapsed because of ‘human errors by the police and CPS’ concerning disclosure. Among the recommendations, the report suggests (see p. 283-84 for the full recommendations):

- There should be national minimum standards for accrediting disclosure officers.
- There needs to be a national training regime to eliminate regional differences in disclosure.
- The abiding principle must be ‘if in doubt disclose’ and nothing must be permitted to qualify or diminish it.

However, perhaps the courts can assist in ushering in such a sea change (to borrow from the disclosure-related *Chorley Justices* case – see below). Should the defence fail to satisfy their disclosure obligations under the CPIA 1996 or CrimPR, there are three potential sanctions available to the court:

1. A Wasted Costs Order
2. Refusal of an application/adjournment or
3. Professional conduct sanctions.

The courts are seemingly reluctant to punish the CPS in the same manner in which they punish defence failings. However, there are examples in which the court issued a WCO against the CPS (See *R (on the application of Singh) v Ealing Magistrates Court* [2014] EWHC 1443 (Admin)). Perhaps the other sanction may incentivise improved disclosure practice. For example, should the defence fail to highlight an error in the prosecution's case and then use this to their advantage, the courts will generally frown upon this attempted 'ambush'. Thomas LJ explicitly stated this in *R (on the application of the DPP) v Chorley Justices* [2006] EWHC 1795:

'For defence advocates to seek to take advantage of such errors by deliberately delaying identification of an issue of fact or law in the case until the last possible moment is in our view no longer acceptable, given the legislative and procedural changes to our criminal justice process in recent years'

This case (and the equally important *R v Gleeson* [2003] EWCA Crim 3357) embody the mantra promulgated by Auld's LJ in his review of the criminal courts: 'The criminal trial is not a game under which a defendant should be given a sporting chance'. The courts are still quick to reiterate this point today. In *R on the application of Hassini v West London Magistrate's Court* [2017] EWHC 1270 (Admin) the court asserted that 'the criminal law is not a game to be played for as long as paying client could afford, in the hope of a lucky outcome.' The courts are undoubtedly correct that the trial is not and never should be treated as a game. Yet, the courts should take as firm a line with the prosecution. Notwithstanding that criminal procedure in England and Wales is entrenched in an era of cooperation, the prosecution has a number of important duties to discharge in order to assist the court in fulfilling their overriding objective of dealing with cases 'justly' (Rule 1.1 CrimPR). Timely disclosure is one of them and is of paramount importance; non-compliance is no less serious a failure than the behaviour described in *Hassini*.

In the quest for a more efficient criminal justice process, there is an undoubted expectation that the accused and their defence lawyer will cooperate with the court – and by extension assist the prosecution – by supplying substantial detail on their case from the start. It is important to remember that details of used and unused evidence from the prosecution represent a fundamental element to an adequate, full and fair defence. Whilst resources are stretched throughout the criminal justice system, the price for efficiency should not be imbalance and injustice. The faults in prosecution disclosure have been the elephant in the room for the better part of 15 years. Perhaps now it is time for an appropriate sanction for

the prosecution, such as dismissing a case or refusing an application by the court. Whilst criminal proceedings are not a game, *neither* side should be allowed to break the rules governing them. If failures in defence disclosure cannot be tolerated by the courts, the prosecution must be treated in a like manner.