

The “near miss” of Liam Allan: Critical Problems in Police Disclosure, Investigation Culture, and the Resourcing of Criminal Justice

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Miscarriages of justice have historically acted as catalysts for reform. It seems we only learn to fix the most serious problems – often obvious to those at the coal-face of practice – once the damage is done. Miscarriages include a failure to deliver justice for those victimised by crime, but as egregious is the conviction of the innocent, and the consequent punishment and social stigma attached to them.¹ There are many examples, old and new. The secretive exploits of the Court of Star Chamber led to the abolition of investigative torture in the 1640s.² Later in the same century, the ‘Popish Plot’ treason trials led to the lifting of the ban on defence lawyers.³ The cases of George Edalji and Adolf Beck led to the creation of the Court of Criminal Appeal in 1908.⁴ In the 1950s and 1960s, several high-profile executions (including Timothy Evans, James Hanratty, Ruth Ellis, and Derek Bentley) generated significant debate about and public opposition to the death penalty – which was abolished for murder in 1965 (and later for the two remaining eligible offences (piracy and treason) by the *Human Rights Act* 1998 and *Crime and Disorder Act* 1998).⁵ In the 1970s, the Maxwell Confait affair and the consequent Fisher Inquiry instigated the creation of the Philips Commission, and eventually the passage of the *Police and Criminal Evidence Act* (PACE) 1984 and the creation of the Crown Prosecution Service (CPS).⁶ Immediately after the freeing of the Birmingham Six in 1991, the Runciman Commission began its work reviewing the criminal justice system, leading to the creation of the Criminal Cases Review Commission (CCRC).⁷ More recently, the cases of Sam Hallam and Victor Nealon have raised serious questions about the requirement that those who are wrongly convicted must prove their innocence beyond reasonable doubt before receiving compensation.⁸ These serious miscarriages of justice have largely resulted in attempts to learn from the abuses and mistakes of those trusted with power. It is unusual for a “near miss” (that is, when a wrongful conviction is (just about) avoided) to come to public attention at all, let alone highlight the range of chronic problems troubling English and Welsh criminal justice. The case of Liam Allan is one such “near miss”, and amply highlights significant and, until recently, under-reported problems related to the disclosure of evidence by the police at the earliest stages of the criminal justice. They typify the flawed structure of the current system which, without radical action, will inevitably lead to repeated injustice for accused persons and victims of crime; wasting of time and resources; and a loss of public confidence in the fairness and effectiveness of the justice system. This article will focus primarily on Allan’s case, and

¹ As Blackstone’s Ratio suggests, ‘It is better that ten guilty persons escape than that one innocent suffer’.

² See Langbein J, ‘The Historical Origins of the Privilege Against Self-Incrimination at Common Law’ (1994) Mich. LR 92, 1047

³ See Chapter 2, ‘The Treason Trials Act of 1696: The Advent of Defense Counsel’, in Langbein J, *The Origins of Adversary Criminal Trial* (2005, Oxford University Press)

⁴ See Pattenden R, *English Criminal Appeals 1844-1994: Appeals Against Conviction and Sentence in England and Wales* (1994, Clarendon Press); Marshall PD, ‘A Comparative Analysis of the Right to Appeal’ (2011) 22 Duke J of Comp. & Int. Law 1, 1

⁵ Seal L, *Capital Punishment in Twentieth Century Britain: Audience, Justice, Memory* (2014, Routledge), 123. For more this debate, also see Twitchell N, *The politics of the rope: the Campaign to Abolish Capital Punishment in Britain 1955-1969* (2012, Arena). It should be noted that for Evans and Bentley, the miscarriages of justice were the execution of innocent men. In contrast, Ellis essentially admitted guilt at trial; opposition to her execution centred on the disproportionate nature of the sentence. Regarding Hanratty, a long-running campaign for his exoneration ended in 2002, when the Court of Appeal accepted that DNA evidence represented overwhelming proof of his guilt.

⁶ *R v. Lattimore, Leighton and Salih* (1976) 62 Cr. App. R. 5; HM Stationery Office, ‘Report of an Inquiry by the Hon. Sir Henry Fisher into the circumstances leading to the trial of three persons on charges arising out of the death of Maxwell Confait and the fire at 27 Doggett Road, London SE6’ (1977): https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228759/0090.pdf; HM Stationery Office, ‘Royal Commission on Criminal Procedure’ (1978-1981, HMSO)

⁷ HM Stationery Office, ‘Royal Commission on Criminal Justice’ (1991-1993, HMSO); Section 8, *Criminal Appeals Act* 1995

⁸ See *R (on the application of Nealon & Hallam) v. Secretary of State for Justice* [2017] QB 571, challenging Section 133 *Anti-Social Behaviour, Crime and Policing Act* 2014

will examine this issue by addressing three specific concerns raised by the case: the disclosure of evidence and information by the police; investigation culture, particularly in relation to allegations of sexual offences; and the wider problem of resourcing of the criminal justice system.

Liam Allan

Allan, a 22 year old Criminology student, was accused of multiple rapes in January 2016.⁹ He insisted that sexual intercourse with the complainant had been consensual, whereas the complainant asserted that she had not wanted to have sex with Allan. Allan claimed that there was evidence on the complainant's phone indicating that this was untrue. The Officer in the Case (OIC) submitted the complainant's phone for digital forensic examination in order to obtain deleted messages for the period relevant to the alleged offences. This resulted in a download of 57,000 lines of message data; the OIC examined this material but it is unclear how comprehensively this was done and using what method. The OIC concluded the records contained nothing that should be disclosed to the defence and the case was referred to the CPS as required by current charging guidance (reporting only that no relevant material had been found on the complainant's phone). Allan was charged with 12 counts of rape and sexual assault. After being released on bail for nearly two years (in itself, a significant but possibly separate issue),¹⁰ the trial started in December 2017 – and collapsed after only three days.

Persistent pressure from the prosecution barrister in the case (former Conservative MP, Jerry Hayes), led to the full phone records being disclosed to both parties. Amongst this vast body of material was crucial exculpatory evidence, providing clear indications that the complainant was, at best, giving a misleading impression as to her sexual relationship with Allan or, at worst, maliciously lying. Texts included multiple requests for sex; the sharing of sexual fantasies, including rape; and a message to a friend saying that she had wanted to have sex with Allan. This appeared to be the material that the defendant had highlighted at the start of the case, and whilst not absolutely conclusive as to whether the allegations were false, it was clearly pertinent to consideration of Allan's guilt and severely undermined the complainant. The primary issue (as with many rape cases) would be who seemed more credible to a jury – the defendant or complainant. Undoubtedly, this highly relevant material should have been clearly identified and made available to the CPS for their charging decision, as well as to the defence. The prosecution invited the judge to find the defendant not guilty, which he did. The aftermath has been significant. The Metropolitan Police Service (MPS) announced an urgent investigation into the case, which was published in January 2018.¹¹ Moreover, only a matter of days after Allan's acquittal, it emerged that another case (that of Isaac Itiary, charged in July 2017 with sexual activity with a child and rape) had also collapsed after the CPS offered no evidence.¹² Again, this was due to the failure of the police to disclose key evidence; namely, text messages suggesting that the complainant had misled the defendant as to her age – as he had claimed. The MPS announced a review of all live cases involving sexual offences and child abuse.¹³ Since then, a string of further similar cases have emerged, resulting in the

⁹ As the case collapsed after a few days, it is not available in Law Reports. It has, however, been the subject of a review by the Metropolitan Police Service (MPS) and CPS London ('A joint review of the disclosure process in the case of R v Allan: Findings and recommendations for the Metropolitan Police Service and CPS London' (January 2018)). It has also been reported extensively in various media sources including the BBC, the Telegraph, the Independent, the Guardian. For an example, see Brown D, 'Judge slams Met Police after Liam Allan cleared in rape trial' *The Times* (London, 15 December 2017)

¹⁰ A delay of nearly a year in charging Allan was questioned by former Lord Chief Justice, Lord Judge (HL Deb 18 December 2017, Vol 787, Col 1836)

¹¹ 'A joint review of the disclosure process in the case of R v Allan: Findings and recommendations for the Metropolitan Police Service and CPS London' (January 2018)

¹² Like Allan's case, Itiary's also collapsed swiftly and is unreported outside of the media. See Brown D, 'Detective Mark Azariah removed from duty after two rape trials collapse in a week' *The Times* (21 December 2017)

¹³ Metropolitan Police, 'Statement re: review of live CASO cases' (19 December 2017):

<http://news.met.police.uk/news/statement-re-review-of-live-caso-cases-286696>; Brown D, 'Met police to review all live rape cases as second trial collapses' *The Times* (20 December 2017)

announcement of a nationwide review of all rape and sexual assault cases by the CPS.¹⁴ These failures have drawn the attention of politicians, with the Prime Minister indicating that a review of disclosure (led by the Attorney General) was under way and peers calling for a judge-led enquiry into the issue.¹⁵ Whilst acknowledging that the right outcome was ultimately reached in these cases, they raise an array of issues which lead one to question whether the investigative stage of the criminal justice process is effectively regulated and whether a culture change is required.

The (old) problem of police disclosure

The central failure in Allan's case (and several since then) relates to the disclosure of relevant information by the police. According to the MPS review, the OIC examined the phone records in some form, although to what extent is far from clear.¹⁶ The OIC may not have examined the records fully or thoroughly, or may have been blind (consciously or not) to the possibility that the records contained exculpatory material. Considering only one officer (the OIC) was involved in examining the evidence, it is possible there may have been some more sinister suppression of evidence involved, although the MPS concluded that 'there is no evidence that the phone download was withheld deliberately'.¹⁷ The police may have come to the realisation (post-charge) that a mistake had been made but did not wish to reveal this. Nonetheless, even if the OIC did not examine this admittedly large amount of material comprehensively, it seems incredible that he did not clearly indicate its existence to the CPS at the very least for an objective view of its value.¹⁸ The defence should also have been notified of its existence as unused material and been given access to it for examination.¹⁹ None of the above happened. It has been suggested that some of the key messages sent by the complainant were withheld on the basis that they were 'very personal'.²⁰ Whether this means the messages were placed on the non-disclosed 'sensitive' schedule (which the CPS should still have been given) or whether they were simply filed away without mention is not made entirely clear by the MPS review.²¹ Undoubtedly, the privacy of complainants needs to be respected and protected by the police; not all material obtained will be relevant to the case and much of it (for example, from phone

¹⁴ These include the cases of Samson Makele (Dearden L, 'Rape case against Eritrean man collapses after photos showing woman 'snuggling' with him uncovered' *The Independent* (15 January 2018): <http://www.independent.co.uk/news/uk/crime/rape-case-collapses-disclosure-eritrean-man-makele-photos-cuddling-snuggling-woman-metropolitan-a8160816.html>); Oliver Mears (Walter S, Maidment J, 'Oxford University student cleared of rape charge as yet another case collapses days before trial begins' *The Telegraph* (18 January 2018): <http://www.telegraph.co.uk/news/2018/01/18/oxford-university-student-cleared-rape-charge-yet-another-case/>); three defendants accused of people trafficking, one of whom gave birth whilst remanded in custody (Bowcott O, 'People-trafficking trial collapses after serious disclosure failures' *The Guardian* (31 January 2018): <https://www.theguardian.com/uk-news/2018/jan/31/people-trafficking-trial-collapses-after-serious-disclosure-failures>); and Michael Doughty (Harley N, 'Judge takes swipe at "collapsing" justice system as CPS failures cause yet another sex trial to collapse' *The Telegraph* (1 February 2018): <http://www.telegraph.co.uk/news/2018/02/01/judge-takes-swipe-collapsing-justice-system-cps-failures-cause/>)

¹⁵ HC Deb 20 December 2017, Vol 633, Col 1062; former Attorney General, Lord Morris of Aberavon called for an independent inquiry (HL Deb 18 December 2017, Vol 787, Col 1835)

¹⁶ 'A joint review of the disclosure process in the case of R v Allan: Findings and recommendations for the Metropolitan Police Service and CPS London', 4

¹⁷ *Ibid.*, 6.

¹⁸ Any logical interpretation of the charging standard under Para. 4.4 of the *Code for Crown Prosecutors* ('sufficient evidence to provide a realistic prospect of conviction') would indicate such material should be shared with the CPS. The requirement that the police share such materials with the CPS are explicit in Section 7 of the Code of Practice for the *Criminal Procedure and Investigations Act* (CPIA) 1996; Chapter 2 of the Crown Prosecution Service 'Disclosure Manual' (<https://www.cps.gov.uk/legal-guidance/disclosure-manual>); and Paragraph 1.14 of the 'Prosecution Team Manual of Guidance' (created by the Association of Chief Police Officers and the National Policing Improvement Agency: <http://library.college.police.uk/docs/appref/MoG-final-2011-july.pdf>)

¹⁹ Again, see above (specifically Paras. 2.5-2.9 of the CPS Disclosure Manual); also, the requirements under the common law disclosure scheme outlined in *R v DPP ex parte Lee [1999] 2 All ER 737* and the Attorney General's Guidelines on Disclosure (2013, Attorney General's Office): <https://www.cps.gov.uk/legal-guidance/attorney-generals-guidelines-disclosure>

²⁰ Hayes J, 'Comment: Liam Allan case – Treasury cuts have crippled justice system' *The Times* (15 December 2017)

²¹ For more on the sensitive schedule, see Chapter 8 of the CPS Disclosure Manual: <https://www.cps.gov.uk/legal-guidance/disclosure-manual-chapter-8-sensitive-material-schedule>

records) will be personal. Ensuring that such material is not disclosed when it is not pertinent to the case is essential, and therefore full disclosure of records will rarely be desirable (and likely incompatible with Article 8 of the European Convention on Human Rights). However, material that is personal but nonetheless probative should not be hidden or suppressed via this mechanism. Whilst the MPS review does not clarify exactly what happened to the relevant messages in Allan's case, the possibility for this to occur is troubling, particularly in a serious sexual offence case which would inevitably involve personal and delicate materials being discussed and disclosed.

It is worth briefly reviewing the rather complex and fragmented legal framework regulating disclosure of material prior to trial. This can be roughly divided into the pre-charge and post-charge stages. The pre-charge stage – involving possible detention and interview of a suspect – imposes very few obligations on the police to disclose information. The CPS will not yet be involved in the process, therefore the only potential requirement for disclosure will be to the suspect and their lawyer (if they have one). PACE Code of Conduct C states that a suspect and their lawyer 'must be given sufficient information to enable them to understand the nature of any such offence, and why they are suspected of committing it'.²² Beyond this, what the police may disclose will 'depend on the circumstances of the case, but... should normally include, as a minimum, a description of the facts relating to the suspected offence that are known to the officer, including the time and place in question'.²³ The Code clarifies that satisfying the above 'does not require the disclosure of details at a time which might prejudice the criminal investigation' and acknowledges that 'what needs to be disclosed for the purpose of this requirement therefore rests with the investigating officer'.²⁴ This thus grants significant discretion to the OIC to decide upon disclosure at the pre-charge stage. Once a suspect is charged, the CPIA regime becomes applicable. A disclosure officer must be appointed, who will make decisions about what material should be shared with the CPS and the defence. The Code of Practice for the statute requires that '[m]aterial which may be relevant to an investigation... and which the disclosure officer believes will not form part of the prosecution case, must be listed on a schedule'.²⁵ If there is 'material known to the disclosure officer that might assist the defence with the early preparation of their case or at a bail hearing', this must be scheduled and disclosed to the prosecutor, who will then determine whether it must be disclosed to the defence under a common law test.²⁶

Under Section 3 of the CPIA, the prosecutor must give initial disclosure to the defence of 'material which has not previously been disclosed... which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused'. To this end, the police must not only provide the prosecutor with material which will constitute the prosecution case, but also indicate any unused material which may assist the accused and therefore may need to be disclosed to the defence by the prosecutor.²⁷ Once initial disclosure is completed, the prosecutor remains under a continuing duty to review disclosure and reveal any material which meets the threshold set out in Section 3;²⁸ the disclosure officer is similarly expected to continue to review material to ensure anything exculpatory is disclosed.²⁹ After initial prosecution disclosure, duties of disclosure for the defence become applicable, with the requirement to set out a defence statement for Crown

²² Para. 11.1A

²³ Ibid., Note for Guidance 11ZA

²⁴ Ibid., Para. 11.1A

²⁵ Para. 6.2. This is obligatory for cases likely to be heard in the Crown Court, and all Magistrates' Court cases where the accused is likely to plead not guilty. It is not, however, required for Magistrates' Court cases where a guilty plea is anticipated.

²⁶ Ibid., Para. 6.6. The common law test is outlined in *R v Director of Public Prosecutions, ex parte Lee* [1999] 1 WLR 1950. This recognised an ongoing duty of disclosure from the point of arrest: 'a responsible prosecutor should be asking himself what if any immediate disclosure justice and fairness requires him to make in the particular circumstances of the case' ([9] *per* Kennedy LJ). Examples given included material which would assist in applying for bail or which might assist the defence effectively prepare for trial.

²⁷ CPIA Code of Practice, Paras. 7.1-7.1B

²⁸ Section 7A, CPIA

²⁹ CPIA Code of Practice, Paras. 8.2-8.3

Court cases.³⁰ Whilst this is only voluntary for Magistrates' Court cases, the Criminal Procedure Rules (applicable to both courts) are fairly extensive in requiring that both parties assist the court in 'early identification of the real issues'.³¹ It will therefore be difficult for the defence to refuse to provide any information on its case. The Rules also impose an obligation of disclosure on the prosecution to serve initial details of its case on the defence if they request it, at the latest, by the beginning of the day of the first hearing.³² As alluded to above, in deciding on what material to schedule and disclose, the disclosure officer must also schedule any unused material which is deemed 'sensitive' (defined by the Code of Practice as material which 'would give rise to a real risk of serious prejudice to an important public interest').³³

The problem of police and prosecution disclosure – or lack thereof – is very significant, as demonstrated by Allan's case. As Glidewell J pointed out in *R v Ward (Judith)*:

'[N]on-disclosure is a potent source of injustice and even with the benefit of hindsight it will often be difficult to say whether or not an undisclosed item of evidence might have shifted the balance or opened up a new line of defence.'³⁴

Nor is it a new issue in criminal justice. Prior to 1981 (and the issuing of guidelines on disclosing unused material), obligations on the police and prosecution to provide information to the defence were extremely limited.³⁵ Since then – in part due to multiple miscarriages of justice in the 1980s and 1990s – the extent to which material must be shared (both by the prosecution and defence) has 'developed markedly, although not always consistently'.³⁶ Due to what Lord Bingham described as the 'bitter experience' of miscarriages resulting from non-disclosure, the 'golden rule' has generally been that full disclosure must be made of all exculpatory evidence.³⁷ However, despite the efforts to achieve this via the regime described above, disclosure has remained a serious problem over the last two decades. Research and commentary has consistently been critical of the disclosure regime established in 1997. In his summary of the new regime, Sprack highlighted the 'potentially far-reaching' implications of the CPIA to 'limit the extent of prosecution disclosure', noting that if this resulted in 'concealment of material which is relevant for the purposes of trial, then [this would be] likely to lead to an increase in the number of miscarriages of justice'.³⁸ In their 2001 evaluation of the regime, Plotnikoff and Woolfson detailed multiple failings in the operation of the process, stating that 'poor CPS and police practice in relation to disclosure was widespread' and concluding that 'the current operation of the CPIA provisions is ineffective'.³⁹ In his response to these findings, Epp suggested that reform 'must... be directed at the police', arguing that '[m]uch of the problem seems to lie in the continuing existence of a "cop culture" and the "working rules"'.⁴⁰ Whilst Part 5 of the *Criminal Justice Act 2003* made significant changes to the CPIA regime, this was considered to be inadequate by various commentators. Redmayne described the reform as 'legislative tweaking', whilst Quirk argued that the revised regime could not work because, among other reasons, it required 'the culturally adversarial police to

³⁰ Section 5, CPIA. The required contents are outlined under Section 6A and, to some extent, case law.

³¹ Section 6, CPIA; Part 3, Rule 3.2(2)(a), Criminal Procedure Rules. Disclosure by the defence is primarily covered under Part 15 of the Rules; although they do not explicitly go beyond the statutory requirements, the interpretation of the various case management duties incumbent on the court and by extension the parties leaves little opportunity for the defence to withhold pertinent material. There is significant focus on complying with the 'spirit' of the rules (see particularly *R. (on the application of DPP) v Chorley Magistrates Court* [2006] EWHC 1795 (Admin); *R v Penner* [2010] EWCA Crim 1155; and *R v Newell* [2012] EWCA Crim 650).

³² Part 8, Rule 8.2.

³³ Paras. 6.7, 6.14, and 2.1

³⁴ [1993] 1 WLR 619, 642

³⁵ See the Attorney General's guidelines on unused material, *Practice Note (Criminal Evidence: Unused Material)* [1982] 1 All ER 734

³⁶ *R v H* [2004] 2 AC 134, [15] *per* Lord Bingham

³⁷ *Ibid.*, [14]

³⁸ Sprack J, 'The Criminal Procedure and Investigations Act 1996: Part 1: The duty of disclosure' (1997) *Crim. L.R.* 308, 319.

³⁹ Plotnikoff J, Woolfson R, "'A Fair Balance'?: Evaluation of the operation of disclosure law (RDS Occasional Paper No. 76)' (2001, Home Office), xix; 131.

⁴⁰ Epp JA, 'Achieving the aims of the disclosure scheme in England and Wales' (2001) 5 *Int. J. of E & P* 188, 190.

fulfil an effectively inquisitorial function'.⁴¹ In empirical research to support her conclusions, Quirk found that officers charged with disclosure decision-making lacked training for and understanding of their role, and remained committed to prosecutorial culture.⁴² As one officer termed it: 'we're salesmen for jail'.⁴³ Two reviews of disclosure were conducted by Lord Justice Gross in 2011 and 2012; and a further review, specific to Magistrates' Courts, was undertaken by His Honour Justice Kinch and Chief Magistrate Howard Riddle in 2014.⁴⁴ The intervening years have seen disclosure largely forgotten.⁴⁵ The case of Allan has swiftly returned it to prominence and, for possibly the first time in decades, brought it to the attention of the public, exemplified by a BBC Panorama investigation in April 2018.⁴⁶

Disclosure as an adversarial strategy

As described above, the police have very limited duties of disclosure to the defence in the police station, particularly prior to charge.⁴⁷ Since statutory obligations of disclosure do not take effect until a suspect is charged, decisions may have already been made about what evidence will be used.⁴⁸ The police will have scheduled the available materials according to their own assessment. The phone records in Allan's case were unused material – regularly ignored simply because all criminal justice practitioners have little time for scouring this resource for relevant information which may not exist.⁴⁹ Initial decisions regarding disclosure of evidence to the defence are made by police officers; this is a fundamentally flawed mechanism in an adversarial system and is exemplified by this case. If one presumes that the police want to successfully convict the suspect (more on this below), there is an obvious conflict in giving them responsibility for impartially determining whether material will undermine the prosecution case. Indeed, Cape has commented that the police may use their discretion to disclose as a strategic tool, deploying it only if they believe it will encourage suspects to make admissions and therefore resolve cases quickly.⁵⁰ A recent study by Kemp suggests that the attitude of police officers towards disclosure can vary widely, depending on the officers involved as well as the nature of the allegation.⁵¹ Some of her respondents asserted that new officers were particularly prone to limiting disclosure to a minimum, but that generally

⁴¹ Redmayne M, 'Criminal Justice Act 2003 Disclosure and its Discontents' [2004] *Crim. L.R.* 441, 445; Quirk H, 'The significance of culture in criminal procedure reform: why the revised disclosure scheme cannot work' (2006) 10 *Int. J. of E & P* (1) 42, 46.

⁴² *Ibid.*

⁴³ *Ibid.*, 48

⁴⁴ The Rt Hon Lord Justice Gross, 'Review of Disclosure in Criminal Proceedings' (September 2011): <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/disclosure-review-september-2011.pdf>; the Rt Hon Lord Justice Gross and the Rt. Hon. Lord Justice Treacy, 'Further review of disclosure in criminal proceedings: sanctions for disclosure failure' (November 2012): https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/disclosure_criminal_courts.pdf; HHJ Kinch QC and Riddle H, 'Magistrates' Court Disclosure Review' (May 2014): <https://www.judiciary.gov.uk/wp-content/uploads/2014/05/Magistrates%E2%80%99-Court-Disclosure-Review.pdf>

⁴⁵ Although, HM Inspectorate of the CPS (HMCPSP) and HM Inspectorate of Constabulary (HMIC) did produce a joint review of disclosure in volume Crown Court cases in July 2017 ('Making It Fair: A joint inspection of the disclosure of unused material in volume Crown Court cases' (July 2017): https://www.justiceinspectorates.gov.uk/cjji/wp-content/uploads/sites/2/2017/07/CJJI_DSC_thm_July17_rpt.pdf

⁴⁶ Razall K, 'Panorama: Getting a Fair Trial?' (BBC One, 30 April 2018): <https://www.bbc.co.uk/programmes/b0b228hf>. Panorama in fact broadcast a similar programme nearly two decades ago, in March 2000.

⁴⁷ See *R v Ara* [2001] EWHC Admin 493; and Sukumar D, Hodgson J, Wade K, 'How the timing of police evidence disclosure impacts custodial legal advice' (2016) *Int. J. of E & P* 201

⁴⁸ See the CPIA Code of Practice and the Attorney General's Guidance on Disclosure (FN12)

⁴⁹ For example, judicial guidance on the disclosure of unused material expresses clear concerns about proceedings becoming lengthy, costly and inefficient due to 'erroneous and inappropriate' disclosure of unused material (Judiciary of England and Wales, 'Judicial Protocol on the Disclosure of Unused Material in Criminal Cases' (December 2013), 5). Curiously, this is juxtaposed with a reminder of the 'golden rule' outlined in *R v H and C* [2004] 2 AC 134, that 'full disclosure of such material should be made'.

⁵⁰ Cape E, 'Transposing the EU Directive on the right to information: a firecracker or a damp squib?' (2015) *Crim. LR* 48; and also, Sukumar et. al. (FN47)

⁵¹ Kemp V, 'Effective Police Station Legal Advice Country Report 2: England And Wales' (April 2018, University of Nottingham), 11: <http://eprints.nottingham.ac.uk/51145/1/Country%20Report%20England%20and%20Wales%20Final%20.pdf>

the disclosure process was ‘very formalised and strategic’.⁵² Respondents also described the use of ‘drip’ or ‘phased’ disclosure by police to entice suspects into providing an account (particularly in relation to serious offences).⁵³ Police disclosure is thus treated as an adversarial negotiation tactic rather than an obligation directed at truth-seeking; material is released in exchange for reciprocal behaviour by the suspect (for example, admissions or other useful information).⁵⁴ This contrasts with pre-trial disclosure requirements incumbent on both the prosecution and defence, a system designed to leave few stones unturned.⁵⁵ That being said, this will only happen if the prosecution and defence are in possession or aware of all the available material. This, therefore, illustrates the two contrasting stages of disclosure – the highly regulated, externally scrutinised, and increasingly non-adversarial court stage; and the largely unregulated and discretionary police station stage. This contrast is a problem as the latter inevitably influences the former. Indeed, Lord Justice Laws described the inter-relationship of the two as a ‘benign continuum’, where the police station and court stages form part of a ‘continuous process in which the suspect is engaged from the beginning’.⁵⁶ If this is true, then full and fair police station disclosure is vital to a properly functioning system.

The ability of the police to control disclosure of information provides them with an obvious advantage, and the danger of miscarriages occurring is heightened by both an entrenched adversarial culture in police investigations and other pressures on suspects. A good example of this is the risk of adverse inferences being drawn from a suspect’s silence under Sections 34 to 37 of the *Criminal Justice and Public Order Act* (CJPOA) 1994. If suspects do not mention relevant information at the police station which is later relied on at trial, magistrates or juries may draw negative inferences (that is, that silence indicates that the accused is not to be believed).⁵⁷ Considering that ‘there is simply no rule of law or practice requiring the police to disclose the full extent of their relevant evidence before questioning a suspect’, there exists an opportunity to “lure” a suspect into silence, and consequent adverse inferences, by limiting or refusing disclosure.⁵⁸ The suspect (devoid of information) may be pressured into to remaining silent – after all, how should a suspect respond to accusations if he or she knows little about them? With the spectre of adverse inferences lingering in the background, they may be advised to comply (or even make admissions).⁵⁹ Inferences in this situation are not inevitable; but as Ashworth and Redmayne argue, ‘the courts have done little to indicate that lack of disclosure should block an inference from silence’.⁶⁰ Whilst there may be justifiable reasons for withholding evidence or providing only partial disclosure, this scenario typifies the potential for adversarial game-playing by the police, the goal being to either secure an early admission in interview or an eventual conviction (assisted by adverse inferences). Faced with an intransigent, adversarial investigator, such pressure on suspects (and their lawyers) in the intimidating environment of the police station will be significant. It is also worth noting that suspects may (for a range of reasons) be unrepresented at the police station and, increasingly,

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Sanders A, Young R, Burton M, *Criminal Justice* (2010, OUP), 288-289; see McConville M, Sanders A, Leng R, *The Case for the Prosecution* (1991, Routledge)

⁵⁵ Primarily, the regime under the *Criminal Procedure and Investigations Act* 1996; and obligations of disclosure under various parts of the Criminal Procedure Rules 2015 (particularly Parts 8 and 15). See also the shift towards a culture of openness regarding disclosure signalled by *R v Gleeson* [2004] 1 Cr. App. R. 29 and *R. (on the application of DPP) v Chorley Magistrates Court* [2006] EWHC 1795 (Admin)

⁵⁶ *R v Howell* [2005] 1 Cr. App. R. 1, 13. Interestingly, Lord Justice Laws made this statement in the context of adverse inferences drawn from silence and ‘reasonable disclosure by a suspected person’. The same logic – that the entire process is now inextricably linked – can equally be applied to police and prosecution disclosure.

⁵⁷ A wide range of cases explore the meaning and purpose of ‘adverse inferences’, including *R v Chenia* [2003] 2 Cr App R 83; *Condon v UK* (2001) 31 EHRR 1; *R v Roble* [1997] Crim LR 449; and *R v Argent* [1997] 2 Cr. App. R. 27.

⁵⁸ *R v W* [2006] EWCA Crim 1292, [8].

⁵⁹ Evidence in the post-CJPOA era suggested that legal advisers may have become less willing to advise silence due to the risks of adverse inferences. See Bucke T, Street R, Brown D ‘The right of silence: the impact of the Criminal Justice and Public Order Act 1994’ (2000, Home Office: London); Bucke T, Brown D, ‘In police custody: police powers and suspects’ rights under the revised PACE codes of practice’ (1997, Home Office: London); Phillips C, Brown D, ‘Entry into the criminal justice system: a survey of police arrests and their outcomes’ (1998, Home Office: London). For a more recent perspective, see Sukumar, et al. (FN47).

⁶⁰ Ashworth A and Redmayne M, *The Criminal Process* (2010, OUP), 105.

at trial, therefore removing a further protection in the face of a potentially hostile investigator or prosecutor.⁶¹ For suspects like Liam Allan, faith in their own innocence may be all that prevents them from making admissions. It is well known that innocence does not necessarily prevent confessions.⁶² Add to this the prospect of a lengthy custodial sentence if convicted and the pressure for an early guilty plea, and one has a recipe for potential miscarriages of justice.⁶³

The latter is particularly relevant in relation to disclosure. There is now a significant drive in the criminal courts to encourage defendants to enter a plea at the earliest opportunity. This is done by way of a “stick and carrot” approach. The “carrot” is the reduction in sentence for a guilty plea, which increases depending on how early a defendant admits the offence.⁶⁴ The “stick” is the loss of credit for a late plea or conviction after trial, reinforced by frequent reminders of this system. The Criminal Procedure Rules, as mentioned above, place emphasis on the need for ‘early identification of the real issues’, but also require courts to either obtain a plea from the defendant or enquire as to the ‘anticipated’ plea.⁶⁵ The court must also ‘satisfy itself that there has been explained to the defendant, in terms the defendant can understand... that the defendant will receive credit for a guilty plea.’⁶⁶ This pressure is intensified by the equally important agenda of ‘discouraging delay, dealing with as many aspects of the case as possible on the same occasion, and avoiding unnecessary hearings’.⁶⁷ These twin imperatives suggest a process aimed at coercing defendants into confessing to offences quickly; if this is combined with limited disclosure by the police and prosecution, defendants may well feel they have little choice but to plead guilty – regardless of their guilt or innocence. Whilst Allan clearly had the fortitude not to fold (even asserting the existence of the evidence which cleared him), one can only speculate on the number of less robust suspects who may have chosen to give in, despite their innocence.⁶⁸ Moreover, Allan’s exoneration resulted not only from his own persistence via his lawyers (partially detailed in the MPS review) but as a result of the actions of a prosecutor acting with integrity (who in fact disclosed the full phone records to the defence).⁶⁹ For this to depend on dogged lawyers rather than fair handling of disclosure by the

⁶¹ Estimates as to the number of unrepresented suspects in police stations vary, but generally lie somewhere between 50-70%; a 2013 study by Vicky Kemp found only 35% of suspects received legal representation, despite a 47% request rate (Kemp V, “No time for a solicitor”: implications for delays on the take-up of legal advice’ (2013) 3 *Crim. L.R.*). The reasons for non-receipt of advice vary; for a summary, see Skinnis L, ‘The Right to Legal Advice in the Police Station: Past, Present and Future’ (2011) 19 *Crim. L.R.*). There is a lack of robust evidence regarding unrepresented defendants, although a recent report by the charity, Transforming Justice, suggests it is a growing problem (Transform Justice, ‘Justice denied? The experience of unrepresented defendants in the criminal courts’ (April 2016): http://www.transformjustice.org.uk/wp-content/uploads/2016/04/TJ-APRIL_Singles.pdf)

⁶² For a wide ranging review of the literature and evidence, see Gudjonsson G, *The Psychology of Interrogations and Confessions: A Handbook* (2009, Wiley); also see, Quirk H, *The rise and fall of the right of silence* (2017, Routledge), Chapter 3; and Easton S, *Silence and Confessions: the suspect as a source of evidence* (2014, Palgrave Macmillan), Chapter 6

⁶³ See Johnston E, ‘The Early Guilty Plea’ (2016) 180 *Crim. L & J. Weekly* 15

⁶⁴ In 2017, the Sentencing Council revised its guidelines on credit for an early guilty plea, making them more stringent – in summary, maximum credit is available only at the very earliest stages of proceedings, with reductions in credit being both greater and earlier (Sentencing Council, ‘Reduction in Sentence for a Guilty Plea: Definitive Guidelines’ (June 2017): https://www.sentencingcouncil.org.uk/wp-content/uploads/Reduction-in-Sentence-for-Guilty-plea-Definitive-Guide_FINAL_WEB.pdf). Nonetheless, the Sentencing Council argued that ‘the guideline is directed only at defendants wishing to enter a guilty plea and does not place pressure on defendants to plead guilty if they do not want to’ (Sentencing Council, ‘Press release: Sentencing Council publishes new guidelines on sentencing children and young people and offenders who plead guilty’ (7 March 2017): <https://www.sentencingcouncil.org.uk/news/item/sentencing-council-publishes-new-guidelines-on-sentencing-children-and-young-people-and-offenders-who-plead-guilty/>)

⁶⁵ Part 3, Rule 3.2(2)(a); Rules 3.3(2)(c)(i), 3.9(2)(b), 3.13(1)(c)(i), and 3.13(2)(b).

⁶⁶ *Ibid.*, Rule 3.13(2)(a)

⁶⁷ *Ibid.*, Rule 3.2(2)(f)

⁶⁸ The multitude of previous miscarriages of justices documented over the years provide evidence of this (for example, the ‘Cardiff Three’ – *R v. Paris, Abdullahi and Miller* (1993) 97 Cr. App. R. 99); for a more recent example (in which the appellant regretted his guilty plea), see *R (on the application of the DPP) v. Leicester Magistrates’ Court* (Unreported, February 9, 2016)

⁶⁹ ‘A joint review of the disclosure process in the case of R v Allan: Findings and recommendations for the Metropolitan Police Service and CPS London’, 4-6. It is perhaps worth noting that the relevant prosecution counsel (Jerry Hayes) is independent – that is, not employed by the CPS. One might suggest that he is therefore not subject to the same organisational pressures of in-house counsel, and possibly more accustomed to adopting

police from the outset is disappointing and worrying, but ultimately not surprising considering the lack of scrutiny and regulation imposed on the police pre-charge, and their in-built adversarial mindset.

In this context, the case raises serious questions about whether the police can be trusted to fairly and thoroughly review evidence and appropriately disclose, to both the defence and the CPS. In July 2017, HMCPSI and HMIC published a joint review of the disclosure process in volume Crown Court cases which suggests that, currently, they cannot.⁷⁰ Among its various findings, the report asserted that ‘revelation by the police to the prosecutor of material that may undermine the prosecution case or assist the defence case is rare’.⁷¹ Moreover, it stressed the need for a ‘cultural shift’ in the management of disclosure, adding:

‘Only then will assurance be provided that the prosecution agencies are motivated in their desire for a fair trial, rather than one that focuses on the prosecution case and pays insufficient heed to potential evidence for the defence that lies within the unused material in their possession’⁷²

This strongly suggests a problem of excessive adversarialism. To tackle this, the report recommended improved training, better communication, and stronger leadership;⁷³ but it is arguable that the existing legal framework governing disclosure also needs reviewing.

Article 7(1) of the EU directive on the right to information in criminal proceedings requires that:

‘Where a person is arrested and detained at any stage of the criminal proceedings, Member States shall ensure that documents related to the specific case in the possession of the competent authorities which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers.’⁷⁴

.PACE Code of Practice C was amended in 2014 to reflect this, although one might question whether the changes were in fact sufficient to comply with the Directive.⁷⁵ It seems reasonable to argue that the police approach to disclosure in Allan’s case was surely non-compliant with the terms of Article 7(1) – and many other cases will also fall short if a similar approach is taken. Whilst the cases mentioned in this article represent only a small sample, there are strong indications of a wider problem. For example, the BBC recently published data (resulting from a Freedom of Information request) suggesting that the number of cases collapsing due to non-disclosure had increased by 70% in the last two years.⁷⁶ In a 2016 study, Cape and the author found that courts were generally reliant on police summaries in making decisions about bail and remands in custody, and such summaries were often incomplete and/or sparse.⁷⁷ It might be noted that Allan spent two years on bail; according to our findings, decisions regarding release or detention prior to trial were regularly based on inadequate information (also

a neutral view of a case, rather than a prosecution focused approach. Whether this is relevant to his approach to the Allan case is debatable, but relevant.

⁷⁰ ‘Making It Fair: A joint inspection of the disclosure of unused material in volume Crown Court cases’ (July 2017)

⁷¹ *Ibid.*, [1.3], 3.

⁷² *Ibid.*, [1.4], 3.

⁷³ *Ibid.*, 4.

⁷⁴ Directive 2012/13/EU on the right to information in criminal proceedings [2012] OJ L142/1

⁷⁵ The relevant sections are Paras. 11.1A and Note for Guidance 11ZA (see FN22 and FN23)

⁷⁶ BBC News, ‘Hundreds of cases dropped over evidence disclosure failings’ (24 January 2018):

<http://www.bbc.co.uk/news/uk-42795058>. For balance, it should also be noted that, according to the CPS, this accounted for 0.15% of total prosecutions (although over what period is not made clear).

⁷⁷ Cape E, Smith T, ‘The practice of pre-trial detention in England and Wales: Research Report’ (2016):

<https://www.fairtrials.org/wp-content/uploads/Country-Report-England-and-Wales-MASTER-Final-PRINT.pdf>.

This report was submitted as part of a European Commission funded report on pre-trial detention across Europe (Fair Trials International, ‘A Measure of Last Resort? The practice of pre-trial detention decision making in the EU’ (2016): <https://www.fairtrials.org/wp-content/uploads/A-Measure-of-Last-Resort-Full-Version.pdf>)

supported by subsequent research).⁷⁸ In contrast to Allan, many accused of rape would likely spend this time remanded in custody, with no compensation should the case end without conviction. Indeed, Isaac Itiary was detained for over four months before his case collapsed in December 2017.⁷⁹ A severe example is the case of Petruta-Cristina Bosoanca, who spent more than a year remanded in custody before her trial collapsed due to non-disclosure – during which time she gave birth in prison.⁸⁰

Detention is not the only potentially negative ancillary effect of the period between being charged and later cleared. A suspect may lose their job (as Connor Fitzgerald did, before the case against him was dropped due to non-disclosure of text messages).⁸¹ If a suspect is a student (like Allan), they may be suspended or expelled from university. Suspects might also miss pre-arranged holidays if conditions of bail include surrendering their passport; suspects may even, depending on the charge, be denied access to their children. Moreover, a defendant may spend significant amounts of personal wealth on their defence with little prospect of reimbursement should they be acquitted or the case against them collapse. The latter is exemplified by the case of Stephen Glascoe, a retired GP accused of multiple rapes against a single complainant.⁸² The charges against him and four others were dropped two weeks prior to trial because of concerns regarding the complainant's credibility and her relationships with both her therapist and the OIC.⁸³ Glascoe's application for costs – amounting to approximately £94,000 in personal assets, due to his ineligibility for legal aid – were rejected and deemed 'in line with enlightened modern practice'.⁸⁴ These are all significant and may affect innocent people for months, years, or possibly for the rest of their lives. In some of the cases mentioned above, one wonders whether the defendants would have been detained (or even charged) had the full extent of the evidence been clear from the earliest stages. Considering that one of the factors to be considered by magistrates and judges assessing bail is 'the strength of the evidence of [the defendant] having committed the offence', it seems doubtful.⁸⁵ Such cases expose serious problems in relying on the police for full and balanced information. To avoid such serious miscarriages (nearly) happening again, we must consider a more robust and clear disclosure scheme for the early stages of an investigation.

The culture of police investigations

The second issue raised by Liam Allan's case, discussed above to some extent, relates to the culture of police investigations. Conceptually, the police should be objective investigators who search for facts. This approach requires both fidelity to the truth and respect for the presumption of innocence for all suspects. However, it has long been a concern that the police (and CPS to an extent) are concerned with 'proof' rather than 'truth'.⁸⁶ When the police adopt a "tunnel vision" approach to investigation, they may – like all human beings – be susceptible to confirmation bias and selectivity in considering the evidence before them.⁸⁷ As such, they become case builders rather than fact finders.⁸⁸ In contrast, guidance in the Code of Practice

⁷⁸ Ibid., also see Transform Justice, 'Presumed innocent but behind bars – is remand overused in England and Wales?' (March 2018): http://www.transformjustice.org.uk/wp-content/uploads/2018/03/TJ_March_13.03-1.pdf

⁷⁹ Evans M, 'Scotland Yard reviews all ongoing rape cases after second trial involving same officer collapses as 'evidence withheld' *The Telegraph* (20 December 2017)

⁸⁰ Brown D, Johnston N, 'Mother gives birth in jail as vital evidence is withheld' *The Times* (1 February 2018)

⁸¹ Ibid.

⁸² Brown D, 'GP accused of paedophilia by 'fantasist' loses fight for costs' (*The Times*, 28 April 2018)

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Schedule 1, Para. 9(d) *Bail Act 1976*

⁸⁶ For example, see Baldwin J, 'Police Interview Techniques: Establishing Proof or Truth?' (1993) 33 *Brit. J. of Crim.* 3

⁸⁷ A concern raised by Lord Justice Leveson recently (see Criminal Cases Review Commission Annual Lecture, 'The Pursuit of Criminal Justice' (25 April 2018): <https://www.judiciary.gov.uk/wp-content/uploads/2018/04/speech-leveson-ccrc-lecture-april-2018.pdf>

⁸⁸ A point made by McConville et al. in *The Case for the Prosecution* (FN21), neatly summarised by David Smith in the following terms: '[P]rosecution is the outcome of an active process of construction, or creation, in which the police play the dominant role. Prosecution is thus a mode of production. This view that the police and prosecutors produce the cases is to be contrasted with the simple-minded idea that they strip away

for the *Criminal Procedure and Investigations Act* 1996 states that ‘[i]n conducting an investigation, the investigator should pursue all reasonable lines of inquiry, whether these point towards or away from the suspect.’⁸⁹ It is plausible that the OIC in Allan’s case fell victim to the temptation to pursue a conviction rather than investigate fully.⁹⁰ However, the situation is arguably more complex in the context of sexual offences. The historic failings of the police in investigating sexual offences (particularly rape) and the resulting problem of attrition are well documented.⁹¹ Low conviction rates and consistently poor experiences of victims drove a new approach by the police and CPS to the pursuit of such cases, particularly during the 1990s and 2000s.⁹² Under New Labour, there was a well-publicised push to ‘rebalance’ the criminal justice system in favour of victims; and the current Director of Public Prosecutions, Alison Saunders, has been a lightning rod for both praise and disapproval for her approach to victims in sexual assault and rape cases.⁹³ At the same time, criticism has been levelled at the adoption of a default assumption by police and prosecutors that rape complainants are truthful and the potential risk of wrongful convictions that might result.⁹⁴ This has been particularly problematic in the wake of what has been termed the ‘Savile’ or ‘Yewtree’ effect – that is, the significant increase in reporting of non-recent (historic) sexual abuse resulting from revelations about the criminal activities of Jimmy Savile and other celebrities.⁹⁵ The acquittal of several well-known public personalities accused of historic sexual offences raised concerns that the police believed complainants too readily in such cases, failing to robustly question the veracity of the, admittedly, large volume of accusations brought to their attention. It has therefore been suggested that ‘[t]he risk now is that mistaken or dishonest allegations of child abuse or rape are more likely to be taken as true, unless there is objective evidence to invalidate the claim.’⁹⁶ Such an approach, which infers a need to prove innocence, clearly undermines the burden of proof. It might be highlighted that in historic cases (possibly dating back many decades) there is a reduced chance of exculpatory evidence existing. Should the above contention regarding

a series of veils to reveal the reality or truth of a person's actions and guilt.’ (Smith D, ‘Case construction and the goals of the criminal process’ (1997) 37 *Brit. J. of Crim.* 3, 320)

⁸⁹ Para. 3.5

⁹⁰ The MPS review is very limited in exploration of the extent of the OIC’s examination of the phone records and the methods used to do this (seemingly due to a lack of information provided – or recorded – by the OIC himself).

⁹¹ Amongst the wide range of literature are some of the following examples: Temkin J, ‘Plus ca change: Reporting Rape in the 1990s’ (1997) 37 *Brit. J. of Crim.* 507; Jordan J, ‘Worlds Apart? Women, Rape and the Police Reporting Process’ (2001) 41 *Brit. J. of Crim.* 679; Kelly L, Lovett J, Regan L, ‘A gap or a chasm? Attrition in reported rape cases’ (2005, Home Office Research Study 293): <http://www.homeoffice.gov.uk/rds/pdfs05/hors293.pdf>; and recently, Hohl K, Stanko EA, ‘Complaints of rape and the criminal justice system: Fresh evidence on the attrition problem in England and Wales’ (2015) 12 *Eur. J. of Crim.* 3.

⁹² For example, the spread of Specially Trained Officers (STOs) from the mid-1980s onward; and the creation of CPS Rape and Serious Sexual Offence (RASSO) units in 2013. For an example of a successful approach in this area, see analysis of Avon and Somerset Constabulary’s ‘Operation Bluestone’ (Rumney P, McPhee D, Fenton R, Williams A, Solle J, ‘A Comparative analysis of Operation Bluestone: A specialist rape investigation unit – summary report’ (2016): <http://eprints.uwe.ac.uk/30894/1/Bluestone%20summary%20final.pdf>

⁹³ Home Office, ‘Rebalancing the criminal justice system in favour of the law-abiding majority’ (2006, Home Office); see two contrasting examples of the public profile of Alison Saunders: Smith J, ‘Sacking Alison Saunders would destroy Britain's best hope of justice for women’ *The Telegraph* (01 July 2015) describing Saunders as ‘brave’; and Purves L, ‘Editorial: False rape accusers should be punished’ *The Times* (18 December 2017) referring (critically) to Saunders’ ‘missionary zeal’ regarding sexual offences and victims.

⁹⁴ See Henriques R, ‘An Independent Review of the Metropolitan Police Service’s handling of non-recent sexual offence investigations alleged against persons of public prominence’ (31 October 2016): <http://news.met.police.uk/documents/report-independent-review-of-metropolitan-police-services-handling-of-non-recent-sexual-offence-investigations-61510>

⁹⁵ See Office for National Statistics, ‘Violent Crime and Sexual Offences – Overview’ (12 February 2015): <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/compendium/focusonviolentcrimeandsexualoffences/2015-02-12/chapter1violentcrimeandsexualoffencesoverview>; and HM Inspectorate of Constabulary, ‘“Mistakes were made”: HMIC’s review into allegations and intelligence material concerning Jimmy Savile between 1964 and 2012’ (March 2013): <https://www.justiceinspectorates.gov.uk/hmicfrs/media/review-into-allegations-and-intelligence-material-concerning-jimmy-savile.pdf>.

⁹⁶ Burnett R, Hoyle C, Speechley N, ‘The Context and Impact of Being Wrongly Accused of Abuse in Occupations of Trust’ (2017) 56 *Howard Journal of Crime and Justice* 2, 177. For more on this issue generally, see Burnett R (ed.), *Wrongful Allegations of Sexual and Child Abuse* (2016, OUP).

default belief of accusations be accurate, this not only places suspects at a serious disadvantage pre-trial, but makes wrongful convictions almost impossible to overturn on appeal.⁹⁷

This issue is extremely delicate and is, in some ways, a “no win” for the police. A major barrier to reporting and prosecution of rape is complainants’ fear of disbelief, often fuelled by damaging myths about rape and sexual assault (such as “only strangers rape”, or that complainants who delay reporting are lying).⁹⁸ The whole process (including reporting an alleged offence, medical examination, interview by police, and eventual cross-examination in court) is undoubtedly traumatic for genuine victims of rape. The desire of the police and the CPS to minimise this stress and reduce attrition rates (thereby maximising successful prosecutions of rapists) should rightly be applauded. It was (and continues to be) necessary to address these problems; but reasonable questions about the risks inherent in tending to automatically believe complainants cannot be easily dismissed. The police should be open to the possibility that a complaint is either mistaken or not genuine; there is also the possibility that a suspect had reasonable belief in consent, and this should be considered. Suspects have a presumption of innocence and prosecutions require robust evidence that must be tested. With these protections, there is indeed a greater chance that some rapists may frustrate justice; but without them, there is a real risk of innocent persons being accused, prosecuted and convicted. In Allan’s case, the police seemingly failed to adequately test the veracity of the complainant’s allegations. What appears to have been obviously exculpatory evidence was either missed, misunderstood, or ignored (again, it is unclear from the MPS review). This may have been due to incompetence or lack of time, and that appears to be the inference from the findings of the MPS review of the case;⁹⁹ but there is also the potential that this was a case of selective investigation due to the strength of belief in the complainant. Whatever the rationale for the approach of the OIC, the material should have been scheduled and by failing to do so the CPS were denied an accurate picture of the case, leading to a flawed charging decision. The latitude granted to the police in deciding what to disclose, combined with the police’s obvious belief in the accuracy of the allegations, nearly led to a deeply questionable outcome. In some cases, the problem may not, in fact, be one of undue belief in the complainant, but a dogged belief in a suspect’s guilt. A good example of this is a recently reported case in which a man was charged with rape, despite the complainant stating he had not done so and had in fact attempted to assist her.¹⁰⁰ The case eventually collapsed after the complainant’s statement had remained undisclosed until the first day of the trial.¹⁰¹ This raises the concern that complainants may be believed (or ignored) not because the veracity of their claims, but due to a determination to secure a conviction. Ultimately, disclosure – used as an adversarial tool – may be limited to achieve this.

It is important to note that cases like those of Allan and the others mentioned in this article are unusual, and can be misused to suggest that false allegations of rape are prevalent. There is little robust evidence to suggest that false allegations are common.¹⁰² Moreover, false allegations should be understood as a complex phenomenon, not limited to people motivated

⁹⁷ It is fairly well established that the courts have taken a narrow view of when a conviction will be deemed ‘unsafe’ for the purposes of the *Criminal Appeal Act 1968* (as amended) (see *R v. Chalkley and Jeffries* [1998] 2 All ER 155, and more recently *R v. Pope* [2013] 1 Cr App R 14). Furthermore, any new exculpatory material would also have to pass the threshold for fresh evidence set by Section 23 of the *Criminal Appeal Act 1968* (as amended) in order to be considered on appeal.

⁹⁸ The links between failure to report, fear of disbelief and rape myths are discussed in a range of literature, including: Home Office, ‘The Stern Review’ (Home Office, 2010); Temkin J, *Rape and the Legal Process* (2002, OUP); Jordan J, ‘Beyond Belief? Police, Rape and Women’s Credibility’ (2004) 4 *Criminal Justice* 1, 29

⁹⁹ ‘A joint review of the disclosure process in the case of R v Allan: Findings and recommendations for the Metropolitan Police Service and CPS London’, 6.

¹⁰⁰ Hamilton F, ‘Victim had absolved man on rape charge’ (*The Times*, 30 April 2018)

¹⁰¹ *Ibid.*

¹⁰² See Kelly et al. ‘A Gap or a Chasm?’ (FN36), which provided an estimate of 3-12% of reports (depending on how false allegations were recorded); see also, Ministry of Justice, ‘Providing anonymity to those accused of rape: an assessment of evidence’ (2010, Ministry of Justice Research Series 20/10) in which it was noted that problems of interpretation and recording ‘make accurate assessment of the true extent of such allegations very difficult’.

by lies or malice.¹⁰³ However, a balance must be struck between ensuring that complainants are not treated like liars and frauds, whilst ensuring innocent suspects are not entrapped by over-zealous belief in allegations. A middle ground must be found – perhaps by starting investigations with a focus on care and respect for complainants, rather than belief that what they say is necessarily true. It now appears that a move away from the latter position is underway, towards something reflecting the suggestion above. In a review of the use of the term ‘believe’ in dealing with complainants, the College of Policing proposed:

‘[A] change removing the word “believe” [from crime counting rules] but reinforce... that any crime will be treated seriously... in a supportive and open-minded way, with active listening and a full explanation to the person making the allegation about the impartial and independent role of police and the way they will be supported in providing the best evidence to support any possible legal proceedings.’¹⁰⁴

This recommendation, resulting from a careful and thorough consideration of the competing interests involved, appears to be a genuine attempt to find a balance between supporting genuine victims of crime, and protecting the impartiality of an investigation. More broadly though, the apparent ‘proof over truth’ approach to investigation of crime generally must be challenged. Indeed, in Allan’s case, the MPS explicitly identified ‘lack of challenge’ to the assumption that the accusation was genuine as a reason for the failures that occurred.¹⁰⁵ Lawyers represent a key way of achieving this, which makes the evidence of under-representation of suspects at police stations all the more concerning. Without a marked shift in the general culture of police investigation towards something more balanced, we are likely to see more cases like Allan’s in the headlines, alongside an invisible class of less ‘newsworthy’ miscarriages across the spectrum of criminal offences.

The impact of resources on the disclosure process

The third issue of relevance is a contextual one – that is, resourcing of the various agencies and functions of the criminal justice system, and the impact this is having on management of disclosure. Allan’s case leads one to question whether the police have the necessary personnel and time to undertake the important (but time consuming) work required in such cases.¹⁰⁶ There is an emerging narrative that failings in police disclosure are the result of reduced budgets and resources across the criminal justice system, particularly for the police.¹⁰⁷ The police (like most other public sector services) have been subjected to funding cuts – some to the point at which they do not feel able to police properly.¹⁰⁸ With regard to sexual offences, Dame Elish Angiolini’s review of investigation and prosecution of rape in London raised specific concerns about ‘excessive workloads on the effectiveness of both police and prosecutors’, particularly exacerbated by ‘[t]he increased evidential opportunities presented by electronic and digital communication and burgeoning social media’.¹⁰⁹ Of particular pertinence to Allan’s case was

¹⁰³ For a fuller discussion, see Rumney P and McCartan K, ‘Purported false allegations of rape, child abuse and non-sexual violence: nature, characteristics and implications’ (2017) *J. of Crim. L* 497.

¹⁰⁴ College of Policing, ‘Review into the Terminology “Victim/Complainant” and Believing Victims at time of Reporting’ (February 2018), [8.9], <http://www.college.police.uk/News/College-news/Documents/Review%20into%20the%20Terminology%20Victim%20Complainant%20and%20Believing%20Victims%20at%20time%20of%20Reporting.pdf>

¹⁰⁵ ‘A joint review of the disclosure process in the case of R v Allan: Findings and recommendations for the Metropolitan Police Service and CPS London’, 6

¹⁰⁶ For a general discussion of this issue (through the lens of an empirical study), see Elliott-Davies M, Donnelly J, Boag-Munroe F, Van Mechelen D, “Getting a battering”: the perceived impact of demand and capacity imbalance within the Police Service of England and Wales: a qualitative review’ (2016) *Police Journal* 93.

¹⁰⁷ See the comments of Lord Justice Thomas in Coleman C, ‘Red diesel trial collapse shows “systemic disclosure failings”’ (*BBC News*, 29 April 2018): <http://www.bbc.co.uk/news/uk-43923056>

¹⁰⁸ See Avon and Somerset Constabulary, ‘The Tipping Point: The case for a safe, sustainable, and fair funding settlement for Avon and Somerset Constabulary’ (September 2017): <https://www.avonandsomerset.police.uk/newsroom/2017/09/avon-and-somerset-reaches-a-financial-tipping-point/>

¹⁰⁹ Angiolini E, ‘Report of the Independent Review into the investigation and prosecution of rape in London’ (30 April 2015), 12:

https://www.cps.gov.uk/sites/default/files/documents/publications/dame_elish_angiolini_rape_review_2015.pdf

the suggestion that this had ‘added significantly to the type and volume of material that investigators and prosecutors must consider for evidence and disclosure’.¹¹⁰ This was previously recognised in Lord Justice Gross’ review of disclosure in criminal proceedings. It was noted that there had been an ‘explosion of electronic materials’ in criminal investigations, requiring acknowledgement that ‘with enormous quantities of material it is likely to be physically impossible or wholly impractical to read every document on every computer seized’.¹¹¹ As such, the review recommended ‘responsible cooperation between the parties - extending to an identification of the issues, the choice of search terms and the like’ – incorporated into the Attorney General’s Guidelines on Disclosure.¹¹² Yet, without appropriate resourcing and expertise it is perhaps unreasonable to expect thorough and well considered disclosure decisions, let alone meaningful cooperation in an adversarial environment.

As noted earlier, it appears Allan and his lawyers drew attention to the existence of exculpatory evidence; yet, the evidence did not come to light prior to the charging decision or even before the progression of the case to court. In the MPS review, the OIC appears to imply that a lack of time contributed to his clearly incomplete review of the evidence, stating: ‘because of the volume of analysis of phone downloads I deal with, I had wrongly assured myself that I had looked through this entire download.’¹¹³ The review contains repeated suggestions that wider investigation was not undertaken, yet the phone records were nonetheless deemed non-disclosable.¹¹⁴ This is perhaps an unsurprising revelation. The joint review of disclosure of unused material conducted by HM Crown Prosecution Service Inspectorate (HMCPSI) and HM Inspectorate of Constabulary (HMIC) found that police scheduling of evidence was ‘routinely poor’, with inadequate descriptions of material, missing items of unused evidence, and only basic listing of the ‘routine’ items suitable for disclosure all being common features.¹¹⁵ This echoes the findings of Plotnikoff and Woolfson nearly two decades earlier. However, the argument that ‘the volume of analysis’ is the key mischief lacks weight, particularly considering the recommendation made by Lord Justice Gross that parties can, and should, work together to tackle this – and that this opportunity arose in Allan’s case.

When a suspect is compliant and assists the police in identifying exculpatory evidence, the twin excuses of lack of resources and large amounts of material seem less viable as explanations for a failure to discover and disclose relevant information. Considering that many of our lives now partially exist in a digital, recorded form on social media, consensual access to such resources may be particularly useful to investigations. For example, if a defendant allows the police to read their Facebook messages, the truth of an allegation may be more easily discovered. Equivalent access to a complainant’s social media profile may be equally important, although this clearly is not within the power of a suspect. However, an open minded and cooperative approach on the part of the police and CPS is crucial in this context. A good example of this is *R v Kay*.¹¹⁶ Kay’s conviction for rape was quashed on appeal after it emerged that incriminating Facebook messages sent between the defendant and the complainant had been edited and partially deleted by the complainant before being supplied to the police. Yet, despite Kay ‘repeatedly urging the prosecution to obtain the full Facebook exchange’ and asserting that ‘the police had his phone and laptop and could have accessed his Facebook account’, this was not discovered until after his conviction.¹¹⁷ This suggests that neither resources nor volume of evidence were to blame, but the attitude of the police and CPS. This is arguably a problem of adversarialism; or perhaps more specifically, a problem resulting from the fact that the current

¹¹⁰ Ibid.

¹¹¹ The Rt Hon Lord Justice Gross, ‘Review of Disclosure in Criminal Proceedings’ (September 2011), 10: <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/disclosure-review-september-2011.pdf>

¹¹² Ibid., 11; Annex: Supplementary Guidelines on Digitally Stored Material, ‘Attorney General’s Guidelines on Disclosure (2013, Attorney General’s Office), 18

¹¹³ ‘A joint review of the disclosure process in the case of R v Allan: Findings and recommendations for the Metropolitan Police Service and CPS London’, 6

¹¹⁴ Ibid., 4-6.

¹¹⁵ ‘Making It Fair: A joint inspection of the disclosure of unused material in volume Crown Court cases’ (July 2017), [1.3]

¹¹⁶ [2017] EWCA Crim 2214

¹¹⁷ Ibid., [29]

disclosure scheme does not recognise the adversarial role of the police and the consequent risks. Of course, it should also be noted that when suspects and defendants fail to comply with their disclosure obligations, this will reasonably limit the ability of the police and CPS to discover exculpatory material. However, short of these obligations, even if one recognises that a decision not to engage with the police will not help a suspect, it must be remembered that the burden of proof lies with investigators and prosecutors. An expectation that suspects help to prove their own innocence would be a dangerous norm to establish.

In general, there are undoubtedly fewer officers available for all police work and many competing demands to satisfy.¹¹⁸ Whilst this is not an excuse for inadequate practice, it recognises that professionals under pressure can make poor choices. A similar argument regarding the impact of financial constraints might be made in relation to the CPS and defence lawyers, who (as a safeguard and quality control) should check and challenge the decisions of the police.¹¹⁹ The CPS have a particularly important duty to ensure they have all relevant information prior to a charging decision. For example, the Attorney General's Guidelines on Disclosure place an explicit burden on prosecutors to 'be alert to the possibility that relevant material may exist which has not been revealed to them' or that materials may not have been inspected thoroughly.¹²⁰ In such an event, they are required to 'take action' to ensure that materials are examined properly and provided to them.¹²¹ However, the aforementioned joint review of HMCPSP and HMIC was scathing regarding CPS performance of this vital function, concluding that despite prosecutors being 'expected to reject substandard schedules... [w]e found little evidence of such challenge and a culture of acceptance appeared to prevail'.¹²² Clearly, CPS lawyers cannot claim to be entirely blameless when cases such as Liam Allan's arise. Indeed, the MPS review identifies multiple failures of the prosecutors in the case to 'probe and challenge' the OIC as a contributing factor.¹²³ Had it not been for the barristers instructed to prosecute at trial disclosing and reviewing the unused material when it finally came to light, the key text messages may have remained undiscovered. There is every chance that Allan would have then been convicted. Subjected to similar resourcing pressures, one must question how likely it is that lawyers for the defence (mostly legally aided and unpaid for reviewing unused material) and the prosecution (normally employed by the CPS, which has been starved of resources) will undertake such additional and possibly fruitless work – work which saved Allan at the last moment.¹²⁴ Judges and juries rely on the police and lawyers to undertake these tasks and provide them with a full case to assess. If this system fails to work properly, innocent persons – refusing to plead guilty notwithstanding consistent reminders of the benefits of doing so – will be convicted, and their lives ruined. Therefore, the lesson should be that whilst cutting

¹¹⁸ Police workforce numbers have declined significantly over the last decade, from approximately 144,000 officers in March 2010 to 123,142 officers in March 2017 – the small officer workforce since 1985 (Hargreaves J, Husband H, Linehan C, 'Police Workforce, England and Wales, 31 March 2017' (July 2017, Home Office): https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/630471/hosb1017-police-workforce.pdf

¹¹⁹ Aside from their function as representative for the defendants interests and defender of their rights, the defence should also assist in directing the police and prosecution to relevant exculpatory material: 'In some cases that involve extensive unused material that is within the knowledge of a defendant, the defence will be expected to provide the prosecution and the court with assistance in identifying material which is suggested to pass the test for disclosure' (Attorney General's Guidelines on Disclosure, 11)

¹²⁰ *Ibid.*, 9

¹²¹ *Ibid.*

¹²² 'Making It Fair: A joint inspection of the disclosure of unused material in volume Crown Court cases' (July 2017), [5.2].

¹²³ 'A joint review of the disclosure process in the case of R v Allan: Findings and recommendations for the Metropolitan Police Service and CPS London', 6.

¹²⁴ A cut of 8.75% to fees for criminal legal aid litigation work was introduced in March 2014. Whilst no comprehensive empirical studies have been undertaken on the impact of this, recent research suggests it has been negative (Welsh L, 'The Effects of Legal Aid Lawyers' Professional Identity and Behaviour in Summary Criminal Cases: A Case Study' (2017) 44 *J. of Law and Soc.* (4) 559. The CPS have seen a budget reduction (amounting to approximately 20% in total) between 2010 and 2016, with a maintenance of funding levels this year. Among those expressing concern about the impact of this included the Chief Inspector of the CPS, Kevin McGinty (Bowcott O, 'Crown Prosecution Service chief inspector signals concern over funding' *The Guardian* (23 September 2015)

resources does not directly cause individual error, it does significantly raise the risk of this due to the reduced scope for scrutiny and investigation.

The Future of Disclosure

All of the above indicates the need for fairly radical reform of the disclosure process at the earliest stages of criminal proceedings. Whether one accepts that the police either cannot be trusted to handle disclosure effectively and fairly, or simply do not have the training and resources to do so, it is reasonable to conclude that responsibility must either be shared or removed from the police. Three potential solutions present themselves as viable in the short-term. The first might be termed “full disclosure” to the suspect and their legal representatives. As the primary investigator, the police have control of the gathering and flow of evidence and material. To ensure that relevant exculpatory material reaches the defence, this proposal would mandate ‘providing the entirety of the available evidence (except for sensitive material) to the defence, with an ongoing duty to continue disclosure of all evidence’.¹²⁵ The scope for ‘adversarial game-playing’ by the police would be significantly reduced, and the argument that the police simply do not have the resources to assess this would be rendered irrelevant. That being said, this would not necessarily eliminate the possibility that they police will fail to discover exculpatory evidence (or even seemingly ignore its possibility, as in *R v Kay*). Moreover, this solution has the potential to overwhelm suspects and their lawyers with a proverbial haystack of material, and no clue as to where the needles might be found.¹²⁶ Unless additional funding for legally aided lawyers accompanied such a change, it is likely legal representatives will either do so handle this task voluntarily or decline to do it all. The second solution is a variation on the first; rather than disclose all evidence to the defence, the police must provide all evidence to the prosecution for a decision regarding disclosure. Considering that the CPS have been rightly criticised in light of cases like Allan’s, this might be a less than ideal situation. There would also be cost implications for the prosecution (just as there would be for defence lawyers). However, it is arguable this already happens in practice in these cases where the disclosure process has not been handled properly. As HMICPSI and HMIC highlighted:

‘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’.¹²⁷

This solution might therefore be the most realistic, since it is to some degree already happening. It would undoubtedly require additional funding for the CPS (which might be considered more politically defensible than increases to legal aid).

The third solution is quite different. It would ‘remove responsibility for decision-making regarding disclosure from the adversarial parties altogether’, and place it in the hands of an independent agency or body.¹²⁸ In a joint submission to the Justice Select Committee (who are currently conducting an inquiry into disclosure in criminal cases), the Centre for Criminal Appeals and Cardiff Law School Innocence Project suggested an ‘Independent Disclosure Agency (IDA)’ which would:

‘consist of legally-qualified staff who are given full access to all police material in a case via access to the HOLMES 2 computer database. IDA staff should review all such

¹²⁵ Johnston E and Smith T, ‘Fixing a hole? Potential solutions to the problem of disclosure’ (*The Justice Gap*, March 2018): <http://www.thejusticegap.com/2018/03/fixing-a-hole-potential-solutions-to-the-problem-of-disclosure/>

¹²⁶ Ibid.

¹²⁷ ‘Making It Fair: A joint inspection of the disclosure of unused material in volume Crown Court cases’ (July 2017), [1.3].

¹²⁸ Johnston and Smith, ‘Fixing a hole?’ (FN126)

material, identify and remove any genuinely sensitive information, and disclose all remaining material to both prosecution and defence.’¹²⁹

Similarly, the author and Johnston suggested a variation on this: ‘Judicial Disclosure Officers’, placed in each police force, who are ‘judicial figure[s]... qualified/experienced to the level of District Judge or Deputy District Judge’.¹³⁰ They would receive all evidence and be tasked with determining:

‘what, if any, evidence fulfils the current requirements under the CPIA for disclosure of exculpatory evidence to the defence... what evidence is non-disclosable on the basis of irrelevance to the defence.... making decisions about withholding evidence on the grounds of sensitivity (for example, on Public Immunity or Article 8 ECHR privacy grounds)... for the life of a case’¹³¹

Either solution would be quite radical and ‘any such structural overhaul must be accompanied by increased resources’.¹³² Whether this like likely is a different question; but the concept of an independent body charged solely with determining disclosure issues would address many of the problems discussed in this article (with perhaps the exception of resourcing). In light of how long this problem has existed and its increasingly visible scope, such bold solutions should be seriously considered.

Considering the scenario experienced by Liam Allan, it is jarring to refer to him as lucky; but lucky he was, and this is a quality that should have no place in a robust and well regulated system of criminal justice. It is hoped that this case, like many previous examples, will spur long overdue examination and reform of the system of disclosure at the police station; a careful assessment of the approach of the police to their investigatory role (particularly in sexual offence cases); and consideration of the resources that should be devoted to ensuring the system functions effectively and fairly at all stages. Without action, this issue – generally ignored until the end of 2017 – will persist and produce miscarriages of justice which ruin the lives of innocent people, do a disservice to genuine victims of crime, and undermine the credibility of the criminal justice system. This was a “near miss” and should be taken as a warning signal for urgent and substantial reform; otherwise, we must sadly accept that there will be more Liam Allans – some of whom will not be so lucky.

¹²⁹ House of Commons Justice Committee, Disclosure of evidence in criminal cases inquiry, ‘Written evidence from the Centre for Criminal Appeals and the Cardiff Law School Innocence Project (DIS0032)’ submitted (April 2018), [20]: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/disclosure-of-evidence-in-criminal-cases/written/80673.html>

¹³⁰ Johnston and Smith, ‘Fixing a hole?’ (FN126)

¹³¹ Ibid.

¹³² Disclosure of evidence in criminal cases inquiry, ‘Written evidence from the Centre for Criminal Appeals and the Cardiff Law School Innocence Project’, [23]