The significance of culture in criminal procedure reform: Why the revised disclosure scheme cannot work

By Hannah Quirk*
School of Law, University of Manchester

Abstract Disclosure of unused material is essential to a fair trial, and non-disclosure has been a potent cause of miscarriages of justice. In England, Wales and Northern Ireland, however, recent legislation addressing this issue has prioritised the alleged problems that disclosure causes to the prosecution, rather than its demonstrable importance as a safeguard against wrongful convictions. Despite amendment by the Criminal Justice Act 2003, it is argued that the controversial disclosure provisions of the Criminal Procedure and Investigations Act 1996 cannot be made to work. This is a consequence of three fundamental defects in the statutory scheme: lack of consideration of the working cultures and practices of the key protagonists; the resulting inappropriate allocation of responsibilities; and insufficient recognition of the limited sanctions for disclosure failures that can be imposed fairly upon defendants under the current system. It has long been recognised that the effectiveness of due process reforms may be limited by police culture and the inadequate delivery of defence legal services. Drawing on new empirical data, this article suggests that it is equally important to consider the interplay between crime control legislation and occupational cultures. Legislative changes may otherwise reinforce poor practice and provoke injustice.

* Email: Hannah.Quirk@manchester.ac.uk.
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Disclosure of unused material\(^1\) by the prosecution has only comparatively recently\(^2\) been recognised as a legal obligation rather than a matter of professional courtesy or ethics but ‘in our adversarial system, in which the police and prosecution control the investigatory process, an accused’s right to fair disclosure is an inseparable part of his right to a fair trial’.\(^3\) In England, Wales and Northern Ireland, ‘the disclosure revolution’\(^4\) created by Part I of the Criminal Procedure and Investigations Act 1996 (CPIA) generated immediate concern amongst practitioners, policymakers and academics. Fears were expressed about its potential, both as a cause of wrongful convictions and as a means by which such mistakes will be less likely to be discovered.\(^5\) The CPIA is a peculiarly difficult Act to assess as it has resulted in little case law\(^6\) and the number of undiscovered wrongful convictions it may have caused is, axiomatically, unknowable. An understanding of the effects of the disclosure procedure thus requires a more nuanced investigation.\(^7\) This article

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1 Unused material is ‘... material which may be relevant to the investigation that has been retained but does not form part of the case for the prosecution against the accused’ (Criminal Procedure and Investigations Act 1996 Joint Operational Instructions—Disclosure of Unused Material (JOPI), issued by the Association of Chief Police Officers and the CPS in 1997 and 2002).

2 For a full history, see J. Niblett, Disclosure in Criminal Proceedings (Blackstone Press Ltd: London, 1997). He identifies the first authoritative ruling on the subject as R v Bryant and Dickson (1946) 31 Cr App R 146. The Attorney-General’s Guidelines (1982) 74 Cr App R 302 first codified the prosecution’s duty. This was developed subsequently by the courts (R v Ward [1993] 1 WLR 619; R v Keane [1994] 1 WLR 746).


6 It appears that where the defence is aware of potentially relevant material, this is usually disclosed. Defence applications to the court for secondary disclosure were made in only about 2.5 per cent of cases; informal disclosure, often with judicial encouragement, was more frequent (CPSI, above n. 5 at 5.82).

7 The Royal Commission on Criminal Justice (Report, Cm 2263 (HMSO: London, 1993)), established in the wake of a series of miscarriages of justice (see below n. 10) provided the impetus for disclosure reform. It has been argued that the Commission’s analysis was weakened by its failure to explore the social and organisational context within which these cases occurred (M. Maguire and C. Norris, ‘Police Investigations: Practice and Malpractice’ (1994) 21 Journal of Law and Society 72 at 73).
draws upon the findings of an in-depth, qualitative study\(^8\) of criminal justice practitioners to contend that, whilst the amendments to the CPIA introduced by Part V of the Criminal Justice Act 2003 (CJA) constitute an improvement, ‘the problems that afflict prosecution disclosure are too deep-rooted to be cured by legislative tweaking’.\(^9\)

Non-disclosure of exculpatory material has been a leitmotif of many notorious wrongful convictions.\(^10\) The CPIA nevertheless appears to have been drafted in a vacuum, without reference to these or other significant cases,\(^11\) academic research, its interaction with other legislation,\(^12\) or the adversarial nature\(^13\) of the criminal justice system. Disclosure has been described as ‘the battleground of the modern justice system’.\(^14\) This structural tension is exacerbated by the flawed premise underpinning the CPIA that prosecution and defence disclosure are equivalent or reciprocal; yet the two processes have discrete rationales, impose distinct responsibilities, raise divergent concerns, and necessarily attract different sanctions.\(^15\)

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8 One hundred interviews were conducted by the author between late 1998–99 as part of a doctoral research project examining the effects of the curtailment of the right to silence and the CPIA provisions in one large metropolitan area. Interviews were conducted with 26 legal representatives, 26 Crown Prosecutors, 17 police officers, 16 barristers, 6 justices’ clerks, 5 lay magistrates, 2 stipendiary magistrates, and 2 judges. In addition, 100 questionnaires were completed by police officers. Interviewees are identified in this article simply by their job title and a number.


10 *Inter alia* R v McIlkenny [1992] 2 All ER 417; R v Maguire (1992) 94 Cr App R 133; R v Kiszko *The Times* (19 February 1992); R v Ward [1993] 1 WLR 619; and R v Taylor (1994) 98 Cr App R 361. The Criminal Cases Review Commission identified non-disclosure as the third most common reason for referring convictions to the Court of Appeal (Annual Report, 1999–2000, para 2.4. (The only subsequent analyses have been in the 2003–2004 Annual Report, which states that non-disclosure was an issue in ‘a number’ of referrals, at 15 and the 2004–2005 Annual Report, which states that non-disclosure had been a ‘less frequent factor’ in referrals than in previous years, at 14.) Concerns were also expressed about inadequate prosecution disclosure in M. Zander and P. Henderson, *Crown Court Study*, Research Study No. 19, Royal Commission on Criminal Justice (HMSO: London, 1993).

11 The courts appeared to have been establishing a workable disclosure procedure (see R v Ward [1993] 1 WLR 619 and R v Keane [1994] 1 WLR 746) and had not recommended parliamentary action as they had done with, e.g., the right of suspects to make no comment at the police station (R v Alladice [1988] 87 Cr App R 380 at 385).

12 In particular, the ‘right to silence’ provisions (Criminal Justice and Public Order Act 1994, ss. 34–38). Subsequent Acts have also been introduced without consideration of their impact on the CPIA; e.g. file preparation time has been curtailed by the sending of indictable only offences to Crown Court at the first hearing (Crime and Disorder Act 1998, s. 51).


15 See Redmayne, above n. 9 at 443. The prosecution carries the burden of proof in establishing the guilt of the accused. It must, therefore, disclose its case in advance of trial to enable the accused to prepare a defence. The superior resources of the prosecution mean that it should disclose unused material it has obtained in order to ensure ‘equality of arms’ between the parties (see R. Leng, ‘Losing Sight of the Defendant: The Government’s Proposals on Pre-Trial Disclosure’ [1995] Crim LR 704). The suggestion that in return defendants should be obliged
Both the CPIA and CJA are underpinned by the ‘crime control’ values and rhetoric about ‘rebalancing’ the system that have characterised recent criminal justice policymaking.\textsuperscript{16} Allegations that speculative defence requests for unused material were causing significant difficulty in the administration of justice were made authoritatively\textsuperscript{17} but were largely anecdotal.\textsuperscript{18} In practice, the majority of offences have only a limited number of sustainable defences, and few cases generate much unused material. A minority of cases could give rise to problematic disclosure issues, typically those involving informants or covert surveillance. Such material, however, tends to attract claims of Public Interest Immunity (PII), which is specifically excluded from the CPIA regime.\textsuperscript{19} Despite arguments that reform was needed, PII is not addressed by the CJA.\textsuperscript{20}

Section 23 of the CPIA requires the investigator (usually a police officer) to retain, record and reveal to the prosecutor, all relevant material obtained in the course of an investigation. This information is classified on a series of schedules, which a named disclosure officer then passes to the CPS. Initially, a two-stage procedure was involved, whereby the prosecutor provided the defence with a copy of the schedule listing non-sensitive material, together with either any previously undisclosed material that, in the opinion of the prosecutor, ‘might undermine’ the Crown’s case, or alternatively, a statement that no such material existed. This stage was known as Primary Prosecution Disclosure. For the first time in the history of English criminal procedure, the defence was then obliged to submit a statement outlining its case in advance of trial, which had to be served within 14 days. Comment could be made and inferences drawn at trial if this statement was submitted late or deviated from in court. The investigator would then reconsider the unused material and advise the

to help either the prosecution or the system is accordingly ‘wrong in principle’ (Michael Zander’s note of dissent to the RCCJ report, above n. 7 at 223).


\textsuperscript{17} Michael Howard, above n. 16 at cols. 738–9; C. Pollard, ‘A Case for Disclosure’ [1994] Crim LR 42; Lord Taylor, ‘The Tom Sergant Memorial Lecture’ (1994) NLJ 125. The police also made representations to the RCCJ about the burden that disclosure imposed upon them.

\textsuperscript{18} No research was conducted into the issues surrounding disclosure before the changes were enacted. What empirical evidence there was, suggested that the vast majority of cases generated fewer than 125 pages of unused material (Law Society, Disclosure: Law Society Response (The Law Society: London, 1995)). Leng noted that ‘The spectre of the ambush defence has been perhaps the single most powerful factor in the campaign to abolish the right to silence in police interrogation and to require early disclosure of the defence case’ (above n. 15 at 706).

\textsuperscript{19} Section 21(2). Prosecutors can apply to the courts to order that material must not be disclosed on the grounds of Public Interest Immunity (ss. 3(6), 7(5), 8(5) and 9(8)). The defence can apply for a review of that order (s. 14(2) and s. 15(4)) and the court must keep the issue under review (s. 15(4)). If the court orders partial or full disclosure, the prosecution must then choose either to disclose the material or to drop the case (ss. 14(4) and 15(6)).

\textsuperscript{20} Ormerod, above n. 16 at 116.
prosecutor of any material that might reasonably support the stated defence, to be disclosed as Secondary Prosecution Disclosure. Prosecutors and investigators then retained an ongoing duty to keep the unused material under review.

This statutory scheme placed responsibilities on criminal justice actors which, as discussed below, failed to consider what was known of their occupational cultures and working practices. Such alien expectations led to the effective breakdown of the Secondary Prosecution Disclosure stage of the CPIA as practitioners adapted or ignored the provisions in accordance with its workloads or sense of justice. This provoked further criticism of the Act by the police, and its subsequent amendment by the CJA. The revised scheme amalgamates the two-stage disclosure procedure into a continuing duty on the prosecution to disclose any unused material ‘which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused’, an objective rather than a subjective standard. The CJA also requires greater defence disclosure.

This article contends that the disclosure regime cannot be made to work merely by amendment because both Acts ignore ‘the radically differing participant perspectives’ and working practices of the key protagonists. The statutory regime requires the culturally adversarial police to fulfil an effectively inquisitorial function; prosecutors to view material from a defence perspective; the defence to act in the interests of the administration of the justice system rather than of their clients; and defendants to cooperate with proceedings against themselves. The administrative burden imposed by the disclosure scheme on already overburdened practitioners has led to the routinised, minimal fulfilment of its requirements and the delegation of essential legal tasks by both sides to non-lawyers. Wider lessons for criminal process reform may be drawn from these findings. Introducing fundamental changes to criminal procedure in the absence of diagnostic research, and ignoring the working cultures and practices of those charged with the implementation of such legislation, is a recipe for failure and a potential source of injustice.

Compiling the schedules: cop culture and case construction

Responsibility for compiling the schedules of unused material is a ‘pivotal role’ in the disclosure regime, but one for which police officers are ill-equipped by purpose.

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22 CPIA, s. 3(1)(a), as amended by CJA, s. 32.
24 Plotnikoff and Woolfson, above n. 5 at 141.
25 See Leng, above n. 4 at 218.
training and occupational culture. The responsibility is onerous, time consuming and unpopular, as one sergeant interviewed complained, ‘Nobody in their right mind would volunteer to be a disclosure officer; I was a pressed man’.

Despite the importance of the role, neither the CPIA nor the Code specifies who should act as disclosure officer; it may be one person or many, a sworn officer or a civilian. The officer in charge of the investigation must ensure that all relevant material has been made available to the disclosure officer, but there is no certification process for this crucial stage. Every case requires the completion of at least five ‘MG6’ forms; something that the police regard as merely a mechanical task. To be done properly, however, this scheduling involves more than just bureaucratic cataloguing: it requires judgments about the legal significance of material, the consideration of multiple possible defences and potentially complex legal argument. Police officers are neither qualified nor trained for such a role; more than 20 per cent of decisions to discontinue cases by the CPS are due to the police having failed to establish an essential legal element of the offence charged. The provisions are complicated and the officers whom I interviewed appeared to have little understanding of what was required of them. Despite repeated questioning, the case-building officers did not appear to know what was meant by ‘might undermine the case for the prosecution’. None of the officers interviewed had seen a defence statement, which they were supposed to have reviewed when considering secondary disclosure.

26 PS/2.

27 In the region studied, the investigating officer usually prepared the schedules and submitted the file within 24 hours to the case-building team in the Criminal Justice Unit (CJU). It was planned to abolish the CJUs and to give arresting officers sole responsibility for file preparation and disclosure. Practical problems were envisaged with this, e.g. in communicating with the CPS or witnesses when the arresting officer is on leave or working nightshifts. Most thought that the quality of files would diminish, resulting in cases being ‘lost,’ as good investigators are not necessarily able administrators.

28 Police files are prepared in accordance with the national Manual of Guidance (MG). The CPIA scheme involves the completion of the MG6 ‘Confidential Information’ form and forms MG6B–E. Guidance for their completion is contained in the JOPI (above n. 1). The MG6 contains the disclosure officer’s assessment of the strengths and weaknesses of the case and all background information. The MG6B requires details of disciplinary findings against any investigating officers. The MG6C and D number, describe and locate the non-sensitive and sensitive unused material respectively. The confidential disclosure officer’s report (MG6E) should indicate on which schedule items for disclosure are listed and the reasons they fulfil the tests. It had to be completed once to highlight material that should be revealed as part of Primary Prosecution Disclosure and again for Secondary Prosecution Disclosure.

29 CPSI, above n. 5 at 4.11.


31 See above n. 27.

32 By contrast, the CPSI found that the defence statement was provided to the police in 95 per cent of cases (above n. 5 at 5.26).

33 One sergeant, when asked about his training replied ‘Four hours lecture and like okay I’m sitting there listening but I’ve got somebody in the cells who I’ve perhaps got to interview. As
The police occupy an anomalous position in the criminal justice process. They are accorded an inquisitorial, investigative role in an adversarial system, yet they continue to be perceived, by both themselves and the public, as agents of the prosecution. Many officers described their role in combative terms, often using sporting or martial analogies. One sergeant declared: ‘we’re salesmen for jail ... it’s us against them’. Some appeared to regard any measures to protect suspects, or strategies used by the defence, as unfair or cheating. Conversely, their own ‘tactics, or ploys’ were considered justifiable in terms of achieving the ‘right result’. Previous research has described how, rather than undertaking objective inquiries, police investigations may be structured in order to ‘construct’ cases against those whom officers believe to be guilty. This selectively gathered evidence may be filtered further by the CPIA provisions. Unused material is, by definition, not considered relevant to the case the police have built against a suspect. Some officers acknowledged their reluctance to give the defence potentially exculpatory evidence:

This thing where you’ve got to give them all your, all the weaknesses in your case. Well, if they can’t find them, why should we give them? I mean all they’re giving us is ‘that’s what my defence is going to be’. Such attitudes militate against the police being able or willing to perform the challenging duty imposed by the CPIA of, not merely reviewing evidence objectively, but of considering it from the perspective of the defence. Concerns have been expressed as to whether any police employee, even those not directly involved in the case, can be sufficiently impartial to execute this role. Some have argued that ‘absolv[ing] the police of the responsibility for identifying undermining material is likely to produce more rather than fewer miscarriages of justice’. The suggested alternative

soon as I finish this, I’ve to go and unlock somebody. Four hours was the maximum input I had on disclosure, and I would be the first to admit my grasp of the disclosure isn’t as good as it ought to be’ (PS/3).

34 PS/4.

35 A. Sanders, L. Bridges, A. Mulvaney and G. Crozier, Advice and Assistance at Police Stations under the 24-hour Duty Solicitor Scheme (Lord Chancellor’s Department: London, 1989) 56.

36 M. McConville, A. Sanders and R. Leng, The Case for the Prosecution (Routledge: London, 1991). The duty to investigate created by s. 23(1)(a) of CPIA is not explored here, but concern has been expressed that the police do not pursue lines of inquiry that might undermine the prosecution (see Crown Police Service Inspectorate, above n. 5 at 4.103).

37 PS/4.

38 Parallels may be drawn with custody sergeants who are also reliant upon information from the investigating officers and who rarely question their judgment about whether or not there is sufficient evidence to merit detention (D. Brown, PACE Ten Years On: A Review of the Research, Home Office Research Study No. 155 (Home Office: London, 1997) 57–63) as to do so runs counter to the prevailing police culture (see McConville et al., above n. 36 at 43–4).

39 Plotnikoff and Woolfson, above n. 5 at 135.
remedies of greater checks and balances, increased training and formal feedback are, however, inadequate, as they fail to address the influence of police culture.40

Police occupational culture41 is a powerful force that has impeded the effectiveness of due process reforms, such as those introduced by the Police and Criminal Evidence Act 1984.42 Past experience led to a recognition that:

change requires more than the promulgation of new rules. Reform requires a consideration not merely of a specific legal power, but rather of the context of that power in the fundamentals of the mandate, culture, and practice of policing.43

The need to consider the interaction between police working culture and legislation is even greater when legislative provisions have the potential to increase the risk of wrongful convictions. The CPIA has brought some benefits: the Code of Practice defining the responsibilities of the police in relation to investigation and disclosure has been described as ‘a benchmark the significance of which should not be underestimated’,44 and almost one-third of officers interviewed in my study thought that such guidance was beneficial. Nevertheless, the spirit of the Act runs counter to the efforts that had been made by statute, common law and organisational procedures to change the ethos of policing and to improve due process safeguards. Rather than requiring presumptive disclosure as the common law had done, the CPIA expects the police to indicate whether or not an item should be disclosed. It then provides scope for legitimately withholding material, whether by classifying it as irrelevant or sensitive.45 A detective explained how the provisions could be interpreted to avoid having to disclose potentially undermining material:

40 Other proposals may be subject to the same criticism, such as the further guidance and closer procedural compliance recommended by J. A. Epp, ‘Achieving the Aims of the Disclosure Scheme in England and Wales’ (2001) 5 E & P 188, or the Attorney-General’s guidance, above n. 5.
42 For example, suspects’ entitlement to legal advice could be undermined by a number of tactics, most commonly reading them their rights in such a way that they were unlikely to understand them (H. Fenwick, ‘Evading Access to Legal Advice’ (1995) 59 JCL 198).
45 Sensitive material is classified by the disclosure officer as that which it is not in the public interest to disclose (Code of Practice, para. 2.1).
There may also be information on that crime report and when you read it, you think ‘ooh’—a policeman has attended and he has put down an innocent comment on there like ‘the witness would never recognise these people again’—when in actual fact, you’ve taken that one step further and you’ve gone on to hold an identification parade and that witness has picked that person out. You could argue that could be detrimental to our case, but because it contains other information like their address, you would put that down ‘not to be disclosed’. And then let the CPS make the decision as to whether they think that information is relevant or not.46

Scheduled material should be described in sufficient detail to permit prosecutors to take decisions regarding disclosure without the need to examine the items in question.47 The desire of the police to secure convictions leads many officers to regard the CPS as too ‘soft’ in pursuing prosecutions. If an officer considers that material should not be revealed to the defence, the schedule is unlikely to portray the item in a way that attracts attention. In the Plotnikoff and Woolfson study, about three-quarters of non-sensitive schedules described material so poorly that it was not possible for the prosecutor to assess the nature of the material.48 Similarly, almost one-third of prosecutors I interviewed complained that the schedules were presented in the form of acronyms and codes.49 Even where the acronym is understood, this reveals only the type of document, not its content.

Most police officers claimed that everything was recorded, whether through honesty, to avoid losing cases on ‘technicalities,’ or because they did not see it as their role to filter material. A few Crown Prosecutors even suggested that some officers now list too much to avoid criticism. No provision is made in the Acts or Code of Practice for independent scrutiny of what is listed on the schedules. What assessments there have been, however, suggest that this work is not done well. The CPSI’s study found that non-sensitive schedules were defective in 38.5 per cent of all cases, and sensitive schedules were defective in 21.5 per cent of relevant cases.50 Plotnikoff and Woolfson found that in 45 per cent of cases, unused material was disclosed by the prosecution that had not been listed on any schedule. Material is frequently not cross-referenced between forms; 24 per cent of reports identifying unused material to be disclosed

46 DC/5.
47 JOPI, above n. 1 at para. 2.65.
48 Above n. 5 at 29. Examples included descriptions limited to ‘police notebooks’ or ‘messages’.
49 The Attorney-General’s guidance now states that descriptions should be ‘detailed, clear and accurate’ and ‘may require a summary of the contents of the retained material’, above n. 5 at para. 10.
50 CPSI, above n. 5 at 4.30 and 6.11.
listed material that was not on or cross-referenced to the appropriate schedule. In my research, one-quarter of barristers and solicitors, and one-third of Crown Prosecutors, expressed concern that important material was omitted from the schedules. This may be due to the volume of documentation in major investigations, officers’ failures to appreciate the potential significance of material, or mendacity. I was given numerous examples of relevant material that had been omitted from the schedules. The existence of these items had emerged serendipitously, often during the trial, leading to the abandonment of cases. Disturbing examples of material revealed in this way include:

- A box of unread material, including original statements.
- Details of identification parades that were illegal or where the defendant had not been picked.
- An interview with the main prosecution witness who had been arrested initially as a suspect.
- Details of someone wearing an identical shirt to the defendant, who had been arrested but not charged.
- The police command and control log, disclosed by prosecuting counsel after the closing speeches. This contained an eyewitness’s report consistent with the defendant’s, otherwise uncorroborated, account.

The most troubling unknown is, of course, the number of cases in which such material exists but is never discovered. The CJA does not address this risk of wrongful convictions, since the prosecution remains ‘heavily dependent on the integrity and diligence of the disclosure officer’.

**Prosecution disclosure**

The CPIA created an ‘awkward split of responsibilities’ between the police and CPS, which is artificial and unrealistic. There is a history of tension between the two organisations that legislators were clearly anxious not to exacerbate by any suggestion of a hierarchy. The result is a convoluted procedure that

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51 Above n. 5 at 33. The MG6C is the only schedule that the defence sees, so omissions from this are potentially very significant.
52 Ormerod, above n. 16 at 114.
53 CPSI, above n. 5 at 13.2.
54 For example, an officer who is unsure whether or not an item is relevant is expected to consult the prosecutor about listing it but the prosecutor must return the schedules to the disclosure officer if later amendments are required (JOPI, above n. 1 at 2.62 and 3.38). It has been noted that tension between the two bodies may be exacerbated if CJA, s. 28 and Sched. 2 (transferring responsibility for decisions about charging suspects from the police to prosecutors) are not implemented wholeheartedly and ‘with a strong desire to make a significant cultural change’ (I. D. Brownlee, ‘The Statutory Charging Scheme in England and Wales: Towards a Unified Prosecution System?’ [2004] Crim LR 896 at 906).
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misunderstands the relatively linear nature of the criminal process; a mistake replicated in the CJA.

The legislation makes the prosecutor formally responsible for disclosure when ‘lawyers are only as good as the material given to them’. Over one-third of the prosecutors interviewed expressed concerns about their reliance on the police. Prosecutors had mixed views about the adequacy of the schedules. In some cases, their judgments were based on their knowledge of the individual officers with whom they work. Differences of opinion may also reflect prosecutors’ varying levels of vigilance, as those who do not interrogate the schedules tend not to find omissions. It is rare for prosecutors to examine material that the disclosure officer has not identified as potentially undermining. In most cases, prosecutors said they would examine the schedules rather than the actual documents listed, unless something alerts them to a potential problem. Some will make certain basic checks, such as comparing initial reports with the witness statements, and then call for all the material if they notice discrepancies. Others prefer not to create work for themselves, despite the reservations they may have, as to do so would make their workloads unmanageable.

The CPIA asks prosecutors to undertake a task for which, like the police, they are neither suited nor trained. Prosecutors do not generally have defence or Crown Court experience and, accordingly, cannot be expected to know what might be useful to the defence at trial. They are not police officers and are therefore unlikely to know what unlisted material might exist in particular types of case. Experience and intuition might nonetheless enable prosecutors to detect omissions. As one executive officer described it, ‘you have to have a bit of a Sixth Sense to anticipate what isn’t there’, but such a critical safeguard should not be left to depend merely upon clairvoyancy. In bigger or more complex cases, disclosure is a burdensome task for prosecutors. Problems with CPS staffing and resources have been well documented, and several interviewees raised the effects of this on the implementation of the disclosure provisions. The CPS has structured its casework in a manner similar to

56 Some complained that increased formality of communicating only through the CJUs and the policy of rotating officers out of the specialist squads, such as drugs and child protection, meant that these personal contacts and trust had broken down.
57 CPSI, above n. 5 at 4.102.
58 EO/3.
59 One Principal Crown Prosecutor (PCP/16) described a case involving nine defendants, each facing 16 charges. All made no comment in interview and no defence statements had been submitted. She spent three days at the police station inspecting all 5,000 items on the unused material schedule considering whether or not each should be disclosed.
60 A solicitor told me that writing to the CPS in the biggest city in the region was ‘like sending it into a black hole … it’s not [their] fault, it’s just they haven’t got enough staff and they’re so demoralised in there, so they’re not going to look at the schedules’ (Sol/2).
that criticised in defence solicitors’ firms. Solicitors focus on advocacy and preparation for hearings at the magistrates’ courts and present whichever cases happen to be listed in the court in which they are appearing. Crown Court work and increasing amounts of pre-committal preparation are undertaken by executive officers, with legally trained prosecutors giving advice only infrequently. This division of labour is potentially dangerous, for again, non-lawyers cannot be expected to appreciate fully the potential evidential significance of material in the prosecution’s possession.

The responsibility given to the CPS ‘implies a trust in the objectivity and insight of prosecutors which experience suggests might be misplaced’. Some prosecutors demonstrated very adversarial attitudes and a dislike of having to provide material to the defence. One executive officer applauded the CPIA provisions because:

Now we are entitled to say ’on your bike, why should we do it all?’ Sometimes you were ending up doing their defence work for them because you were giving them their defence.

It is remarkable that the two-stage disclosure scheme was drafted in such a way that prosecutors’ responsibilities under the Act could conflict with their overriding duty to act fairly. When considering primary disclosure, prosecutors could legitimately withhold material that might have supported a defence but did not directly undermine any positive assertions in their case. At the secondary disclosure stage, material could be withheld which was supportive of a defence other than the one stated. There is great variation in the application of the disclosure provisions between CPS branches, officers, and types of cases. Much depends on the temperament of the individual prosecutors and their workloads. Those interviewed varied between disclosing everything in the interests of either justice or expediency, to those who

62 See Rt Hon. Sir Iain Glidewell, The Review of the Crown Prosecution Service: A Report, Cm. 3960 (TSO: London, 1998) 67; Plotnikoff and Woolfson, above n. 5 at 55, were advised that caseworker involvement with unused material had dropped from 80 to 50 per cent of cases after publication of the CPSI Report.
64 EO12.
66 Although the Attorney-General’s guidance, above n. 5 at para. 37, discourages such an approach.
67 In one instance, the CPS refused to disclose a statement from a witness who said the accused was acting in self-defence, because the defence stated was alibi (British Academy of Forensic Sciences/Criminal Bar Association, above n. 5 at 21).
68 CPSI, above n. 5 at 9.7 and 13.36. Of the two branch offices visited for this study, the first was much more enthusiastic about the CPIA (71 per cent were in favour and 14 per cent opposed; at the other, 50 per cent were in favour and 38 per cent opposed).
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applied the tests rigorously, either to avoid setting precedents or as a curb upon the
defence. The CPS Inspectorate reported examples where prosecutors had applied ‘an
unreasonably strict interpretation of the test’69 and some of the barristers I
interviewed thought that the provisions were being interpreted ever more exactlying.

Prosecuting counsel tempered the operation of the original CPIA regime by extensive,
informal disclosure. This created tension with Crown Prosecutors and the police,
many of whom regarded such behaviour as undermining their decisions and the
integrity of the Act.70 The barristers interviewed were almost unanimous in their
opposition to the limitations on full disclosure required by the CPIA. Several emphasised
the importance of the independent Bar as a safeguard in the disclosure regime:

The Bar is an independent referral body, independent of the CPS or
anybody else ... Most of us prosecute and defend ... If you get a whiff that
there’s something slightly funny going on, you can investigate and these
things come tumbling out ... We sometimes end up in conflict
with the civil service lawyer who is told ‘you must apply the rules’. For
example, if you go round copying lots of stuff for the defence, it’s
expensive, it’s a nuisance and that is how it’s looked at.71

The Bar Code of Conduct has provided a fortuitous safeguard to underpin the CPIA
disclosure regime, but its effectiveness depends on the, often limited, amount of
time that the barrister has to consider the brief. Prosecuting counsel are rarely
requested to advise formally on the disclosure of unused material, and the
instructions they receive regarding the prosecutors’ decisions were judged to be
inadequate in about one-third of relevant cases.72 Almost three-quarters of prosecuting
counsel do not usually receive unused material with the brief.73

The single objective test introduced by the CJA is more straightforward than the
separate tests for primary and secondary disclosure, which in practice were often
arbitrary and difficult to distinguish.74 Whilst representing an improvement on the

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69 Above n. 5 at 4.117.
70 See Association of Chief Police Officers (ACPO), Response to the Report by the Right Honourable
Lord Justice Auld Following his Review of the Criminal Courts of England and Wales (January 2002),
available at www.dca.gov.uk/criminal/auldcom/cja/cja13.htm#part10, accessed 8 November
2005; and CPSI, above n. 5 at 9.10.
71 Barrister/3.
72 They were asked to advise in 22 out of 380 cases studied (CPSI, above n. 5 at 4.159 and 4.162).
73 Plotnikoff and Woolfson, above n. 5 at 56.
74 For example, the JOPI (above n. 1 at 3.24 and 3.49) suggested that material that pointed away
from the defendant having committed the offence with the requisite intent should be disclosed
at the primary stage, and material that might assist the defence with cross-examining
prosecution witnesses should be secondary disclosure. The wording of the CPIA might suggest
that the opposite classifications were more appropriate.
existing situation, this continuing duty of review still fails to consider the working routines of the police and prosecution, and the generally linear progression of cases through the system. Once the police have submitted a file, they usually consider their involvement in the disclosure processes to be at an end unless the CPS makes a specific inquiry.\textsuperscript{75} Even under the CJA, the first examination of the unused material is likely to be the most thorough, and often the only systematic scrutiny. Yet at this early stage, investigations may still be ongoing and the prosecution’s case remains subject to change. Unless given the broadest interpretation, ‘since relevance is context dependent … prosecution disclosure decision[s] will remain inherently speculative until defence disclosure has been made’.\textsuperscript{76} Unexpected issues may also arise during the trial that make previously unused material relevant. It is possible that no member of the prosecution team in court will have personal knowledge of all the unused material. The disclosure officer is unlikely to attend the trial, the CPS executive officer may not be present (organisational stringencies within the CPS mean that caseworkers now have to cover two or three courts simultaneously), and counsel may not have viewed the unused material.\textsuperscript{77} The barristers interviewed complained that they are no longer paid for reading unused material. This financial disincentive further weakens their effectiveness as a safeguard in identifying potentially relevant undisclosed material and monitoring the process of continuing review.\textsuperscript{78}

**Defence disclosure**

Much of the discontent the police expressed with the CPIA arose from the perceived unfairness of their having to make extensive disclosure, whilst defendants made only token reciprocal efforts.\textsuperscript{79} Having replaced the partially contingent nature of prosecution disclosure with a single ongoing duty of review, seven of the nine sections relating to disclosure in the CJA focus upon the requirement for more detailed defence statements.\textsuperscript{80} The duty imposed on defendants and their legal representatives to submit defence statements within a strict 14-day time limit is predicated upon the importance of processing cases expeditiously, in accordance with the prevailing

\textsuperscript{75} As described above, none of the officers I interviewed had seen a defence statement.

\textsuperscript{76} See Ormerod, above n. 16 at 114.

\textsuperscript{77} The CPSI expressed concern as to whether prosecuting counsel could properly discharge its duty of continuing review as they will rarely have read the material and Crown Prosecutors were not always informed of unused material created after the primary disclosure stage (above n. 5 at 7.7 and 7.4).

\textsuperscript{78} The Graduated Fees Scheme determines the taxation and payment of fees for advocacy and preparation in most Crown Court cases. Unused material is excluded from the calculation of work undertaken (\textit{Archbold} Supplement (Sweet and Maxwell: London, 2005) Appendix G, 35A; and for prosecutors, see www.cps.gov.uk/publications/docs/graduatedfee.pdf, accessed 8 November 2005).

\textsuperscript{79} See Phillips, above n. 14 and ACPO, above n. 70.

\textsuperscript{80} This includes details of any witnesses it is proposed to call and any experts consulted, whether or not they are to be called.
political ideas of system ‘rebalancing’ and the philosophy of managerialism. This duty of providing information to the prosecution in advance of trial compromises the function of the defence lawyer in an adversarial system and is rarely a priority for the defendant. The CJA requirements may make it more difficult for the defence to test the prosecution case in certain circumstances, or to adapt its case to the evidence presented by the Crown at trial. Although attractive to the crime control lobby, these requirements were never likely to have a dramatic impact on the conviction rate, as there was little evidence that ambush defences and ‘fishing expeditions’ were enabling ‘criminals’ to escape justice hitherto. The literature available when the CPIA was passed, detailing the working practices of defence solicitors and their general lack of adversarialism, indicated that such conduct was unlikely to be widespread. It also suggested that defence solicitors would be unlikely to engage with the disclosure procedures with the necessary scepticism and spirit of inquiry.

There is a marked difference in attitudes between barristers and solicitors regarding disclosure. The Bar Council issued a Practice Statement advising barristers against drafting defence statements unless given adequate time, because ‘if instructions are accepted, then the professional obligations on counsel are considerable’. Most solicitors’ firms, however, delegate their Crown Court work, including the tasks of scrutinising the disclosure schedules and drafting defence statements, to paralegal staff. Few legal representatives in my research showed any enthusiasm for using statements tactically to elicit material. I was shown a variety of formats for defence statements; many were merely pro formas. Some included detailed questions about sensitive material and PII applications but most tended to be as ‘brief’ or ‘vague as possible’ in order to leave scope to adapt the defence presented at trial, and to avoid

82 The courts vary as to how amenable they are to granting extensions to the 14-day time limit. If the defendant fails to give instructions, the solicitor has to choose between submitting a statement without authority, or the risk of comment being made or inferences drawn at trial. CJA, s. 36 means that a statement will now be assumed to have been given with the client’s authority, unless the contrary is proved.
83 See above n. 18.
84 McConville et al., above n. 61. Even if it were, the miscarriages of justice that have been uncovered or prevented by fishing expeditions mean that, ‘it should certainly not be assumed that it is a tactic inimical to justice’ (Leng, above n. 15 at 707).
85 Solicitors did not appear to share the concerns of barristers about the risks of wrongful convictions resulting from the CPIA; only 15 per cent of legal representatives interviewed expressed such fears, whereas barristers were almost unanimous in their condemnation of the Act.
87 A small minority thought that counsel would need to be involved in the process. Barristers tended to view such requests as an admission of the solicitor’s incompetence or desire to ‘cover their backs’.
making any concessions that might support the prosecution’s case. Plotnikoff and Woolfson found that just over half of defence statements either contained a bare denial of guilt or did not meet the requirements of the CPIA.88 Most practitioners interviewed for this study thought that defence statements were merely an administrative requirement rather than of any practical utility. This expectation became self-fulfilling, as CPS executive officers revealed that they regarded any inquiries contained in the statements as ‘just a formula’ and duly ignored them. Many of those interviewed pointed to the limited sanctions that could be imposed on defendants for failure to comply. It would be unfair if the courts refused to allow a relevant item to be disclosed or a defence not to be advanced as a punishment for a bureaucratic failure. These considerations rendered the two-stage CPIA regime effectively unworkable.

The CJA requires more detailed defence statements and gives the prosecution and co-defendants scope to comment on any inadequacies without leave of the court. It is, however, difficult to see what can be inferred from a late or deficient statement if the defence was advanced in police interview, or witness or alibi details were submitted well before trial. Such inferences have been described as artificial in comparison with those permissible from ‘no comment’ interviews under s. 34 of the Criminal Justice and Public Order Act 1994.89 Whilst the courts have applied s. 34 often and increasingly widely90 they have shown little enthusiasm for the additional scope the CPIA gave for directing juries about drawing inferences from inadequate disclosure and the CJA seems unlikely to offer greater encouragement. It would thus appear that the CJA reforms in relation to defence statements were ‘designed more for their symbolic resonance than for their practical utility’.91

Conclusion

The disclosure provisions of the CPIA, as with so much recent criminal justice policy, attacked a crime control chimera of criminals exploiting due process protections to escape justice. The CJA was an attempt to rectify an unnecessarily complex system that was not working and had lost the confidence of all participants. Although the CJA offers some improvements, the disclosure procedure cannot be made to work satisfactorily merely by legislative amendment.

88 Above n. 5 at 55. The CPSI judged that 25 per cent of defence statements contained inadequate detail for the prosecutor to make an informed decision about disclosure (above n. 5 at 5.19).
89 Redmayne, above n. 9 at 446.
90 This legislation has generated numerous appeals and required increasingly complex directions to juries, but has offered relatively limited evidential advantage to the prosecution (see D. Birch, ‘Suffering in Silence: A Cost-Benefit Analysis of Section 34 of the Criminal Justice and Public Order Act 1994’ [1999] Crim LR 769; I. Dennis, ‘Silence in the Police Station: the Marginalisation of Section 34’ [2002] Crim LR 25).
91 Redmayne, above n. 9 at 448.
These Acts illustrate the critical importance of considering the interplay between occupational practices and cultures, and the implementation of ‘crime control’ initiatives. Inappropriate division of responsibility under the CPIA has created confusion and vacuums of accountability. The disclosure scheme is dependent upon the accurate scheduling and classification of material by an ‘often relatively inexperienced investigative officer perfunctorily trained for the purpose’.92 Yet in an adversarial system of criminal justice, the selection of material with which to compose a defence and to test the prosecution case ought primarily to be the responsibility of a defence solicitor.93 The police have little interest or investment in this critical task, which conflicts with the prevailing culture of policing. Crown Prosecutors are responsible for making disclosure but they are reliant upon schedules that are often insufficiently detailed and contain significant omissions. Specialist prosecutors are also unsuited to considering material from the perspective of the defence; it is noteworthy that prosecuting counsel, who also defend, tended to regard the requirements of a fair trial as overriding those of the CPIA.

Disclosure is a critical and complex legal responsibility, but CPIA tasks are routinely carried out by non-lawyers. The delegation of work by the CPS and defence solicitors to paralegal staff means that it is unremarkable for a case to reach the Crown Court without a qualified lawyer having had any involvement in the disclosure process. Recent reforms have not addressed these structural and cultural shortcomings. The continuing duty of review introduced by the CJA is in practice likely to be honoured more in the breach than observance, as it ignores the generally linear progression of cases through the system. The limited extent of the problems the Acts sought to address, and the restricted sanctions that can be imposed fairly upon defendants, mean that the CJA requirements for more detailed defence disclosure are likely to be of greater rhetorical than practical effect.

Disclosure of unused material is crucial to ensure that defendants receive a fair trial and in safeguarding against wrongful convictions. Requiring the police and prosecution to discriminate about disclosing material ignores the lessons of the most notorious miscarriages of justice, risks reinforcing bad practice and may lead to further wrongful convictions. No system can thwart sufficiently determined malfeasance, but to minimise the risk of errors occurring, deliberately or otherwise, requires coherent allocation of responsibilities, within and between organisations fully trained and well-motivated officials who understand their duties, and a robust
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system of oversight to detect and deter mistakes.94 Despite the CJA reforms, the CPIA fails on each count; its deficiencies a continuing reminder to policymakers of the imperative to address the interaction between legislative initiatives and the occupational cultures and practices of criminal justice practitioners. Such omissions from the 'law in books' may otherwise result in unjust 'law in practice'.

94 CPSI, above n. 5 at 13.39.