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**DETECTIVES AND DISCLOSURE: AN ANALYSIS OF THE IMPLEMENTATION OF THE DISCLOSURE PROVISIONS OF THE CRIMINAL PROCEDURE AND INVESTIGATIONS ACT 1996 BY CID OFFICERS, BASED ON A STUDY OF OPERATIONAL PROCEDURE IN TWO POLICE FORCE AREAS.**

**CHRISTOPHER WILLIAM TAYLOR**

A thesis submitted in fulfilment of the requirements of the University of Durham  
(Dept of Law) for the degree of Doctor of Philosophy

December 2002

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18 JUN 2003

**DETECTIVES AND DISCLOSURE: AN ANALYSIS OF THE IMPLEMENTATION OF THE DISCLOSURE PROVISIONS OF THE CRIMINAL PROCEDURE AND INVESTIGATIONS ACT 1996 BY CID OFFICERS, BASED ON A STUDY OF OPERATIONAL PROCEDURE IN TWO POLICE FORCE AREAS.**

**CHRISTOPHER WILLIAM TAYLOR**

The Criminal Procedure and Investigations Act 1996 introduced new procedures for the handling of unused material in criminal cases. Defective treatment of such material has been a central aspect of many of the most notorious miscarriages of justice of the past 25 years.

This work seeks to present an overview of the first three years of disclosure under the new provisions, by reference to a study of disclosure practice within two police force areas. In addition, by examining the process of investigation and file preparation, it is possible to identify the operational and cultural factors within the police service which continue to impede the effective treatment of unused material. Central to this process are the working practices of the CID and the way in which they interface with other elements of the criminal justice system. This thesis presents an ethnographic analysis of the reasoning and strategies employed by those involved in the process of disclosure, in an attempt to highlight weaknesses in the current regime for the handling of unused material.

Having identified those aspects of police working practice which militate against the effective operation of the 1996 Act, the study concludes with consideration of the most recent Government proposals in relation to disclosure in order to assess their likely success.

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**SECTION 1.**

**DISCLOSURE WITHIN THE CRIMINAL JUSTICE  
SYSTEM**

# 1. introduction

## 1.1. disclosure

'I mean, the Act is not adhered to 100%. You get so many pieces of paper that some inevitably go in the bin because they are no use...they don't show anything, so basically they end up in the bin.'<sup>1</sup>

'For the average operational police officer at the time it was just viewed as nothing too important. It was a pain in the arse and we would put it to one side. "If it bites us then we will patch it up after that".'<sup>2</sup>

The principal aim of this work was to consider in detail the operation of advance disclosure, by which is meant the process of (primarily) the prosecution making known to the defence material which has been gathered during the investigation, which is not to be used by the prosecution, but which may impact on the case by either undermining the prosecution case or assisting the defence. It is widely accepted that the current procedures for disclosure of this so-called 'unused material', as set out in the Criminal Procedure and Investigations Act 1996, have never operated as originally intended,<sup>3</sup> leaving the possibility that potentially vital information will be withheld from the defence, either innocently or otherwise. Less clear, however, are the reasons *why* such omissions occur. The instrumental role played by disclosure within the pre-trial process makes it essential that we gain an understanding of why it is that material which should be disclosed is routinely ignored and why the criminal justice system as a whole appears incapable of adequately recognising and correcting defective disclosure where it occurs.

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<sup>1</sup> CID 7/40.

<sup>2</sup> ASU 12/26.

<sup>3</sup> This is the conclusion of all of the major studies of CPIA disclosure to date. See the Law Society (1999) *CPIA 1996 Disclosure Provisions Survey*. (unpublished); *Survey of the Practising Independent Bar into the Operation in Practice of the Criminal Procedure and Investigations Act 1996 Disclosure Provisions*. British Academy of Forensic Sciences and the Criminal Bar Association. October 1999. (unpublished); Crown Prosecution Service Inspectorate. *Report on the Thematic Review of the Disclosure of Unused Material*. 2/2000 (March 2000). (unpublished).

Although the popular perception of 'fighting crime' centres on the detection and pursuit of suspects, the reality is that success, measured in terms of convictions, is increasingly dependent on the administrative construction of 'cases'. The ability to translate physical evidence into the paper form which forms the basis for all subsequent stages of the prosecution process is now a key skill for police officers, a situation made more difficult by the ever expanding range of scientific and technical data at the disposal of investigators, much of which generates yet more documentation to be accounted for as part of the file preparation process. This surfeit of material, together with the historical difficulties experienced by the police in dealing with the concept of unused material has made the question of disclosure central to many of the wider concerns which exist over the effectiveness of the criminal justice system.

The impetus for this study came with the 1996 Act which, even before its introduction, had been criticised<sup>4</sup> for the fundamental shift which it represented in the balance of power between prosecution and defence in matters of unused material. This debate is examined in some depth in later sections of this work<sup>5</sup> but, from the outset, the introduction of the new disclosure regime presented a valuable opportunity to monitor the effectiveness of the police in implementing this contentious legislation. This study presents an analysis of the first three years of CPIA disclosure in two regional police forces in an attempt to identify those factors, both cultural and institutional, which have acted to impede the effective operation of the provisions.

## **1.2. structure**

This work can be divided into two sections, with Chapters 1 to 8 providing a background to the empirical findings presented in Chapters 9 to 13. After an overview in Chapter 2 of the limited disclosure literature to date, Chapter 3 contains

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<sup>4</sup> See, for example, Redmayne. R. 'Process Gains and Process Values: The Criminal Procedure and Investigations Act 1996.' [1997] 60 MLR 79.

<sup>5</sup> See Chapter 5.

a discussion of the 'due process' and 'crime control' dichotomy as postulated by Herbert Packer, which represents a recurring theme within this study. As with other aspects of the criminal justice system, Packer's models provide a valuable theoretical framework for assessing the competing pressures at work in the implementation of CPIA and, at various points within this work, the models are used to demonstrate the frequently subliminal forces at work. The nature of the police role means that the essentially due process provisions of CPIA have been implemented within an environment traditionally influenced more by crime control values and the tensions generated by this ideological conflict are central to many of the defects in the operation of disclosure. Packer's models provide a point of reference against which the actions of the police and others within the disclosure regime may be assessed.

In Chapter 4 a brief history of disclosure in the UK is provided, charting the key developments leading up to the implementation of the Criminal Procedure and Investigations Act 1996. The concept of disclosure has proved problematic for police and courts alike and, as with many other perceived due process safeguards, it has become embroiled in the political struggle between political parties eager to lay claim to the 'law and order' agenda. Inevitably, this was reflected in the final statute, and the sections on the parliamentary passage of the Criminal Procedure and Investigations Bill demonstrate the way in which the initial proposals were subverted by this scarcely hidden agenda which proved, ultimately, to be in conflict with the due process safeguards embodied in the Human Rights Act 1998. The extent to which CPIA can be reconciled with the requirements of HRA is also considered in this chapter and it is suggested that the theoretical safeguards provided by the 1998 Act may not, ultimately, prove sufficient to remedy the defects in CPIA. This is followed in Chapter 5 by a brief outline of the key provisions of the Act itself.

In examining the operation of disclosure in practice it is clear that, despite the role played in the process by the CPS and defence, the routine control of unused material remains very much in the hands of the police. For this reason, the attitudes and working practices of officers are central to assessing the effectiveness, or otherwise, of the provisions and it is the aim of this work to seek some explanation for the widespread failure of the disclosure regime in those underlying factors which impact directly on the ability and willingness of officers to deal with unused material effectively. In order to provide a context for the findings detailed in the later chapters, Chapters 6 and 7 outline some of the major structural changes which have affected the police service over recent years and which have combined to shape the operational character of officers. It is generally accepted that the 'golden age of policing'<sup>6</sup> has gone, to be replaced by performance culture, performance monitoring and performance indicators. In the process, the 'police force' has evolved into an increasingly beleaguered 'police service' and this transition has not been without difficulty for many officers. An appreciation of the impact of this process on culture and morale is crucial to understanding the perspective which officers bring to their duties (including disclosure) and this is particularly important in relation to the CID officers whose work forms the basis of this study. Some of the environmental factors which have combined to shape the CID personality and the cultural factors particular to this group are considered in detail in Chapter 8.

After these introductory sections, attention turns to the practical application of the disclosure provisions themselves by operational CID officers and the remainder of the study (Chapters 9 to 13) provides a stage-by-stage examination of disclosure within the investigation and file preparation process, based on the fieldwork conducted within two police forces over the period 1999-2001. Chapter 9 outlines the methodological strategies employed during the fieldwork for this study and, in particular, the decision to employ extensive interview data to draw out the largely subconscious motivation of detectives. In addition, a number of practical difficulties

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<sup>6</sup> 'When the streets were protected by bands of jovial bobbies, taking cups of tea and slices of Hovis with worried parents, and a clip round the ear was the only weapon in the arsenal of deterrence'. Baldwin R & Kinsey R (1982) *Police Powers and Politics*. London: Quartet. p 9.

were encountered during the research and the way in which these were addressed, together with the mechanisms by which the research data was collated and interpreted, are also considered in this chapter. The basis of the work was to examine the way in which detectives approach disclosure decision making at an operational level and to explore the impact of the cultural and practical factors which emerged from interviews conducted with investigators of all ranks, supported by similar interview data from CPS staff, defence solicitors and others. By allowing officers to describe, in their own words, the strategies and reasoning employed in dealing with unused material, it is possible to highlight potential conflicts between the requirements of CPIA and the realities of policing.

Comments from the various interviews are identified by a straightforward referencing system, with a prefix such as 'CID' or 'CPS', followed by the number of the interviewee and the text location of the quotation within the transcript of the interview. Other material, such as excerpts from case files, are referenced in order to locate them within the research data but their origins are obscured for reasons of confidentiality.

By adopting an essentially chronological approach and charting the process of disclosure through the investigation, file preparation and submission stages of case preparation, it is possible not only to identify those factors particular to the CID which undermine the operation of CPIA, but also to recognise the importance of the interfaces between investigators, administrative staff and prosecutors which act to exacerbate police failings in relation to unused material. The persistent failure of disclosure arises from errors compounded by all stages of the process and it is only by considering the treatment of unused material in its entirety that a true picture of the scale of the problem becomes apparent. For this reason it is important that the disclosure process is viewed not as a seamless and continuous process but, instead, as a series of stages marked by critical interfaces which mark the transfer of information from police to ASU, from ASU to CPS and from CPS to defence. At each of these interfaces, the transfer of material and all subsequent communication is

tainted by cultural forces which operate from both sides and a key aspect of this work has been to identify the origins of such antagonisms and their consequences.

With this objective, Chapter 10 examines how considerations of disclosure influence the actual investigation and exert a, mostly subconscious, influence on officers to pursue or record certain enquiries. From here, attention turns in Chapter 11 to the critical file preparation stage, where the 'paper' case is created and the full impact of the disclosure duties becomes apparent, as officers 'shape' the version of events that will form the basis for all subsequent stages of the prosecution process. Once again, issues of disclosure are an integral part of the process and affect the way in which investigators approach this crucial stage of the process. From here, Chapter 12 considers the impact of loss of case ownership on the police as others, most notably the Crown Prosecution Service and the defence, introduce their own (and competing) interpretations of the disclosure agenda before, in Chapter 13, a brief consideration of those characteristics of the trial process itself which act to undermine the operation of disclosure. Finally, Chapter 14 draws together the conclusions of this research and attempts to assess the overall impact of disclosure under CPIA.

It has already been acknowledged that the failings of the current disclosure regime are widely recognised and so, in beginning this work, there was little expectation of finding anything other than a system which was than flawed. The purpose of this study, therefore, was not to ascertain whether disclosure operated as intended (as this question has already been answered elsewhere) but rather to provide something which is missing from other studies of the subject – some indication as to *why* the provisions are not being applied adequately.

It is apparent that the answer is to be found, primarily, in the attitudes and conduct of those officers responsible for implementing the practicalities of disclosure, as they are instrumental in determining the direction of the inquiry and in deciding what material falls to be disclosed to the defence. As such, the perspective which the

individual officer brings to applying this highly discretionary legislation assumes central importance and, for this reason, particular emphasis is placed on the way in which officers themselves describe their activities. Their own words are used wherever possible to convey the nuances of the underlying norms and values which underpin their actions and these are assessed and challenged on an ongoing basis throughout this work, with the aim of presenting a continuous analysis of the complexities of disclosure as it unfolds during the various stages of file preparation and submission.

### **1.3. questions to be addressed**

Over the period of this research, from 1998 to 2002, a number of developments served to underline the urgent need for improvements to the disclosure regime as embodied in the 1996 Act. Research by the Police,<sup>7</sup> the Law Society,<sup>8</sup> the Bar Council<sup>9</sup> and the CPS<sup>10</sup> consistently highlighted failures in the disclosure mechanisms and contributed to a climate of unease with the system as it currently operates. In addition, revised Attorney General's Guidelines were issued in 2000<sup>11</sup> but even this did little to ease concerns, as instances of alarmingly defective disclosure continued,<sup>12</sup> exacerbated by persistent fears over wider police misconduct.<sup>13</sup>

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<sup>7</sup> Such as the 1998 survey by South Wales Police. (unpublished).

<sup>8</sup> Law Society (1999) *CPIA 1996 Disclosure Provisions Survey*. (unpublished).

<sup>9</sup> *Survey of the Practising Independent Bar into the Operation in Practice of the Criminal Procedure and Investigations Act 1996 Disclosure Provisions*. British Academy of Forensic Sciences and the Criminal Bar Association. October 1999. (unpublished).

<sup>10</sup> Crown Prosecution Service Inspectorate. *Report on the Thematic Review of the Disclosure of Unused Material*. 2/2000 (March 2000). (unpublished).

<sup>11</sup> Legal Secretariat to the Law Officers. *Attorney General's Guidelines: Disclosure Of Information In Criminal Proceedings*. 29th November 2000.

<sup>12</sup> *R v Humphreys and Others*, unreported, 14<sup>th</sup> February 2000, Maidstone CC, T19990290, T19990344, Crush J; *R v Langley* [2001] Crim LR 651 CA; *R v Jamil* [2002] Crim LR 56 CA.

<sup>13</sup> *R v Hall, O'Brien and Sherwood* [2000] Crim LR 676 and Dein. J. *Police Misconduct Revisited*. [2000] Crim LR 801.

In December 1999 the Lord Chancellor appointed Lord Justice Auld to report on the operation of the criminal courts,<sup>14</sup> with wide terms of reference,<sup>15</sup> including disclosure, and informed by a Home Office study into the operation of the 1996 Act.<sup>16</sup> The recommendations contained in the subsequent White Paper<sup>17</sup> will be considered in the conclusion of this work but, at the outset, it is possible to identify a number of fundamental questions which inform any research into this area:

1. Is there any evidence that disclosure does not operate as intended?
2. What are the potential consequences?
3. Can the reasons for any perceived failures be identified?
4. Are the causes of any perceived failures innocent or otherwise?
5. Can any perceived failures be remedied?

These questions will be revisited in the conclusion to this work, where the findings of this study will be compared with the other recent research, in an attempt to generate a more complete picture of how this vital aspect of the criminal justice system operates in practice. It is hoped that, by providing some insight into the motivation, reasoning and strategies employed by those directly involved with operational disclosure, this work will augment that which is already known about the mechanisms for the handling of unused material and address aspects of the process which have, to date, remained relatively unexplored.

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<sup>14</sup> Auld, L. J. (2001) *A Review of the Criminal Courts of England and Wales*, Final Report. London: HMSO.

<sup>15</sup> But also with accusations of underfunding not levelled at either the Philips Commission or Runciman. See Zander, M. *What on Earth is Lord Justice Auld supposed to do?* [2000] Crim LR 419.

<sup>16</sup> Plotnikoff, J., Woolfson, R. (2001) *A Fair Balance? Evaluation of the Operation of Disclosure Law*. London: HMSO.

<sup>17</sup> Home Office. (2002) *Justice for All*. Cm 5563. London: HMSO.

## 2. background

### 2.1. disclosure literature

Until recently the operation of disclosure has remained largely unexplored when compared with other aspects of the criminal justice system and this absence of extensive research means that the existing body of work on the topic is relatively modest. In the immediate aftermath of the 1996 Act a number of essentially descriptive texts appeared, outlining the framework of the provisions<sup>1</sup> but, in terms of analysis of the practical implications of the legislation, it is probably the research conducted by the Law Society and CPS which has addressed the structural difficulties in the greatest depth. Two titles, however, warrant particular mention for the perspectives which they provide on the operation of disclosure in practice: firstly, Ede and Shepherd's *Active Defence*,<sup>2</sup> which sets out in practical terms the implications of the current disclosure regime for the defence, and secondly, Epp's *Building on the Decade of Disclosure in Criminal Procedure*<sup>3</sup> which provides the most comprehensive overview of the topic.

All examinations of the disclosure regime to date have reached the same conclusion, that the system is not operating as intended. However, there has been little attempt to move beyond this basic assertion and to consider defective disclosure as a product of the cultural and practical exigencies of policing. It is these, largely hidden, imperatives which dictate officers' strategies towards matters of case preparation, including the handling of unused material and, inevitably, this invites comparisons with the voluminous research which has been undertaken on the general operational practices and culture of the police.

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<sup>1</sup> Perhaps the best of which is Card. R., Ward. R. (1996) *The Criminal Procedure and Investigations Act 1996*. London: Jordan. For a background to the development of disclosure see also Niblett. J. (1997) *Disclosure in Criminal Proceedings*. London: Blackstone.

<sup>2</sup> Ede. R., Shepherd. E. (2000) *Active Defence*. London: Law Society.

<sup>3</sup> Epp. J.A. (2001) *Building on the Decade of Disclosure in Criminal Procedure*. London: Cavendish.

## 2.2. related research

Various theories have been advanced to explain the way in which the police translate law into practice and it is not intended to provide an exhaustive account of the development of police research here, as it is of only limited relevance to this study. However, a number of these models may assist in interpreting the actions of officers towards their disclosure obligations. This is particularly important in relation to police culture and the exercise of police discretion, which is considered more fully in Chapter 7, but the discussion takes place against the background of an evolving body of work on the police,<sup>4</sup> some of which has influenced this study.

Initially, the operation of the police and their relationship with the laws which they enforce was largely ignored, with the interaction between police officers and the law seen as largely symmetrical and neither the methods employed nor the discretion inherent in this role were considered worthy of study.<sup>5</sup> This view was reflected in the UK, where police research can generally be traced back to Banton's *The Policeman in the Community*<sup>6</sup> which, although based on an international comparison between the USA and the UK, began the trend for detailed participant observation as the principal research methodology and for police culture as a topic of analysis. The tone, however, remained celebratory, with the police seen as inherently neutral and impartial.<sup>7</sup>

By the 1970s, however, this consensus view had been lost and new, more challenging, themes emerged based on symbolic interactionism and labelling theories which would later develop into radical and Marxist criminology. The police were no longer passive and merely reactive to crime but, instead, played

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<sup>4</sup> For a manageable overview of the various themes see, Reiner. R. (2000) 'Police Research', in King. R.D., Wincup. E. *Doing Research on Crime and Justice*. Oxford: OUP.

<sup>5</sup> An ambivalence which was evident in early work such as Merton. R.K. (1938) 'Social Structure and Anomie' in Lemert. C. (ed) *Social Theory: The Multicultural Readings*. Boulder: Westview Press.

<sup>6</sup> Banton. M. (1964) *The Policeman in the Community*. London: Tavistock.

<sup>7</sup> Based on the premise that, 'it can be instructive to analyse institutions that are working well in order to see if anything can be learned from their success.' p vii.

an active role in the shaping of societal deviance by the exercise of discretion.<sup>8</sup> In particular, the work of Packer, which is examined in the next chapter, provoked civil libertarian concerns over the police deviation from 'due process' protections in pursuit of the objectives embodied in the 'crime control' model. This prompted a number of seminal UK studies<sup>9</sup> which marked a new starting point in police research and which replaced the celebratory tones of Banton with a far more critical approach. The focus became the operation of informal organisation and the differences between 'law in books' and 'law in action', as typified by the existence of 'easing behaviour', 'the Ways & Means Act' and other informal rules. This work was on the whole suspicious of the police<sup>10</sup> and the question of who controls the police, together with broader issues of politicisation, assumed increasing importance.<sup>11</sup>

Renewed interest in issues such as class and state power inevitably led to a neo-Marxist approach to criminology which criticised the existing criminology for failing to address adequately the fundamental question of who rules and why. This marked a return to a more political, socio-economic analysis which viewed the police, together with the other elements of the criminal justice system, in essentially instrumentalistic terms.<sup>12</sup> On this model, the police were not influential actors who themselves define the processes at work but, instead, were largely passive instruments of control acting as part of a social process. The Centre for Contemporary Cultural Studies, under Stuart Hall, sought to refine and develop the concept of the criminal justice system as a reflection of the

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<sup>8</sup> Lambert. J. (1969) 'The Police can Choose'. *New Society* 14:364, 430-432.; Cain. M. (1971) 'On the Beat: Interactions and Relations in Rural and Urban Police Forces' in Cohen. S. (ed) *Images of Deviance*. Harmondsworth: Penguin.; Rock. P. (1973) *Deviant Behaviour*. London: Hutchinson; Holdaway. S. (1979) (ed) *The British Police*. London: Arnold; Manning. P. (1977) *Police Work: The Social Organisation of Policing*. Cambridge Mass: MIT Press; Punch. M. (1979) *Policing the Inner City: A Study of Amsterdam's Warmoesstraat*. London: Macmillan.

<sup>9</sup> Cain. M. (1973) *Society and the Policeman's Role*. London: Routledge & Kegan Paul; Chatterton. M. (1976) 'Police in Social Control' in King. J. (ed) *Control Without Custody*. Cambridge: Institute of Criminology; Holdaway. S. (1977) 'Changes in Urban Policing'. *British Journal of Sociology*. 28; 119-137.

<sup>10</sup> And the way in which 'the lower ranks of the service control their own work situation and such control may well shield highly questionable practices.' Holdaway. S. (1979) (ed) *The British Police*. London: Arnold. p 12.

<sup>11</sup> This became even more pronounced in the aftermath of the police role in the industrial unrest of the late 1970s, culminating in the miners' strike of 1984-85.

<sup>12</sup> This can be seen in the work of Jock Young and, in particular, his 1971 study of Notting Hill drug takers. Young. J. (1971) *The Drugtakers*. London: Paladin.

economic structure of society<sup>13</sup> and the result was a view reminiscent of Gramscian 'hegemony'<sup>14</sup> and which underplayed the importance of police action, both individually and as an organisation, except insofar as this acted to define the relationship between the police and the state, the questionability of police neutrality and the criminalisation of the poor.

From the 1980s onwards, the centre based research project became more prevalent over the individual researcher and the focus shifted to a more overtly political critique of the police and the means by which they could be controlled. By the mid 1980s this had turned to more practical issues and the operation of police management, and such research is regularly commissioned by the Home Office.

Against this background, this study seeks to address the topic of disclosure from an essentially interactionist perspective, which extends the concept of 'law infraction' to encompass rule and norm infraction and, in the process, emphasises the importance of the relationships between the protagonists and their respective motivations. This permits investigation of the meanings and thought processes which the protagonists bring to various situations in a way which is difficult to achieve by means of merely quantitative methodology. This process, by which officers categorise and make sense of material, by reference to the cultural norms and values which underpin their work environment, is central to this study of disclosure, as it is suggested that it is precisely the existence of a particular cultural template which permits officers to make swift assessments of the relevance or otherwise of material.

At the same time the importance of labelling theories is also recognised and the labelling process is highly significant in relation to the consideration of evidence and unused material. In assessing roles within the criminal justice system, the

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<sup>13</sup> And to combat analyses where, 'state power through the operation of law is acknowledged only formally and its mode of operation is treated as unproblematic'. Hall. S., Critcher. C., Jefferson. T., Clarke. J., Roberts. B. (1978) *Policing the Crisis: Mugging, the State and Law and Order*. London: Macmillan. p 194

<sup>14</sup> For an overview of the theory see, Gramsci. A. (1971). *Selections from the Prison Notebooks*. New York: International Publishers.

police are widely acknowledged as the most powerful group in terms of defining and selectively enforcing the law and, consequently, the object of attention from those concerned with the processes which lead to individuals being 'labelled', thereby defining their status within and their relationship to the rest of the criminal justice system. Although early studies into this labelling process centred on police/public encounters,<sup>15</sup> over time attention has turned to the operation of the police organisation itself and the key aspects of police occupational culture.<sup>16</sup> To a degree this reflects the 'structuralist' perspective which sees cases made up of events determined by the operation of both formal and informal structures and processes. Investigations are not the impartial search for truth but, instead, constructions designed to demonstrate the guilt of the suspect. This point is further developed in Chapter 10 and the influence of the interactionist perspective is discussed further in relation to the methodology of this study.

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<sup>15</sup> Piliavin, I., Briar, S. (1964) 'Police Encounters with Juveniles'. *American Journal of Sociology*. 70; Bittner, E. (1967) 'The Police on Skid-Row: A Study of Peace Keeping'. *American Sociological Review*. 32, 699; Chapman, B. (1970) *Police State*. London: Macmillan.

<sup>16</sup> Skolnick, J. H. (1975) *Justice Without Trial*. New York: Macmillan; Van Maanen, J. (1978) 'On Watching the Watchers', in Manning, P., Van Maanen, J. *Policing*. Santa Monica: Goodyear.

### **3. models of the criminal justice system**

#### **3.1. Herbert Packer**

Disclosure is but one aspect of a criminal justice system which exists in a state of almost perpetual change, attempting to balance the rights of the suspect against the broader requirements of society and, in seeking to evaluate any element of the system against such a background of 'law and order' politics, a valuable starting point may be found in the work of Herbert Packer.<sup>1</sup> By means of his 'due process' and 'crime control' models, Packer's overview of the conflicting pressures inherent in any criminal justice system provided competing value systems by which the motivation of the individual protagonist or the underlying priorities of the legislation or organisation might be assessed. In the context of this examination of the work of the modern police service in conjunction with the other elements of the system, most notably the CPS, such an analysis can usefully be employed not only to highlight the dilemmas presented by the introduction of extensive pre-trial disclosure as part of the trial process but also to demonstrate the clear ideological shift represented by the 1996 Act. Packer's work has been exhaustively examined elsewhere, however a brief outline of the most significant aspects of the models is required in order to illustrate the influence which they exert from the perspective of the police.

#### **3.2. the crime control and due process models**

At its most fundamental, the crime control model presents the repression of criminal conduct as the central function of the criminal justice system with emphasis on the largely informal and intuitive early investigative process, rather than the subsequent judicial proceedings. Success is determined, not by the quality of justice administered, but by the volume of cases processed and, most importantly, the numbers of convictions.

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<sup>1</sup> Packer. H. (1968) *The Limits of the Criminal Sanction*. Stanford: Stanford University Press.

'The model, in order to operate successfully, must produce a high rate of apprehension and conviction... There must be a premium on speed and finality. Speed, in turn, depends on informality and uniformity; finality depends on minimising the occasions for challenge.'<sup>2</sup>

To achieve this objective the State must not only share the police's confidence in their own investigative methods but also permit the police to operate within a climate of maximum discretion in the belief that they are best equipped to identify the guilty and also to identify the innocent. This reliance on the value judgments of the police results in an informal 'presumption of guilt' which governs the conduct of the investigation once the decision has been made that there is sufficient evidence to charge. As such this does not so much dictate the conduct of the prosecution, as with the presumption of innocence which is inherent in the due process model, but rather becomes a prediction of outcome which renders the rest of the criminal justice system largely perfunctory.

'For all practical purposes the defendant is a criminal. Just because the assembly line cannot move fast enough for him to be immediately disposed of is no reason for him to go free'<sup>3</sup>

Packer contrasted this crime control 'assembly line' with the 'obstacle course' of the due process model, which presents the maximum possible impediment to the accused progressing to the next stage of the prosecution process. It does not deny the importance of controlling crime but differs from the crime control model in its concern with the formal structures of the criminal justice system rather than the early, and largely informal, investigative process. Consequently, the due process model dictates that a person accused of a crime is not automatically a criminal as 'guilt' is determined, not by the professional judgment of the police, but by proving a case based on reliable evidence and, furthermore, doing so visibly and in accordance with the appropriate procedures and safeguards. This more formalistic approach to establishing guilt creates a fundamental conflict between the models, with the due process model imposing the additional standard of legal (as well as factual) guilt and this illustrates how

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<sup>2</sup> Packer, p 159.

<sup>3</sup> Packer, p 211.

the due process model can be viewed as reliant on values independent of outcomes unlike the crime control model which is concerned solely with results.

By concentrating on the judicial stages of the criminal justice system the due process model also emphasises that there should be ample opportunity for scrutiny at all stages of the process. This adversarial element is central to the model as it affords the accused the opportunity to actively challenge the forces of investigation and prosecution, a process which the crime control model would represent as merely an unwelcome impediment to processing the accused as efficiently as possible from suspicion to conviction.

This requirement for interference to be kept to a minimum means that the crime control model largely accepts the potential for error providing this does not interfere with the ultimate objective of combating crime. By contrast, the due process model is willing to sacrifice efficiency rather than to compromise reliability and views the potential harm to the individual resulting from a flawed conviction as far outweighing any benefit to the community achieved by more demonstrable law enforcement, on the premise that the greatest threat to the individual arises from the inequality in bargaining power between the prosecution and the accused, with the power and resources weighed heavily in favour of the State.

At its simplest, the crime control/due process debate can be presented as a straightforward conflict between State and individual, as in the Royal Commission on Criminal Procedure's<sup>4</sup> quest for, '*a balance to be struck here between the interests of the whole community and the rights and liberties of the individual citizen*'<sup>5</sup> and this has left Packer open to criticism for simply presenting the criminal justice system with a choice between two sets of biases to incorporate into its rules.<sup>6</sup> However this is to fundamentally misinterpret Packer's original thesis for 'crime control' and 'due process' are not simply

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<sup>4</sup> Royal Commission on Criminal Procedure (1981) Report. Cm 8092. London: HMSO.

<sup>5</sup> p 4.

<sup>6</sup> Griffiths. J. 'Ideology in Criminal Procedure or a Third "Model" of the Criminal Process.' (1970) 79 Yale LJ 359.

competing models in a 'zero sum game' but rather statements of competing values which must be reconciled within any developed criminal justice system and the complexities of the two models militate against the notion of an inevitable balance or 'hydraulic relationship' between the two.<sup>7</sup> Unfortunately this distinction has occasionally become obscured by terminology and, in particular, by naming one of the models 'crime control' Packer paved the way for considerable confusion for, as both Damaska<sup>8</sup> and Smith<sup>9</sup> have pointed out, to view the models as mutually exclusive blueprints for the criminal justice system is absurd as the logical justification for *any* criminal justice system is the control of crime, whereas it clearly makes little sense to claim that the primary purpose of a criminal justice system is due process. One solution to the confusion caused by Packer's nomenclature was provided by Duff<sup>10</sup> who, through the simple mechanism of renaming the 'crime control' model as the 'efficiency model',<sup>11</sup> succeeded in differentiating between the values within the criminal justice system and its overall objectives, thereby illustrating that 'crime control' was not the ultimate objective, but only a set of values underpinning decision making within the investigative and prosecution process.

### **3.3. the models after Packer**

In the years following Packer's original work his models have been subject to repeated analysis and development, such as by Ashworth,<sup>12</sup> who looked to a human rights based approach.<sup>13</sup> However, of more interest in the context of this work is the more detailed re-assessment by King<sup>14</sup> who presented a further four

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<sup>7</sup> Braithwaite. J. (1989) *Crime, Shame and Reintegration*. Cambridge: Cambridge University Press.

<sup>8</sup> Damaska. M. (1973) 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study.' *University of Pennsylvania Law Review*, 121: 506.

<sup>9</sup> Smith. D.J. 'Case Construction and the Goals of Criminal Process.' (1997) 37 *Br J Criminol* 319.

<sup>10</sup> Duff. P. 'Crime Control, Due Process and the Case for the Prosecution.' (1998) 38 *Br J Criminol*.

<sup>11</sup> Although what precisely what is meant by 'efficiency' is left unexplored and unchallenged.

<sup>12</sup> Ashworth. A. (1994) *Criminal Process Values: A Study of the Criminal Justice System*. Oxford: Clarendon.

<sup>13</sup> Incorporating the perspective of victims which is noticeably lacking from Packer's original thesis. This is also a feature of the critique of Packer's models provided by Jackson. J. D. (1990) 'Getting Criminal Justice out of Balance', in Livingstone. S., Morison. J. (eds) *Law, Society and Change*. Aldershot: Dartmouth.

<sup>14</sup> King. M. (1981) *The Framework of Criminal Justice*. London: Croom Helm.

models, two of which; the *medical model* (which emphasises rehabilitation) and the *status passage model* (based on denunciation and degradation) are of little relevance to this discussion. The remaining models, however, may contribute something to the examination of the investigative and prosecution processes.

King's *bureaucratic model* shares with the crime control model an emphasis on efficiency and expediency but concentrates on an assessment of the bureaucratic efficiency of the criminal justice system largely independent of political considerations. Issues of crime control and due process must be measured against criteria of cost effectiveness and a balance struck which permits the maximum throughput of offenders with minimum potential for conflict and delay within the process. Here there are echoes of the crime control model but the bureaucratic model also shares the due process desire to avoid miscarriages of justice, although this is motivated less by a wish to safeguard civil liberties than by the fear of wasted resources.

An entirely different perspective is presented by King's *power model* which attempts to rationalise the criminal justice system from a neo-Marxist perspective and raises the question of whose law is being enforced. Although this presentation of prosecution as a mechanism of class domination is not of particular interest here, what is significant is the potentially detrimental effect of stereotyping on the investigative process. This may result from the subconscious labelling of suspects, based on a police view of what constitutes the 'criminal classes' but it may also be a product of the repeated encounters with known offenders which make up a large proportion of policework. If investigating officers regard the suspect as obviously guilty, not because of the facts of the case in question but due to prior knowledge of the individual then this could consciously or unconsciously affect the consideration of evidence which may support the suspect's version of events.

The notion of a criminal justice system concerned less with issues of justice than with issues of efficiency and cost effectiveness may seem anomalous yet it is impossible to ignore the impact of financial constraints on all aspects of the prosecution process. Following the introduction of the Crime and Disorder Act

1998, with its emphasis on expedited offences and issues of timeliness, the bureaucratic model of policing may yet produce concerns over the quality of justice administered. Again this has resonance in the current study.

As with every other aspect of the criminal justice system attempts have been made to place operational policework within the context of Packer's models and to assess developments in police regulation against the background of the due process/ crime control dichotomy. This process has been evident in the debates preceding all of the recent changes in procedure, from PACE and the Prosecution of Offences Act 1985, through to the Criminal Procedure and Investigations Act 1996 and Crime and Disorder Act 1998. In each case the police perspective has echoed the sentiments associated with the crime control model<sup>15</sup> which is hardly surprising given its deference to police professionalism and the fact that police judgment is taken as the principal determinant of guilt.

'Facts can be established more quickly through interrogation in a police station than through the formal process of examination and cross-examination in a court. It follows that extra-judicial processes should be preferred to judicial processes, informal operation to formal ones.'<sup>16</sup>

For many (not only within the police service) support for due process values is equated with a soft and permissive attitude towards crime and criminals in general, leading to the conclusion that due process safeguards, by definition, prevent crime control and therefore are at odds with the essential character of policework. Despite suggestions that emphasising the crime control aspect of policework has pernicious effects not only on upholding due process values but also on police community relations,<sup>17</sup> suspicion persists (particularly among experienced investigators) of a due process agenda which represents little more than a time consuming impediment to effective policing. Similarly any suggestion that the legitimisation of a criminal justice system is dependent on upholding due process values is unlikely to sway David Phillips, Chief Constable

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<sup>15</sup> '*...it should be understood from the outset, that the object to be attained is the prevention of crime.*' General Instructions to the Metropolitan Police 1829. From Baldwin. R. & Kinsey. R. (1982) *Police Powers and Politics*. London: Quartet.

<sup>16</sup> Packer, p 159.

<sup>17</sup> Manning. P.K. (1977) *Police Work: The Social Organisation of Policing*. Cambridge, Mass: MIT Press.

of Kent who concluded '*The whole concept of due process is foreign to us: it comes for the US constitution.*'<sup>18</sup>

Similar sentiments were expressed by one of the ASU officers interviewed.

'The saddest thing I have seen for a long time was, in relation to HRA, I saw John Wadham say, 'The view of ACPO has been refreshing'. Now that is worrying because the thought of John Wadham being on our side...if we have Wadham on our side then we have a big problem in this organisation because he has his agenda and we certainly have ours and, if ours are also his, then there is something wrong somewhere in my view.'<sup>19</sup>

This absolutist view articulates a deeply held belief within the police service which underpins their operational culture and influence the police attitude both to their work and to change. It has also been suggested that the perceived departure of the police from due process standards may be based less on deliberate manipulation by the police than on a failure of due process standards to meet the realities of modern policing.<sup>20</sup> Fears of over regulation, an enduring sense of professional isolation and a belief that the rules governing the conduct of investigations come from politicians with scant understanding of the practical consequences of their policies all contribute to the police view of events. Police officers see themselves as sharing a unique insight into human behaviour which the rest of society cannot understand and the result is a 'professional paternalism'<sup>21</sup> on the part of the police, a cultural view that they know best in the face of criticism from a society which constantly expects results but which has little or no comprehension of the difficulties of police work. Inevitably the result is a degree of cynicism.<sup>22</sup> For many officers, the aforementioned distinction between crime control as a value structure and crime control as an overall objective is blurred to the extent that an officer operating to a crime control

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<sup>18</sup> Interview quoted in Rose, D. (1996) *In the Name of the Law: The Collapse of Criminal Justice*. London: Vintage. p 111.

<sup>19</sup> ASU 12/152.

<sup>20</sup> Dixon, D., Bottomley, A., Coleman, C., Gill, M., and Wall, D. (1989) 'Reality and Rules in the Construction and Regulation of Police Suspicion.' *International Journal of the Sociology of Law*: 17, 185-206.

<sup>21</sup> Kleinig, J. (1996) *The Ethics of Policing*. Cambridge: Cambridge University Press.

<sup>22</sup> Niederhoffer, A. (1967) *Behind the Shield: The Police in Urban Society*. New York: Doubleday.

agenda may well see him/herself as performing the central function of any criminal justice system by apprehending and convicting those which his/her experience suggests are guilty, a task made all the more difficult by demands for further due process protections for the accused.<sup>23</sup> This has led to suggestions that it is not deliberate wrongdoing by the police which causes a failure to observe due process standards but rather a failure of those standards to reflect the realities of policing.<sup>24</sup>

The view of effective policework subjected to constant erosion by due process is a common perception, however the history of the UK criminal justice system does not entirely support this assertion. In the early years of the police, the investigative process ended with arrest, after which the suspect had to be brought before the magistrates for a decision on whether or not to prosecute. Now arrest is merely a preliminary part of the process, used in order to facilitate the investigation and so, it could be argued, due process standards have been sacrificed in this routine interference in individual civil liberty in the absence of sufficient evidence to prosecute. Similarly, even those changes which are overtly due process in nature may equally serve crime control imperatives.<sup>25</sup> For example, Smith<sup>26</sup> saw the presence of due process values as pivotal in the deterrence of potential offenders, arguing that those engaged in crime are unlikely to be deterred by a system which they view as arbitrary in nature and equally likely to result in the conviction of the innocent as the guilty<sup>27</sup> and it could be argued that legislation such as PACE serves both agendas simultaneously, by introducing due process safeguards which co-exist with crime control values to protect suspects, but which also lend legitimacy to the system by safeguarding suspect's rights. The result is success under both models, as the

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<sup>23</sup> As in the speech by Sir Robert Mark Speech to The Newspaper Conference 21/1/77.

<sup>24</sup> Dixon. D., Bottomley. A., Coleman. C., Gill. M., Wall. D. (1989) 'Reality and Rules in the Construction and Regulation of Police Suspicion.' *International Journal of the Sociology of Law*: 17, 185-206.

<sup>25</sup> Which is perfectly consistent with Packer's original thesis.

<sup>26</sup> Smith. D.J. 'Case Construction and the Goals of Criminal Process.' (1997) 37 *Br J Criminol* 319.

<sup>27</sup> although it is difficult to accept that this presents as significant a disincentive to criminal conduct as the evaluation of personal risk which leads potential offenders to assess the likelihood of *their own* detection and apprehension.

system operates without reducing overall conviction rates but lends convictions the additional credibility of compliance with the safeguards embodied in the Act.

As with other aspects of the criminal justice system, it is possible to subject the disclosure debate to analysis by reference to Packer's models which, as might be anticipated, adopt markedly different standpoints. Clearly a due process model dictates that the accused should be permitted full access to all materials available to the prosecution, not only to provide the accused with the clearest indication of the likely strength of the prosecution case, but also to identify any evidential weaknesses or alternative lines of enquiry which can be exploited by the defence. In this way, the prosecution is put to proof and must establish the guilt of the accused beyond reasonable doubt in the face of all the available evidence. In doing so this leaves the defence free to retain material and to conceal until trial both the nature of the defence case and the evidence on which it is based.

Inevitably the crime control model rejects any such obligation on the part of the prosecution to assist the defence by means of disclosure of unused material. The role of the prosecution is to secure the efficient conviction of the guilty, utilising all available means and, consequently, it falls to the defence, not the prosecution, to unearth information which may assist in rebutting the charge. Obstacles to the speedy processing of cases should be avoided and the resources of police and prosecution should not be expended needlessly in doing the work of the defence or in fielding requests for further information which are little more than speculative defence 'fishing expeditions,' undertaken in the hope, rather than the expectation, of revealing additional information. In this way the only crime control justification for advance disclosure would be to facilitate the speedy trial and conviction of the accused by reducing the opportunity for adjournments on evidential issues.

Of course this simplistic analysis ignores the gulf between State and individual in terms of resources and, furthermore, recognises no iniquity in the State securing a conviction whilst aware of contradictory evidence which it declines to reveal to the defence. For this reason, as elsewhere within the criminal justice system,

neither model has entirely dictated the disclosure debate. Bottoms and McClean<sup>28</sup> concluded that the criminal justice system was based less on Packer's models than on a 'liberal bureaucratic' model which, whilst acknowledging the importance of due process safeguards, realises that things have to get done and systems have to run.

The 'due process' and 'crime control' models are an integral part of the theoretical underpinning of this work and will be used throughout to provide a benchmark against which both the provisions themselves and the mechanisms used to circumvent them may be assessed. As such, Packer's models provide an invaluable shorthand for juxtaposing calls for safeguards within the criminal justice system in general (and disclosure in particular) against the exigencies of policing and the operational culture which is produced as a consequence. In examining CPIA it is clear that, despite its origins in the miscarriages of justice of the 1970s and 1980s, the changes which it introduced were influenced to a far greater extent by crime control values than by any due process concerns and, to appreciate fully the impact which this initial ideological standpoint has exerted on the subsequent operation of disclosure, it is necessary to consider something of the background to the current disclosure debate, together with the origins of the legislation.

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<sup>28</sup> Bottoms. A., McClean. J. (1976) *Defendants in the Criminal Process*. London: Routledge.

## 4. the development of disclosure

### 4.1. disclosure and miscarriages of justice

If anything has been learned from the miscarriages of justice of the past twenty years it is that effective pre-trial disclosure is central to the notion of a fair trial.<sup>1</sup> The principle of equality of arms dictates that there must be safeguards to prevent the State from enjoying an unfair advantage by virtue of the greater resources at its disposal and, for this reason, it is the prosecution which has traditionally borne the burden of disclosure, as in relation to the previous convictions of prosecution witnesses,<sup>2</sup> previous inconsistent statements<sup>3</sup> and requests for reward.<sup>4</sup> By contrast, the defence has remained free to retain the maximum tactical advantage gained by concealing its case until trial, on the basis that the accused is under no obligation to produce a defence unless or until the prosecution had established that there was a case to answer. Over time there have been limited encroachments into this general principle in the case of alibi evidence<sup>5</sup> and expert evidence,<sup>6</sup> on the grounds that each is difficult for the state to refute at short notice but, otherwise, the balance has remained firmly in favour of the defence.

### 4.2. the development of disclosure

The development of disclosure must be viewed in the context of a criminal justice system which has, only recently, recognised the potential ramifications of defective discovery in criminal cases. It was only in 1946, with *R v Bryant and*

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<sup>1</sup> A far from exhaustive list includes, *R v Richardson, Conlon, Armstrong and Hill* (1989) The Times, 20<sup>th</sup> October, CA; *R v McIlkenny and Others* (1991) 93 Cr App R 287 CA (decided March 1991); *R v Maguire and Others* (1992) 94 Cr App R 133 CA (decided June 1991); *R v Taylor (Michelle)* (1994) 98 Cr App R 361 CA; *R v Kiszko* (1992) The Times 18 February.

<sup>2</sup> *R v Collister and Warhurst* (1955) 39 Cr App R 100 CCA; *R v Taylor (Nicholas)* [1999] 2 Cr App R 163 CA.

<sup>3</sup> *R v Baksh* [1958] AC 167 PC.

<sup>4</sup> *R v Taylor (Michelle)* (1994) 98 Cr App R 361 CA.

<sup>5</sup> Criminal Justice Act 1967. s 11.

<sup>6</sup> PACE 1984. s 81.

*Dickson*,<sup>7</sup> that the Court of Appeal issued clear guidance on the scope of the prosecution duty in relation to the disclosure of unused witness statements, with an approach centred more on the needs of the prosecution than the due process rights of the accused.

'is there a duty in such circumstances on the prosecution to supply a copy of the statement which they have taken to the defence? In the opinion of the Court there is no such duty, nor has there ever been.'<sup>8</sup>

With this the principles governing disclosure were established for the best part of three decades, with the general (and understandable) support of the prosecuting authorities although, by 1965 when the matter next came to be considered by the Court of Appeal,<sup>9</sup> the position was already less consistent. For his part, Diplock LJ was forthright in reiterating *Bryant*.

'A prosecutor is under no such duty. His duty is to prosecute not to defend.'<sup>10</sup>

Yet for Denning MR, the position of the prosecution was less clear-cut and far more influenced by the prosecutor's role as 'minister of justice'.

'The duty of a prosecuting counsel or solicitor, as I have always understood it, is this: if he knows of a credible witness who can speak to material facts which tend to show the prisoner to be innocent, he must either call that witness himself or make his statement available to the defence.'<sup>11</sup>

In this way, although the court continued to reject the notion of a duty on the part of the prosecution, the difference of opinion at the heart of the disclosure debate had already begun to emerge. What was noticeably absent, however, was any

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<sup>7</sup> (1946) 31 Cr App R 146. Thereby confirming the earlier decision in *Banks* [1916] 2 KB 621.

<sup>8</sup> Goddard. CJ (at p.151).

<sup>9</sup> *Dallison v Caffery* [1965] 1 QB 348. (albeit in the context of a civil rather than a criminal case). Also see, *R v Oliva* [1965] 1 WLR 1028 CCA and *R v Armstrong* [1995] Crim LR 831 CA.

<sup>10</sup> At 375.

<sup>11</sup> At 369.

formal and uniform policy in relation to disclosure<sup>12</sup> and it was therefore left to individual police and prosecuting authorities to develop their own procedures in conjunction with the local defence practitioners. In most areas this entailed little more than the police providing the defence with the names and addresses of witnesses, which was considered the bare minimum required to comply with *Bryant*. However, by the 1970s, there was growing pressure both for consistency and for a more extensive and clearly defined obligation on the part of the prosecution. This disquiet culminated in the Fisher Report of 1977<sup>13</sup> which was forthright in its criticism of the existing practices and was emphasised by the courts in *R v Leyland Magistrates, ex parte Hawthorn*<sup>14</sup>, which held non-disclosure to be a denial of natural justice sufficient to warrant overturning the conviction.<sup>15</sup> The matter was referred to the Royal Commission on Criminal Procedure which called for disclosure of all non-sensitive witness statements<sup>16</sup> and concluded that, in matters of disclosure, discretion should lie with the prosecutor.<sup>17</sup>

#### **4.3. the Attorney General's Guidelines**

What was needed was more structured guidance for police and prosecutors and this came in 1982, with the introduction of the 'Attorney-General's Guidelines for the Disclosure of "Unused Material" to the Defence.'<sup>18</sup> The Guidelines introduced the term 'unused material' which clearly included the hitherto problematic statements (including drafts) which did not form part of the committal bundles served on the defence. However, where the Guidelines were less helpful was in identifying precisely which other categories of material might

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<sup>12</sup> Although a policy, based in part on the Denning approach in *Dallison*, was implemented by the Solicitor's Department of the Metropolitan Police in 1974.

<sup>13</sup> Home Office (1977) '*Report of an Enquiry by 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.*' London: HMSO.

<sup>14</sup> [1979] 1 All ER 209. See also, *R v Hassan and Kotaish* (1968) 52 Cr App R 291

<sup>15</sup> for driving without due care and attention

<sup>16</sup> Royal Commission on Criminal Procedure (1981) Report. Cm 8092. London: HMSO. Para 29.36.

<sup>17</sup> Para 8.19.

<sup>18</sup> (1982) 74 Cr App R 302.

fall within the category and so qualify for disclosure.<sup>19</sup> In part this may have been a consequence of the prevailing practice at the time (at least in DPP cases) whereby the police would submit to the prosecutor a comprehensive report of all the evidence gathered during the investigation,<sup>20</sup> leaving the prosecutor to decide what evidence to adduce and leaving the remainder, by definition, 'unused'.

Under the Guidelines material was subject to disclosure where:

'it has some bearing on the offence(s) charged and the subsequent circumstances of the case'<sup>21</sup>

Despite its apparent simplicity, subsequent events would show just how broadly this definition could be interpreted.<sup>22</sup> However, with regard to the non-disclosure of sensitive material the Guidelines were clear that the discretion lay with prosecuting counsel without reference to the defence or the court<sup>23</sup> with the proviso that, where non-disclosure would deny the accused a fair trial, the only course of action would be to abandon the case.<sup>24</sup>

From the outset, the fact that the Guidelines did not entirely replace the common law rules on disclosure was the source of some confusion, exacerbated by uncertainty over their precise legal status. Dispute as to whether they enjoyed the full force of law<sup>25</sup> or whether they were merely advisory<sup>26</sup> was finally resolved in 1995<sup>27</sup> when the Court of Appeal approved the latter interpretation yet, despite this, the Guidelines attracted relatively little attention until the end of the 1980s when the events began which would, ultimately, render them obsolete.

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<sup>19</sup> Only with the *Guinness* Ruling was the scope of 'unused material' significantly extended to other categories of documents.

<sup>20</sup> The extent to which this practice varied between forces was revealed in *R v Ward*.

<sup>21</sup> Para 2.

<sup>22</sup> *R v Livingstone* [1993] Crim LR 597 CA.

<sup>23</sup> Para 6.

<sup>24</sup> Para 15.

<sup>25</sup> Runciman concluded that they 'to all intents and purposes have the force of law.' Royal Commission on Criminal Justice (1993) Report. Cm 2263. (at p.91, n.20).

<sup>26</sup> *Re Barlow Clowes Ltd* [1992] Ch 208.

<sup>27</sup> *R v Brown (Winston)* [1995] 1 Cr App R 191 (CA).

#### 4.4. the demise of the guidelines

In 1989 the litigation arising from the Guinness takeover of Distillers Group began and with it, a process which would see the courts expand the scope of 'unused material' to breaking point. In *R v Saunders and Others No.1*.<sup>28</sup> the term was broadly defined by Henry J:

'it is clear the term "unused material" may apply to virtually all material collected during the investigation of a case.'

It was instantly apparent that his inclusive interpretation extended well beyond the draft witness statements which, until then, had been the focus of the debate, to encompass, potentially, any material that had, or might have some bearing on the offence charged and the surrounding circumstances of the case. Even more far reaching was the statement that the relevance of any unused material was to be decided, not by police or prosecution, but by the defence. The inevitable consequence of this sweeping judgment was a fundamental reappraisal of the scope of the A-G's Guidelines. However, when the Attorney General declined to redraft them,<sup>29</sup> the task of providing guidance for prosecutors and police fell, instead, to the Director of Public Prosecutions. The result was the '*Guinness Advice*,' issued in 1992, which instructed the police to catalogue all materials generated during an investigation, whilst leaving decisions regarding disclosure to the CPS. This was accompanied by the Joint Operational Instructions (JOPI),<sup>30</sup> a key aspect of which was the introduction of standard forms for use by the police as part of file preparation. The schedules MG6C (non-sensitive unused material) and MG6D (sensitive unused material) recorded all the unused material generated during the enquiry and were passed to the CPS who would then decide what, if any, material warranted an application to the court for PII. The defence was provided with copies of the MG6C and was entitled not only to inspect the listed documents but also to have them copied at prosecution expense.

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<sup>28</sup> (unreported) Central Criminal Court, 29<sup>th</sup> September 1989, Transcript T881630.

<sup>29</sup> Hansard, Vol. 202, HC, 20 January 1992.

<sup>30</sup> ACPO and CPS (1997) *Joint Operating Instructions: Disclosure of Unused Material*. (unpublished).

As with later changes to the disclosure regime, the system was introduced with minimal training.

The police reaction was largely negative, partly due to the man hours expended meeting defence requests for material, but mainly because control of what material was disclosed lay, not with the police or CPS, but with the defence who, as a consequence, routinely demanded copies of all unused material.<sup>31</sup> However the new regime was barely in place when the Court of Appeal delivered another blow to the A-G's Guidelines in upholding the appeal of Judith Ward.<sup>32</sup> The court was scathing of the failure by the prosecution to disclose a mass of conflicting and undermining evidence and, in the process, looked to the definition of 'unused material,' given by Lawton LJ in *R v Hennessey*:<sup>33</sup>

'Those who prepare and conduct prosecutions owe a duty to the Courts to ensure that all relevant evidence of help to an accused is either led by them or made available to the defence.'<sup>34</sup>

As Glidewell L J commented in *Ward*:

'We would emphasise that "all relevant evidence of help to the accused" is not limited to evidence which will obviously advance the accused's case. It is of help to the accused to have the opportunity of considering all the material evidence which the prosecution have gathered, and from which the prosecution have made their own selection of evidence to be led.'<sup>35</sup>

In adopting this view, and by ruling that the disclosure responsibilities of the prosecution included conflicting expert evidence,<sup>36</sup> the court went far beyond the definition in the A-G's Guidelines. Of even greater concern to prosecutors, however, was the statement that it was no longer acceptable for the prosecution

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<sup>31</sup> However, in *R v Bromley Magistrates' Court ex parte Smith and another* [1995] 4 All ER 146 the court, in extending disclosure to summary cases, also approved the police policy of refusing to copy materials for the defence unless a defence representative had inspected the documents at the police station and identified them as being relevant to the case. See also *R v South Worcestershire Magistrates ex p Lilley* [1996] 2 Cr App R 420 DC.

<sup>32</sup> (1993) 96 Cr App R 1.

<sup>33</sup> (1978) 68 Cr App R 419.

<sup>34</sup> at 426.

<sup>35</sup> at 25.

<sup>36</sup> Although this point had already been established in *R v Maguire* (1992) 94 Cr App R 133.

to withhold documents on grounds of PII without the consent of the court or without giving notice to the defence.<sup>37</sup> The ramifications were clear, the prosecution had lost its last remaining element of control in the disclosure process. In the immediate aftermath of *Ward* there was consternation from prosecutors, over the time spent supplying the defence with material not covered by PII, and from judges required to examine large quantities of documents for which PII was claimed.<sup>38</sup> The result was even greater uncertainty for those involved and, for many, the case represented a watershed after which the A-G's Guidelines themselves could no longer be viewed as viable.

Having opened the floodgates to disclosure, the courts twice had cause to revisit the question of PII in the months immediately following *Ward* and, in each case, took the opportunity to qualify the sweeping approach adopted in the earlier case. *R v Davis, Johnson and Rowe*,<sup>39</sup> saw an acceptance that PII applications could, in the most sensitive cases, be *ex parte* (a general principle which still applies) and in *R v Keane*,<sup>40</sup> the court went further by addressing the vexed question of materiality in the following terms:

'First, it is for the prosecution to put before the court only those documents which it regards as material but wishes to withhold. As to what documents are "material" we would adopt the test suggested by Jowitt J in *R v Melvin and Dingle*. The learned judge said:

"I would judge to be material in the realm of disclosure that which can be seen on a sensible appraisal by the prosecution: (1) to be relevant or possibly relevant to an issue in the case; (2) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use; (3) to hold out a real (as opposed to fanciful) prospect of providing a lead on evidence which goes to (1) or (2)".'

This was undoubtedly an improvement and provided much needed guidance for the prosecution, although it remained somewhat unclear whether this approach

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<sup>37</sup> See also *R v Trevor Douglas K* (1993) 97 Cr App R 342.

<sup>38</sup> See, for example, Jowitt J in *R v Melvin and Dingle* (unreported) Central Criminal Court, 20<sup>th</sup> December 1993.

<sup>39</sup> (1993) 97 Cr App R 110.

<sup>40</sup> (1994) 99 Cr App R 1.

was limited to PII claims or, alternatively, extended to disclosure in general. What was clear, however, was that the two decisions signalled the beginning of a shift of responsibility back to the prosecution in matters of disclosure.

#### **4.5. Runciman and the response**

While the courts grappled with the precise nature and extent of the duty of disclosure, the subject was also under scrutiny from Lord Runciman and the Royal Commission on Criminal Justice (RCCJ), which had been announced on the day that the appeals of the Birmingham Six were allowed.<sup>41</sup> Given the role of non-disclosure in many of the miscarriages of justice of the 1970's, it was inevitable that the subject should feature in the Commission's deliberations, leading to fears, from the police in particular, that the result might be further concessions to the defence. In order to prevent this, the police mounted a concerted and ultimately highly effective campaign to present their own agenda for change. This portrayed the recent miscarriages of justice as isolated incidents of malpractice by a few individual officers, with any repetition impossible following the introduction of PACE.<sup>42</sup> The real priority, the police argued, was extending the powers available to combat increasingly sophisticated criminals and three specific proposals were put forward: curtailment of the suspect's right to silence; statutory provisions for electronic surveillance; and reform of the system for pre-trial disclosure.

Certainly in relation to disclosure this pressure succeeded for, despite having had the opportunity to consider both *Ward* and *Davis, Johnson and Rowe* (both of which amply demonstrated the deficiencies in the current regime), the Commission concluded that there was no reason to recommend significant change to the regime for prosecution disclosure. Furthermore, the tone of the Commission's final report demonstrated obvious sympathy with the police perspective:

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<sup>41</sup> *R v McIlkenny and Others* (1991) 93 Cr App R 287 CA (decided March 1991).

<sup>42</sup> Although, as the RCCJ noted, the case of the Cardiff Three occurred after PACE was introduced.

'the defence can require the police and prosecution to comb through large masses of material in the hope either of causing delay or of chancing upon something that will induce the prosecution to drop the case rather than have to disclose the material concerned.'<sup>43</sup>

The inference was clear. The purpose of defence requests for disclosure was not to secure relevant information but to subvert the prosecution process, a position made all the more iniquitous by the absence of any comparable obligation on the defence to reveal information in its possession.<sup>44</sup> For this reason the Commission was prepared<sup>45</sup> to take the radical step of recommending a reciprocal, albeit more limited, duty on the part of the defence, '*to disclose the substance of their defence in advance of the trial.*'<sup>46</sup>

In addition, and somewhat alarmingly, the Commission saw no difficulty in encouraging the defence to cooperate in this way by suggesting that otherwise valuable unused material might be withheld by the prosecution if the defence did not comply with the duty:

'This means that, the less the defendant chooses to disclose in advance, the less scope he or she would have to demand that the prosecution discloses further material.'<sup>47</sup>

The result was a fundamental shift of power back to the police and prosecution in determining what, if any, information should be revealed to the defence. Although this was a surprising outcome given the origins of the Commission, it was received with enthusiasm by the government which went even further in its final proposals for a duty of defence disclosure.<sup>48</sup> These were met with severe criticism, not least from the Criminal Law Committee of the Law Society,<sup>49</sup> which argued that, not only were there relatively few cases involving large

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<sup>43</sup> Para 42.

<sup>44</sup> Although the informal practice had evolved of the prosecution providing the defence with a 'Keane letter,' outlining the issues which had influenced the prosecution's disclosure decisions and inviting the defence to comment and outline their position.

<sup>45</sup> With the sole exception of Prof Michael Zander.

<sup>46</sup> Para 66.

<sup>47</sup> Para 72.

<sup>48</sup> Home Office (1995) *Disclosure: A Consultation Document*. Cm.2864. London: HMSO.

<sup>49</sup> [http://www.lawsoc.org.uk/dcs/fourth\\_tier.asp?section\\_id=438](http://www.lawsoc.org.uk/dcs/fourth_tier.asp?section_id=438)

amounts of unused material, but also that the incidence of 'ambush defences,' seen as one of the principal justifications for a duty of defence disclosure, was far less than the Government (and the police) had suggested.<sup>50</sup> More fundamental, however, were concerns over the role of defence statements as a trigger for secondary disclosure which, it was feared, would restrict the scope of the defence case at trial<sup>51</sup> as well as allowing the prosecution to seek to justify withholding material on the grounds that its relevance was to a line of defence other than that contained in the defence statement, a point openly acknowledged by the Government when seeking to restrict the common law duty of disclosure:

'the current law requires the prosecutor to disclose to the accused anything which might possibly be relevant to an issue at the trial, whether or not it has any bearing *on the defence which the accused relies on at trial.*'<sup>52</sup>

This represented a fundamental attack on the presumption of innocence for, if the prosecution was required to establish guilt beyond reasonable doubt, then it followed that the defence was entitled to adduce evidence capable of generating that doubt, irrespective of whether or not it formed part of the original defence case. This raised the question of how the defence can explore evidence if its very existence is hidden and the Law Society concluded that only the full disclosure of all evidence would guarantee a fair trial, echoing the earlier concerns of the Royal Commission:

'we cannot see how any system can conclusively guarantee that the investigator will not bury such evidence if the defence is unaware of it.'<sup>53</sup>

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<sup>50</sup> Zander. M., Henderson. P. (1993) Crown Court Study. Royal Commission on Criminal Justice Research Study No. 19. London: HMSO. It is significant that the RCCJ itself did not appear totally convinced of the merits of the police argument on this point. (Para 64).

<sup>51</sup> In conjunction with the threat of adverse inference posed by s 34 – 39 CJPOA 1994.

<sup>52</sup> Baroness Blatch. HL Debs. Vol.567., col.463. (emphasis added).

<sup>53</sup> Leigh. L.H., Zedner. L. (1992) *A Report on the Administration of Criminal Justice in France and Germany*. Royal Commission for Criminal Justice Study Research Study No 1. London: HMSO

#### 4.6. the Parliamentary progress of the CPI Bill

The Criminal Procedure and Investigations Bill took just under eight months to complete the legislative process and, from the outset, concerns were raised over the pace of such radical change to such a fundamental due process safeguard, with fierce criticism of both the way in which the Bill was presented and, in particular, the time which was made available for consideration of the proposals:

'in some 25 years of parliamentary life I can remember no occasion on which a Bill that was not urgent has come forward so ill-prepared and so carelessly drafted...The truth is that the Bill has been rushed forward in a most extraordinary way.'<sup>54</sup>

Despite the clear wish of the Lords that the codes of practice be available before the Committee stage these did not materialise until 5 days beforehand<sup>55</sup> and the Bill arrived for consideration with 102 government amendments having been tabled in a single day. Lord McIntosh concluded:

'the code of practice is much more vague and is not acceptable. In other words, as regards every part of the Bill, proper debate...has been inhibited by the inefficiency of the Home Office.'<sup>56</sup>

During this time the government remained resolute in its twin objectives to rein in the duty of disclosure provided by the common law and to balance the obligations placed on the prosecution with some form of duty on the defence. However, factors such as the conflict between this due process safeguard and the operational pressures of policing, and the willingness of officers to provide the defence with the information necessary to counter the charge, were never adequately acknowledged or explored,<sup>57</sup> despite the fact that precisely these concerns were repeatedly raised at all stages of the Bill's passage.

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<sup>54</sup> Lord Rodgers of Quarry Bank (HL Debs. vol.567., col.1408).

<sup>55</sup> A situation described as 'quite inadequate' by Lord McIntosh of Haringey (HL Debs. vol.567., col.1407).

<sup>56</sup> HL Debs. vol.567., col.1408.

<sup>57</sup> At no point did the government appear to question the ability of the police to embrace such an open approach to the disclosure of all potentially undermining information as was being proposed (A criticism which could equally be levelled at the Runciman Commission itself).

As Lord McIntosh commented, the Bill:

'provides too much possibility for the prosecution to exercise varying judgment, and judgment which might be too restrictive as regards what should be disclosed to the defence.'<sup>58</sup>

The debates largely centred on a number of key issues which served to illustrate both the conflicting standpoints toward the entire disclosure debate and, more significantly, the extent to which the government was prepared to compromise due process safeguards as part of an uncompromising policy towards law and order. Nowhere was this more apparent than in the deliberations on the precise scope of the prosecution duty, which emerged as one of the most contentious issues. This was hardly surprising as it represented, for the government, the principal mechanism by which the perceived excesses of the common law could be remedied, but it was also the greatest potential threat in terms of future miscarriages of justice.

In defining the scope of disclosure, Runciman had initially proposed that the prosecution be subject to a duty:

'to supply to the defence all material relevant to the offence or to the offender or to the surrounding circumstances of the case.'<sup>59</sup>

The duty, therefore, was essentially objective, applying some external guidance to the decision making process and leaving the possibility that the prosecutor's decision might subsequently be open to judicial review. However, this was clearly a prospect which the government was anxious to avoid. The, somewhat ungainly, solution was to introduce different tests within the proposed two-stage disclosure process, with a subjective test, 'in the prosecutor's opinion,' at the primary disclosure stage but an objective test at the secondary stage (following the defence submission). This was opposed from the outset<sup>60</sup> and led to repeated

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<sup>58</sup> HL Debs. vol.567., col.469.

<sup>59</sup> Para 50.

<sup>60</sup> 'it cannot be right for the statutory test for what is disclosed to be in the prosecutor's opinion.' Lord McIntosh of Haringey (HL Debs. vol.567., col.1439).

attempts to introduce a greater element of objectivity and accountability to the prosecutor's initial duty.

In opposing the extension of the objective test to include the primary disclosure stage, the government position was frequently less than convincing.<sup>61</sup> In cases before the Crown Court, it was argued, the prosecutor's decision would fall under the categories of matters relating to trial on indictment which are excluded from judicial review. Furthermore, the presence of defence disclosure made an objective test easier to justify at the secondary disclosure stage, on the grounds that the defence had already disclosed the general nature of the proposed defence,<sup>62</sup> thereby enabling the prosecutor to make a more reasoned judgment as to additional disclosure. In relation to summary cases it was simply felt that the potential for delay arising from judicial review of prosecutor's decisions was prohibitive. Despite the somewhat tenuous nature of these arguments, attempts to introduce a more objective test, for example by reference to 'a reasonable prosecutor's opinion'<sup>63</sup> were also rejected and the result was one of the most critical defects in the final legislation.

This conflict between the government desire to restrict the prosecution duty and calls for greater defence access was repeated when considering the question of what material fell to be disclosed. For the government the central issue was the degree to which the documents were likely to 'undermine' the prosecution case and this view was maintained, although without any clear explanation of exactly what was meant by the term.<sup>64</sup> Despite this, attempts to replace 'undermine' with the (slightly) more explicit 'cast significant doubt upon' were rejected.<sup>65</sup> Once again, the government emphasised that defence co-operation was central if there was to be any prospect of full disclosure on the part of the prosecution. To this end, an amendment to include the phrase 'or assist the defence case so far as it is

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<sup>61</sup> Baroness Blatch (HL Debs. vol.567., col.1441).

<sup>62</sup> An assumption which later proved to be erroneous.

<sup>63</sup> HL Debs. vol.568., col.1576.

<sup>64</sup> An omission which is not remedied in the final statute.

<sup>65</sup> Hansard, Vol.279., cols.377-382.

known' after 'undermine the case' was rejected.<sup>66</sup> It was the government view that it was not for the prosecution to assist the defence in this way. Even so the government only proposed to provide the schedule of unused material to the accused after the nature of the proposed defence itself had been disclosed so that the schedule:

'is not abused by defendants who know themselves to be guilty and who are looking for material from which to construct a defence.'<sup>67</sup>

The potential difficulties of such an approach were illustrated when a further amendment came to be considered, proposing the inclusion of 'the prosecutor may disclose to the accused any prosecution material which he considers it to be in the interests of justice for the accused to see.' This, it was explained by Baroness Mallalieu,<sup>68</sup> arose from strong representations from the Bar and echoed the emphasis on the prosecutor as 'minister of justice' made by Lord Denning in *Dallison v Caffery*.<sup>69</sup> For precisely this reason, however, the government concluded that such an obligation was unnecessary as it already fell under the code of conduct for crown prosecutors and, as a consequence, the amendment was withdrawn. The extent to which this assumption creates operational conflicts in the implementation of the legislation will be shown.

Just as the government was anxious to avoid too expansive a test for prosecution disclosure, there was also pressure for restrictions on the categories of material which the prosecution were required to consider for possible disclosure. The original proposal had been for:

'any material in the possession of any prosecutor, or inspected by any prosecutor in pursuance of the code of practice, whether or not it has any bearing on the particular case he is prosecuting.'<sup>70</sup>

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<sup>66</sup> HL Debs. vol.567., col.1445.

<sup>67</sup> Baroness Blatch (HL Debs. vol.567., col.465). It is interesting to note that, every stage of the legislative process, the government sought to characterise defence applications for further information as vexatious rather than genuine.

<sup>68</sup> HL Debs. vol.567., col.1483.

<sup>69</sup> [1965] 1 QB 348.

<sup>70</sup> HL 26<sup>th</sup> June 1996, col 952.

For the government this was seen as unduly inclusive and seemed likely to result in precisely the type of speculative defence applications which the Bill was intended to combat. For this reason the test was restricted to:

'material which is in the prosecutor's possession or which he has inspected in connection with the case against the accused.'

Again, what is crucial is the link between disclosure and what the prosecutor has *inspected*, which results in an implied disincentive to examine documentation (particularly when in the possession of third parties) and creates a conflict of interest on the part of investigators and prosecutors which is at the heart of the subsequent difficulties with the Act.

One of the most interesting exchanges concerned the proposal, in the committee stage of the Lords, to remove the reference to disclosure of material which might undermine the case for the prosecution in favour of a simple test of 'relevance.'<sup>71</sup> This was rejected as presenting little advance on the former position under the common law as the government explained:

'a test of relevance includes everything which might possibly have a bearing on the case. But that is very different from whether it has a bearing on the defence which the accused actually relies upon in court.'<sup>72</sup>

However, the government logic on this point revealed an acceptance that the scheme as proposed could facilitate the withholding of otherwise relevant material:

'a test of 'relevance' is inconsistent with the rest of the disclosure scheme. If the prosecutor discloses everything which might be relevant, there is no point in requiring secondary prosecution disclosure of material which might reasonably assist the defence, because there would be nothing left to disclose.'<sup>73</sup>

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<sup>71</sup> HL Debs. vol.567., col.1436.

<sup>72</sup> Baroness Blatch (HL Debs. vol.567., col.1437).

<sup>73</sup> Baroness Blatch. (HL Debs. vol.567., col.1438).

The aim was clear, to impose a duty of disclosure on the defence by means of the implicit threat that failure to comply would not only result in adverse inference at trial. The Criminal Justice Act 1967 had introduced such adverse inference as an explicit sanction in cases of inadequate advance disclosure in fraud cases<sup>74</sup> but, in expanding this principle to all contested cases, the current proposals added the further risk of there being only partial disclosure by the prosecution. Similarly, the proposal to expand the test for primary disclosure to include the broader test in *Keane* (to address those cases which did not fall easily into either the 'undermine' or 'assist' categories) was rejected as, again, unduly expanding the scope of the disclosure duty on the prosecution and, effectively, thwarting the government intention of reining in the existing duty under the common law.<sup>75</sup>

One of the most consistent criticisms of the Bill throughout its passage through both Commons and Lords<sup>76</sup> was that it was uneven in the obligations which it imposed on the defence and the prosecution respectively. The defence was subject to penalty if it failed to outline the nature of the proposed defence before trial and yet the Crown was under no corresponding obligation to set out the prosecution case in advance and this caused many to question how the accused could be expected to set out not only the proposed defence but also points on which the defence took issue with the prosecution case, when the prosecution case had not been previously outlined with equal clarity. However, the proposal that sanctions be imposed on both parties for non-disclosure, rather than merely on the accused, was rejected,<sup>77</sup> the Government view being that the defence already had the benefit of receiving copies of all the written evidence prior to submitting the defence statement, although this is hardly the same as a clear outline of the proposed case. This reliance on the charge and the witness statements as adequate indication of the nature of the prosecution case raises an additional problem in that it is far from inconceivable that, in tailoring its response to the prosecution case it anticipates, the defence will neglect areas

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<sup>74</sup> s 7.

<sup>75</sup> HL Debs. vol.567., col.1482.

<sup>76</sup> Not least by Lord Ackner who raised the matter on three separate occasions – see for example HL Debs., vol. 567, cols. 491-2.

<sup>77</sup> HL Debs., vol.567, col.1495.

which, if featured in the defence statement, would have triggered the release of additional evidence by means of secondary disclosure. Given that the Act is drafted to prevent 'fishing trips' for additional evidence by limiting the defence to applications for specific documents<sup>78</sup> there is the real danger that the trial will be concluded with the defence still unaware of potentially valuable evidence.

#### **4.7. disclosure and the Human Rights Act 1998**

It has already been noted that, despite the part played by disclosure in the most notorious miscarriages of justice and the subsequent criticisms by Runciman, the final legislation was influenced far more by the crime control agenda of the Conservative government than by consideration for the due process rights of the accused. The price of prosecution disclosure was to be a new duty of disclosure on the defence and the entire process remained very much under the control of the police, leaving real concerns that the new disclosure regime would represent little by way of real improvement.

What the government could not have foreseen at the time was that within a few years a New Labour government would take the step that the Conservatives had resisted for so long, in the form of the the Human Rights Act 1998 and, with the Act now in force, it is inevitable that cases alleging breach of human rights based on issues of non-disclosure will come before the domestic courts.<sup>79</sup> This raises the question of whether the HRA will provide the due process protections which are so clearly absent from CPIA or, alternatively, be largely ineffective as a remedy for defective disclosure.

The fact that disclosure falls within the general ambit of HRA is not in doubt as the wording of the 1998 Act makes clear,<sup>80</sup> the police and the courts qualify as 'public authorities' and, as such, are prohibited from acting in a manner

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<sup>78</sup> s 8.

<sup>79</sup> A fact made even more likely by the fact that the Human Rights Act 1998 will operate retrospectively in relation to criminal proceedings (s 22(4) & s 7(1)(b)).

<sup>80</sup> Human Rights Act 1998 s 6 (3)(a).

incompatible with Convention rights.<sup>81</sup> Under s 3(1) the court must give effect to all primary legislation in a manner compatible with Convention rights 'so far as is possible to do so' and, as the White Paper *'Rights Brought Home'*<sup>82</sup> emphasised, this was intended to go further than the previous rule, which permitted reference to the Convention in cases of ambiguity or doubt. Furthermore, the courts would not be bound by previous authority on the construction of a particular section.<sup>83</sup>

From the outset opinions have differed as to the precise impact of HRA on CPIA and, although the Attorney General has stated that the two are compatible,<sup>84</sup> JUSTICE concluded that the disclosure regime would not withstand challenge under the fair trial provisions of ECHR.<sup>85</sup> Others have suggested that, although it is unlikely that the entire disclosure regime would be found to be in contravention of Art 6,<sup>86</sup> certain key aspects of the process, such as primary disclosure, may be.<sup>87</sup>

Cases on issues of disclosure will almost certainly be presented on the basis of breach of Article 6<sup>88</sup> and, in particular, of Article 6.3, which provides that:

6.3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

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<sup>81</sup> s 6 (1). Subject to the limitations imposed by s 6(2).

<sup>82</sup> Home Office (1997) *Bringing Rights Home*, Cm 3782. London: HMSO.

<sup>83</sup> With the decision in *R v A* [2001] 2 WLR 1546. providing an early indication of the extent to which the courts have been prepared to take up this challenge.

<sup>84</sup> Attorney General (2000) *Points for Prosecutors*. [www.LsLs.gov.uk](http://www.LsLs.gov.uk)

<sup>85</sup> JUSTICE (1995) *Disclosure A Consultation Paper: The JUSTICE Response*. London: JUSTICE.

<sup>86</sup> Emmerson. B. (1999) 'The CPIA and the Human Rights Act – Compatibility PII and the Human Rights Act', in *Disclosure under the Criminal Procedure and Investigations Act 1996*, conference papers. London: British Academy of Forensic Sciences (BAFS).

<sup>87</sup> Sharpe. S. 'Human Rights Act 1998: Art 6 and the Disclosure of Evidence in Criminal Trials.' [1999] Crim LR 273; Wadham. J. 'Prosecution Disclosure, Crime and Human Rights.' (1997) 147 NLJ 697.

<sup>88</sup> The right to a fair trial in common law addressed in *R v Brown (Winston)* [1995] 1 Cr App R 191 CA, affirmed HL, and the domestic courts may be tempted to maintain their previous position that there is little difference between the fair trial aspects of ECHR and the principles of the common law. *R v Khan (Sultan)* [1996] 2 Cr App R 440 HL, p.456, per Lord Nicholls; *R v Stratford Justices ex p Imbert* [1999] 2 Cr App R 276 DC, p.285, per Buxton LJ.

- (b) to have adequate time and facilities for the preparation of his defence;<sup>89</sup>
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

As with CPIA, Art 6.3 is restricted to criminal trials and there seems no doubt that cases which are subject to the disclosure provisions would also fall within the terms of Art 6<sup>90</sup> and the more specific rights contained in Art 6.3.(a),(b) and (d).<sup>91</sup> What is less clear is the extent to which domestic courts, in implementing the 1998 Act, will follow the existing Strasbourg case law relating to disclosure.

Pre-CPIA the matter was considered in *Edwards v UK*<sup>92</sup> where the court held:

'it is a requirement of fairness under Article 6 indeed one which is recognised under English Law, that the prosecution must disclose to the defence all material evidence for or against the accused.'<sup>93</sup>

Pre-implementation it was suggested that proposals to restrict the information disclosed to the defence, particularly on the advice of the prosecutor, might well contradict the equality of arms principle<sup>94</sup> and there are a number of decisions

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<sup>89</sup> In *Jespers v Belgium* (1981) 27 DR 61 (EctHR Com) it was established that 'facilities' included the findings of any investigations carried out throughout the proceedings, a point reaffirmed in both *Edwards v UK*. and *Rowe and Davis v UK* (2000) 30 EHRR 1.

<sup>90</sup> *Benham v UK* (1996) E.H.R.R. 293., *Ravnsborg v Sweden* (1994) Application 00014220/88.

<sup>91</sup> Although, by way of comparison, in *Nattrass v Patterson* [1993] 2 N.Z.L.R. 115 at 119 s 24 of the New Zealand Bill of Rights Act, which entitles the accused to be, 'informed and in detail of the nature and cause of the charge' was held not to confer a right to discovery in criminal proceedings.

<sup>92</sup> (1992) 15 E.H.R.R. 417.

<sup>93</sup> Para 36.

<sup>94</sup> Leng. R. 'Losing Sight of the Defendant: The Government's Proposals on Pre-Trial Disclosure.' [1995] Crim LR 704.

which may provide some early indication of the possible reasoning to be applied to the early cases heard under the 1998 Act.

The jurisprudence of the EHCR shows that each element of the procedure is examined as part of the total trial process,<sup>95</sup> with the function of the court being to consider the conduct of the case to determine whether the proceedings were fair *in their entirety*<sup>96</sup> and, for this reason, it is the effect of CPIA on the entire process which is at issue. On this basis, the court in *Edwards* held that the non-disclosure at the original trial (which would otherwise have constituted a breach of Art 6) had been remedied by the later disclosure before the hearing at the Court of Appeal and, consequently, it is conceivable that the ability of the defence to request additional prosecution disclosure by means of a s8 application may also be interpreted as providing sufficient safeguard within the process *as a whole* to comply with Art 6.<sup>97</sup>

One weakness in this analysis, however, is that, except in cases attracting PII, the s8 procedure, if made, represents the first judicial intervention in the disclosure process. Until this point, disclosure remains solely in the hands of police and CPS and this may well undermine any attempt to apply the *Edwards* principle to CPIA as, previously,<sup>98</sup> the ECHR has looked to the facility for the courts to review the evidence in the case as an important indication of a fair trial. Clearly, in this regard, the hearing before the Court of Appeal in *Edwards* cannot be compared to a limited application for the disclosure of specific documents under a s8 application.

Equally, it should be recognised that, in implementing the 1998 Act, it is by no means inevitable that the domestic courts will follow the Strasbourg

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<sup>95</sup> *Kostovski v The Netherlands* (1989) 12 EHRR 434, para. 39; *Windisch v Austria* (1990) 13 EHRR 281, para. 25; *Ludi v Switzerland* (1992) EHRR 173, para. 43; *Saidi v France* (1993) 17 EHRR 251, para. 251; *Doorson v The Netherlands* (1996) 22 EHRR 330, para. 67; *Van Mechelen v The Netherlands* (1997) 25 EHRR, para. 49.

<sup>96</sup> The early Scottish cases also appear to have favoured this interpretation. See for example *H.M. Advocate v Robb* 2000 J.C. 127; *Patton v Ritchie* 2000 J.C. 271; *McKenna v H.M. Advocate* 2000 J.C. 291.

<sup>97</sup> See also *R v Stafford JJ, ex p Imbert*. Times 25<sup>th</sup> February 1999.

<sup>98</sup> *Mialhe v France* (1996) 23 EHRR 491.

jurisprudence<sup>99</sup> and examine the conduct of the case as a whole. It would be open to the court to adopt a more step-by-step approach and apply the Convention rights at each stage of the proceedings as they occur.<sup>100</sup> In this eventuality, the three stage disclosure procedure under CPIA will come under far greater pressure, with both the subjective duty of primary disclosure and the implications of the use of defence statements open to challenge. Traditionally the Strasbourg court has seen its function as not to consider complaints in abstract, but rather to consider the fairness of proceedings in a given case. However, this does not preclude a more structural challenge to CPIA on the grounds that it represents a system, the very existence of which involves the withholding of the information needed to establish a complaint. The obvious difficulty is that this would, by its very nature, arise from circumstances where the claimant could not prove that such information had actually been withheld (unless subsequent revelations have shown this to be the case), leading to doubts as to whether the court would entertain a claim on this basis. However a similar argument was put forward in relation to covert surveillance in *Klass v Germany*;<sup>101</sup> the court concluded that the secrecy of the procedures and the lack of procedural safeguards provided valid grounds for complaint and that the effectiveness of the Convention would be seriously undermined if the complainant was required to show 'any concrete measure affecting him'. It remains to be seen whether the domestic courts, in implementing the 1998 Act, will also apply this principle although it is equally likely that such general claims will be discouraged from the outset.

This raises the question of what, if any, latitude is available to the domestic courts in implementing the 1998 Act, where a perceived conflict arises between the Convention rights and the provisions of CPIA.

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<sup>99</sup> Being required, under s 2, only to 'take into account' previous decisions of the Strasbourg Court.

<sup>100</sup> Although the House of Lords reiterated the test of *overall* fairness, rather than an application to each stage of the process in *R v Lambert* [2001] 3 WLR 206, HL and the Court of Appeal adopted a similar approach in *R v Craven* (2001) *The Times*, 2 February.

<sup>101</sup> (1979) 2 EHRR 214.

The 1998 Act expresses this duty in the following terms:

s. 3(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

s. 3(2) This section-

- (a) applies to primary legislation and subordinate legislation whenever enacted;
- (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
- (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

Where it is asserted that a statutory provision is incompatible with ECHR, the court must attempt, if possible, to interpret the legislation in a manner compatible with the Convention rights. Should this prove impossible, however, the trial must continue under the disputed provisions,<sup>102</sup> with the matter becoming a potential ground for appeal. The function of the court, therefore, is not to search for Parliament's intention in enacting the legislation, but instead to adopt any possible construction compatible with the Convention rights. The exercise of such a power on the part of the UK courts signals an important stage in the development of the domestic courts as courts of human rights and there are indications that the courts are prepared to radically reinterpret statute to achieve compatibility.<sup>103</sup>

The relationship between Strasbourg and the domestic courts in such cases was considered by the ECHR in *Khan v UK*,<sup>104</sup> where the court re-stated the principle that the admissibility of improperly obtained evidence was a matter, not for Strasbourg, but for regulation under the domestic law<sup>105</sup> and confirmed that the availability of the judge's discretion to exclude evidence, either under the

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<sup>102</sup> HRA 1998, s.3(2)(b)., unless the matter is sufficient to constitute an abuse of process.

<sup>103</sup> *R v A* [2001] 2 WLR 1546.

<sup>104</sup> (2000) Application No 35394/97.

<sup>105</sup> *Schenk v Switzerland* 13 EHRR 242.

common law or under s 78 of PACE, was sufficient to comply with Art 6. Although the collection of the evidence in question (in the form of covert tape recordings), itself, constituted a breach of Art 8, this was not sufficient to render the trial unfair from the outset (as, for example, in *Teixeira de Castro v Portugal*<sup>106</sup>) and so left any question of a breach of Art 6 for the domestic courts. It is suggested that this principle is somewhat difficult to apply in cases of defective disclosure, which are more likely to be viewed either as a straightforward breach of Art 6, or as an abuse of process.<sup>107</sup> Non-disclosure is, therefore, unlikely to prompt an application of the principles set out in *Khan*.

Before leaving *Khan*, it is important to note that another key aspect of the case was its illustration of the potential for the domestic courts to adopt a fresh approach to the implementation of Convention rights under HRA 1998 and, in particular, the capacity to expand upon, rather than simply follow, the established Strasbourg jurisprudence, which they are required only to 'take into account.'<sup>108</sup> In this way the UK courts may ultimately seek to reconcile the potential conflict between CPIA and HRA by exploiting their status as courts of human rights and by employing that latitude of interpretation which the Strasbourg Court has traditionally left to member states under the margin of appreciation doctrine. By this mechanism the domestic courts may be able to reconcile the more contentious aspects of the current disclosure regime with the obligations imposed by the 1998 Act.

One such example concerns the question of whether Art 6 requires the prosecution to disclose merely that material which undermines the prosecution case and/or assists the defence or, alternatively, extends the duty of disclosure to encompass material which is largely neutral.<sup>109</sup> Here it could be argued that s3 of CPIA is entirely compatible with Article 6 by virtue of the obligation which it

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<sup>106</sup> (1998) 28 EHRR 101.

<sup>107</sup> Interestingly the decision in *Teixeira* itself was viewed in this way by the Court of Appeal in *R v Shannon* [2001] 1 WLR 51. For further consideration of the abuse of process argument in relation to non-disclosure, see Section 10.7.

<sup>108</sup> HRA, s 2.

<sup>109</sup> As suggested in *Edwards*.

imposes on the prosecutor to disclose material which undermines the prosecution case. Support for this interpretation can be found in *Bendenoun v France*<sup>110</sup> which emphasised that the documents at issue did not form any part of the prosecution case and which held that there had been no breach of Art 6 where the prosecuting authorities had selected the documents to be made available to the defence. The court concluded:

'in such circumstances the concept of a fair trial may nevertheless entail an obligation on the Revenue to agree to supply the litigant with certain documents from the file on him or even with the file in its entirety. However, it is necessary, at the very least, that the person concerned should have given, even if only briefly, specific reasons for his request.'<sup>111</sup>

This is largely in line with the 1996 Act, both in the definition of unused material and in making at least part of the prosecution disclosure process dependent on specific, rather than general, requests from the defence. This would certainly equate with the requirement for the defence to demonstrate reasonable belief that there is additional relevant material within the possession of the prosecution. What is less clear is whether this principle would extend to the obligation on the defence to provide a detailed defence statement as a trigger for secondary disclosure. It should also be noted that the duty of disclosure under Art 6 is not dependent on disclosure of the defence case, leading to a potential conflict with the Convention caselaw on freedom from self-incrimination and the right to silence.<sup>112</sup> However, should a wider interpretation find favour, the implications are twofold: firstly, this would create a clear disparity between the duty imposed on the prosecution by CPIA and that required to comply with Art 6. Secondly, it would effectively negate the principle of the 1996 Act, which was to restrict the blanket disclosure obligation under the common law (as embodied in *Ward*) and return the police and prosecution to a regime of total disclosure.

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<sup>110</sup> (1994) 18 E.H.R.R. 54.

<sup>111</sup> Para. 52.

<sup>112</sup> *John Murray v UK* (1996) 22 EHRR 29; *Funke v France* (1993) 16 EHRR 297; *Saunders v UK* (1997) 23 EHRR 313.

Another potential extension of the prosecution duty which would be of particular concern to the police and CPS concerns third party unused material. Under CPIA and the police Codes of Practice, the investigator is not required to make speculative enquiries of third parties.<sup>113</sup> This was supported by *R v Reading Justices ex p Berkshire County Council*,<sup>114</sup> which held that a summons for third party documents should not be issued merely in order to ascertain whether they did or did not contain relevant information and, once again, this serves to limit the defence 'fishing trips' so criticised by the police and government during the passage of CPIA. However, whereas this may be in keeping with the ethos of the 1996 Act, it may not prove sufficient to ensure compliance with Art 6 and the court may, instead, follow *Jespers v Belgium*<sup>115</sup> which proposed a broader duty of third party disclosure extending to any material 'to which the prosecution or the police could gain access,' even though the implications of such an elastic interpretation would be to introduce even greater uncertainty into an area which, as this study illustrates, has already proved problematic for the police.

As has already been noted, in summary cases it is only on entering a not guilty plea that the defence qualifies for prosecution disclosure and this too may create difficulties. The ECHR has previously held that Art 6 entitles the accused to access to the prosecution file even in relation to minor offences.<sup>116</sup> However, in *R v Stratford Justices ex parte Imbert*<sup>117</sup> the Divisional Court held not only that advance disclosure in the Magistrates was not a requirement of the right to a fair trial but also that this would be unaffected by the implementation of the 1998 Act. Once again it remains to be seen whether such a view will prove tenable.

One of the most contentious aspects of the disclosure process is the treatment of PII applications arising from the use of covert policing techniques and, in particular, informants. Although some argue that, once a criminal prosecution has begun, the whole prosecution evidence must be disclosed, regardless of its

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<sup>113</sup> Codes of Practice, para 3.5.

<sup>114</sup> [1996] 1 Cr App R 239.

<sup>115</sup> (1981) 27 DR 61.

<sup>116</sup> *Foucher v France* (1997) 25 EHRR 36

<sup>117</sup> The Times, 25 February 1999.

sensitivity<sup>118</sup> it has been accepted by the European Court that the interests of national security can justify the withholding of evidence, providing there are the necessary safeguards.<sup>119</sup> Issues of PII are specifically exempted from the provisions of CPIA, and so remain under the existing common law, there is inevitably an overlap due to the role of the disclosure officer and prosecutor in preparing the schedule of sensitive unused material (MG6D) and in making applications for PII. This raises the question of to what extent it is justified to withhold information to protect sources, informants or other witnesses as part of balancing the interests of the State and the defendant and, more importantly, the potential breach of Art 6 which might occur as a consequence.

The nature of this dilemma was addressed by the Strasbourg Court in *Rowe and Davis v UK*<sup>120</sup> where the Strasbourg court unanimously held that the prosecution decision to withhold relevant material on grounds of PII amounted to a violation of Art 6.1.<sup>121</sup> as this had been done without notifying the judge and therefore without providing an opportunity for the judicial consideration of the contested material. In addition, consideration of the case by the Court of Appeal was insufficient to remedy the earlier omission as, at this stage, the defence had still not received all of the information at issue. This can be contrasted with *Edwards* where, by the time of the Appeal, all of the relevant material had been made available to the defence which, as a consequence, was adequately prepared for the appeal.<sup>122</sup>

This could indicate that the current rules governing non-disclosure in cases involving PII will be viewed as adequate, particularly when these include the established practice of discontinuing a case where to reveal the documents for

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<sup>118</sup> See, for example, the dissenting ruling of Judge Pettiti in *Edwards v UK*.

<sup>119</sup> *Tinnelly v UK* (1998) Application No 00020390/92.

<sup>120</sup> (2000) 30 EHRR 1. The case itself pre dating *Ward*.

<sup>121</sup> Although the court held by the narrowest of margins (9 to 8) that *ex parte* hearings do not, themselves, violate Art 6. See also *Fitt and Jasper v UK* (2000) 30 EHRR 441.

<sup>122</sup> Although the court has accepted the possibility of *ex parte* PII applications, in both *Jasper v UK* (1998) Application No 27052/95. and *Fitt v UK* (1998) Application No 29777/96. The court held (albeit only by 9 votes to 8) that there had been no breach of Art 6. where the defence had been kept informed of the PII application and the dissenting judgments centred on the essentially adversarial nature of PII hearings which required an opportunity for the defence to challenge the prosecution case for non-disclosure.

which PII is sought would endanger the safety of the source but to withhold them would be to risk a miscarriage of justice. The Strasbourg caselaw to date has centred more on anonymous evidence rather than evidence the very existence of which is concealed, and in *Doorson v Netherlands*<sup>123</sup> the court had to address a possible violation of Article 6 caused by the testimony of anonymous witnesses and concluded:

'It is true that Article 6 does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However their life, liberty or security of person may be at stake...Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.'<sup>124</sup>

It should be noted, however, that both *Doorson* and the later case of *Van Mechelen v Netherlands*<sup>125</sup> concerned evidence which, although given anonymously, was capable of challenge and cross examination by the defence. This is a very different situation from cases involving PII, where the very existence of the source is concealed together with the precise nature of the evidence produced by that individual, and where the opportunity for challenge by the defence is denied. Another key consideration is that, although the European Court has accepted the use of written statements from witnesses not giving direct evidence,<sup>126</sup> this has been on the basis that any subsequent conviction has not been based solely on such evidence<sup>127</sup> but, again, if the very existence of the evidence is concealed then it is difficult to see how this condition can be satisfied.

Notwithstanding such concerns, recent cases before the Court of Appeal have continued to focus on the question of whether the defence was informed of the existence of the sensitive material during the course of the original proceedings.

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<sup>123</sup> (1996) E.H.R.R. 330.

<sup>124</sup> Para 70.

<sup>125</sup> (1998) 25 EHRR 657.

<sup>126</sup> *Asch v Austria* (1993) 15 EHRR 597.

<sup>127</sup> *Kostovski v Netherlands* (1990) 12 EHRR 434; *Ludi v Switzerland* (1992) 15 EHRR 173.

In *R v Smith (Joe)*<sup>128</sup> the Court, after considering the Strasbourg jurisprudence, found no breach of Art 6 in the conduct of an *ex parte* PII application made at the original trial. However, more alarmingly, in *R v Bothmeh and Alami*<sup>129</sup> the Court of Appeal similarly found no breach of Art 6 even though the material subject to PII had not been disclosed to the trial judge and accepted the validity of an *ex parte* hearing at the appeal stage.

Such decisions suggest that there is little desire on the part of the domestic courts to recognise a conflict between the procedures for PII and HRA and this must reduce the likelihood that the courts will challenge the basic application of CPIA by means of the 1998 Act. If so, this means that HRA will not ultimately provide a remedy the due process deficit in the disclosure legislation and will assist only in the most egregious cases of non-disclosure.

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<sup>128</sup> [2001] 1 WLR 1031 CA; *Bothmeh and Alami* [2002] 1 Cr App R 345 CA.

<sup>129</sup> [2002] 1 Cr App R 28.

## **5. disclosure under the Criminal Procedure and Investigations Act 1996.**

### **5.1. the Act**

The Criminal Procedure and Investigations Act 1996 (CPIA), which incorporated the majority of the 17 recommendations made by the Royal Commission, received Royal Assent in July 1996 and came into force on 1<sup>st</sup> April 1997.

Despite the fact that, in some areas<sup>1</sup> the definitions employed by CPIA were arguably as broad as those which had existed previously under the common law, the Act undoubtedly represented a fundamental change to the conduct of criminal cases akin to that introduced by PACE a decade earlier.<sup>2</sup> This was achieved primarily by the introduction of the three-stage disclosure procedure,<sup>3</sup> which replaced the largely automatic disclosure which had operated previously, with a process which imposed a duty to disclose arose only where material first satisfied the tests imposed by the Act.

### **5.2. the key provisions**

CPIA applies once the accused is committed or sent to Crown Court for trial on indictment<sup>4</sup> and voluntarily before the magistrates' court.<sup>5</sup> The Act imposes no disclosure obligations prior to charge.<sup>6</sup> Under CPIA, each investigation sees one police officer nominated as 'disclosure officer' and, as such, responsible for satisfying the requirements of the Act relating to the collation and disclosure of

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<sup>1</sup> For example the test of 'relevance'.

<sup>2</sup> And, like the earlier statute, CPIA relied heavily on the supporting Codes of Practice for its effective operation.

<sup>3</sup> Although the suggestion that a duty of defence disclosure would save time and expense during the trial process was doubted even by the RCCP (para.8.14).

<sup>4</sup> s. 1(2).

<sup>5</sup> s. 6.

<sup>6</sup> *DPP ex p Lee* [1999] 2 Cr App R 304 DC. But see also, *DPP v Ara* [2002] 1 Cr App R 16.

unused material, the most crucial aspect of which being the preparation of the MG6C<sup>7</sup> and MG6D<sup>8</sup> schedules of unused material which form the basis for all subsequent disclosure. Although the wording of the Act suggests that the work of the disclosure officer represents some form of supervision over the work of the officer in the case (OIC), in the overwhelming majority of cases both roles are performed by the same individual and the potential conflict of interest which this produces forms a key aspect of this study.

From the disclosure officer the file is passed to the police Administrative Support Unit (ASU). As will be shown, the precise role of the unit varies from force to force but, as a minimum, they ensure that the file contains the correct documentation and handle liaison with the CPS. The file will then pass to the CPS and ultimately it falls to the CPS lawyer to fulfil the prosecution responsibilities set out under the Act.

As has already been stated, disclosure under CPIA is a three-fold procedure, which begins with the 'primary' disclosure stage, in which the prosecution must:

- (a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which in the prosecutor's opinion might undermine the case for the prosecution against the accused, or
- (b) give to the accused a written statement that there is no material of a description mentioned in paragraph (a).<sup>9</sup>

The term 'material' covers anything:

- (a) which is in the prosecutor's possession, and came into his possession in connection with the case for the prosecution against the accused, or
- (b) which, in pursuance of a code operative under Part II, he has inspected in connection with the case for the prosecution against the accused.<sup>10</sup>

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<sup>7</sup> Non-sensitive.

<sup>8</sup> Sensitive.

<sup>9</sup> s. 3(1). The duty is subject to the provisions for 'protected material' in sexual cases under the Sexual Offences (Protected Material) Act 1997.

<sup>10</sup> s. 3(2). Subsequent caselaw has established that the words 'in connection with the case for the prosecution against the accused' are to be broadly construed. *R v Reid* [2002] Crim LR 234.

The rejection of an objective duty on the prosecutor as part of the test for primary disclosure under CPIA represented one of the two major diversions from the recommendations of the Royal Commission and, as a result, it falls to the individual prosecutor<sup>11</sup> to reach a subjective assessment of the possible impact of the material on the prosecution case,<sup>12</sup> based on the schedules prepared by the disclosure officer. Of these, the schedule of non-sensitive material is passed to the defence and, with it, the duty of disclosure.

The question of a reciprocal obligation for the defence was possibly the most contentious issue considered by the Royal Commission in relation to disclosure and the final proposal was for a pro-forma list of possible defences ('accident,' 'consent,' etc.) from which the defence could select<sup>13</sup> as a trigger for any possible additional disclosure from the prosecution. The government, however, rejected this notion of a rather general indication of the proposed defence and the provisions of CPIA relating to the preparation of the defence statement represented the second major departure from the Runciman recommendations. Under the Act, the defence is required to produce a more detailed statement:

- (a) setting out in general terms the nature of the accused's defence,
- (b) indicating the matters on which he takes issue with the prosecution, and
- (c) setting out, in the case of each such matter, the reason why he takes issue with the prosecution.<sup>14</sup>

The defence statement is to be served on the prosecution within 14 days of primary disclosure<sup>15</sup> and prompts a re-examination of the unused material by the

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<sup>11</sup> Materiality is not dependent on the admissibility of the evidence. *R v Preston* (1994) 98 Cr App R 405 HL, p 429. On issues of materiality, the intervention of the court is reserved for matters of PII. *R v B* [2000] Crim LR 50 CA. It is also open to the defence in common law to seek the assistance of the court in determining issues of materiality, although even this requires the defence to establish a clear prima facie case for opposing the prosecutor's view. *Bromley Justices ex p Smith and Wilkins* [1995] 2 Cr App R 285 DC.

<sup>12</sup> 'What potentially undermines at the primary stage is a subjective opinion and, if I got 10 lawyers in here, or 10 police officers, you would get 10 different opinions as to what to disclose. It depends on whether you want it "half full" or "half empty". So you can never really say, "I have done that and it is spot on." It is not that tangible - that is the point.' [CPS 2/27].

<sup>13</sup> p.99. para 68.

<sup>14</sup> s. 5(6).

<sup>15</sup> Although this time period is subject to extension. The Criminal Procedure and Investigations Act 1996 (Defence Disclosure Time Limits) Regulations 1997 SI 1997/684, reg 2 and extension reg 3(2).

prosecution, a process undertaken not by reference to the initial subjective test of primary disclosure but, instead, by means of an objective assessment of the remaining unused material,<sup>16</sup> whereby the prosecutor is required to:

- (a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might be reasonably expected to assist the accused's defence as disclosed by the defence statement given under section 5 or 6, or
- (b) give to the accused a written statement that there is no material of a description mentioned in paragraph (a).<sup>17</sup>

By requiring the prosecution to revisit their initial assessment of the unused material in the case, the professed aim of this process of 'secondary' disclosure was to provide additional protection for the accused, without reverting to the previous regime which often required the police to provide copies of all material in their possession. It should be noted, however, that this process relies entirely on the defence statement to indicate the proposed character of the defence and so identify material which may undermine the prosecution case.<sup>18</sup>

### **5.3. reaction to CPIA**

On reading the final statute it was easy to forget that its origins lay in a Royal Commission arising from miscarriages of justice. It might have been thought that such glaring evidence of the dangers of an overtly 'crime control' agenda to criminal investigation and prosecution would have produced a revised disclosure regime based on 'due process' protections, yet the final statute was almost entirely tailored to the needs of the prosecution. In particular, the relationship between the defence statement and the process of secondary disclosure illustrated

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<sup>16</sup> 'the differently formulated tests for disclosure, suggesting a subjective and narrow approach at the primary stage and a broader and objective one at the secondary stage, are logically indefensible, confusing and the cause of much unnecessary pre-trial dispute and delay.' Auld. R. (Sir) (2001) Review of the Criminal Courts. London:HMSO. Para 162.

<sup>17</sup> s. 7(2).

<sup>18</sup> A process which causes some prosecutors difficulty. 'There had to be a carrot and that carrot was secondary disclosure - the prospect that there would be more material disclosed and it just doesn't feel right...either there is a duty to disclose or there isn't and I don't see why I have to say, "Well, because you have gone into marvellous detail about your defence, you can look at item 13"'. It is the nature of our criminal justice system that the prosecution have to prove their case and the defence do not. Requiring a defence statement in that way is blackmailing the defence into revealing their case.' [CPS 4/358].

the government's determination not only to restrict the flow of information to the defence, but also to compel defence compliance by means of the twin threats of possibly incomplete prosecution disclosure (where the defence statement is not sufficiently explicit to permit a detailed consideration of issues of secondary disclosure) and adverse inference at trial (where a defence statement is not provided at all).<sup>19</sup> Furthermore, the fact that, in summary cases, the provisions only apply on a not guilty plea<sup>20</sup> means that defendants in the majority of criminal cases were placed in the unenviable position of having to forfeit the possibility of a discounted sentence if they were to compel prosecution disclosure.

The result was a procedure which left discretion in matters of disclosure to the prosecution, with only limited safeguards for the accused and where even the penalties for non-compliance or inadequate disclosure were unequal for, although the defence ran the risk of adverse inference, the Act provided no sanction for the prosecution beyond the granting of a s8 order by the court compelling additional disclosure. Failure to observe time limits did not, in itself, constitute abuse of process<sup>21</sup> unless the delay was so egregious as to threaten the fairness of the trial. Also, the procedure under s8 for obtaining further prosecution material placed the burden on the defence to show 'reasonable cause to believe that there is prosecution material which might be reasonably expected to assist the accused's defence,'<sup>22</sup> thereby raising the question of to what extent the defence would be equipped to identify such material where both the defence and the court may be ignorant of its existence.<sup>23</sup>

The extent to which the final legislation was governed by 'crime control' imperatives would quickly become apparent when CPLA came into force and,

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<sup>19</sup> s. 11.

<sup>20</sup> s. 1(a).

<sup>21</sup> s. 10.

<sup>22</sup> s. 8(2)(a).

<sup>23</sup> 'Though the defence may apply to the court to order the disclosure of material held by the police, it first has to show how this helps its particular case. Without seeing it, the defence may not know how it is relevant and unless it can show its relevance will not be allowed to see it.' Ede. R. 'In the Name of Justice.' (1997) *The Times*, 1 April. So-called 'fishing expeditions' were again discouraged in *R v Brown (Winston)* [1995] 1 Cr App R 191 CA and *R v Guney* [1998] 2 Cr App R 242 CA, p 257.

during the fieldwork for this study, the way in which the 'crime control' philosophy of the police exacerbated the weaknesses of CPIA disclosure was evident at every stage of the process.

**SECTION 2.**

**THE POLICE AND DISCLOSURE**

## **6. issues within the police service**

### **6.1. the police**

Before considering the mechanisms employed by police officers and others to fulfil their disclosure obligations under CPIA, it is useful to mention some of the broader issues which arose from the interviews and which provide a background to a number of the practical and ethical dilemmas which will be examined in later sections. Quite apart from the direct influence which some of these factors have on the effectiveness of the disclosure regime they also provide some insight into more general problems faced by the police.

### **6.2. the changing nature of the police service**

Unprecedented criticism of the police over recent years has prompted a continuing programme of change as the 'police force' has given way to the 'police service' and great efforts have been made to display a more modern and progressive approach towards the public in general and minority groups in particular. In common with other public services, the police have found themselves subject to ever-increasing managerial and governmental pressure aimed at achieving 'value for money' policing conducted on a 'businesslike' basis.<sup>1</sup> This has been accompanied by a management ethos which many within the service see as incompatible with their role and the increasing emphasis on performance and value has led a number of the officers interviewed to question the direction in which the police are moving.

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<sup>1</sup> Morgan. R., Newburn. T. (1997) *The Future of Policing*. Oxford: OUP.; Leishman. F., Loveday. B., Savage. S. (eds) *Core Issues in Policing*. London: Longman.

'I think we are trying to be the all singing and all dancing "police plc" and we are not. We are trying to be a service now and we have all these people now who are more interested in mission statements. It is all very well and good having a more open management style, but getting cases to court and getting convictions is harder now than it ever has been, because you have to consider all these other things.'<sup>2</sup>

This manifests itself in a number of ways, perhaps best illustrated by reference to Niederhoffer's<sup>3</sup> essential characteristics of a 'professional,' which he identified as:

1. high standard of admission.
2. a special body of knowledge and theory.
3. altruism and dedication to the service ideal.
4. a lengthy period of training.
5. a code of ethics.
6. licencing of members.
7. autonomous control.
8. pride of the members of the profession.
9. publicly recognised status and prestige.

In speaking to police officers, it is clear that they perceive a decline in standards in relation to a number of these areas and this is reflected in the various stages of the disclosure procedures outlined in this research. Quite apart from their potential impact on mechanisms such as disclosure, there is also the question of to what extent ongoing changes to the nature of the police service have eroded general morale and a number of key developments serve to illustrate the dangers.

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<sup>2</sup> ASU 12/140.

<sup>3</sup> Niederhoffer. A. (1967) *Behind the Shield: The Police in Urban Society*. New York: Doubleday.

### **6.3. recruitment and training**

Concerns over the general standard of new officers emerged as a common theme in interviews with many of the more experienced officers, who cited declining entrance standards and changes to the basic training as an area of concern. For some, changes to recruitment over the past decade have expanded opportunity at the expense of quality and changes to the police entrance exam attracted particular criticism.

'We agree to everything now – "Yes we will do that", instead of someone being strong and powerful enough at a chief officer level to say, "no, we are not doing that". In 1992, we did away with the police entrance exam, which was by no means difficult, but ensured that we knew that people could spell correctly, could write fairly legibly and could hold a conversation. We got rid of all that and why? Because somebody somewhere said, "This is discriminatory against such-and-such a group"...so we did away with all that and we have this system in place now whereby you just have to watch a video and try to remember what happened, do a little bit of spelling and very few people fail it - then we say "Right, the CPIA". There are people coming into the job now, and I can visualise them as I talk to you, they are as thick as two short planks and we are asking them to deal with issues such as disclosure.'

<sup>4</sup>

It is tempting to see such comments as merely the cynicism of experience, but the prevalence of such views does suggest at least some justification. Coupled with changes to the selection procedures for CID, the result of any general diminution of standards must be a cause for concern, particularly when combined with widespread dissatisfaction with the provision of subsequent training.

Changes to the police service have exerted a detrimental impact on training in two ways: firstly, over time there has been a declining expectation on the part of officers as to the training which will be made available to prepare them for new legislation. In part, this is a consequence of limited manpower and resources,

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<sup>4</sup> ASU 12/154. An ASU officer from another force expressed similar views, 'You do get some thick policemen, they are not all the brightest people in the world. Some people bring other qualities to the job, and some people bring no qualities and shouldn't have got in the first place...I mean, there's a certain number of people here now who, in my opinion, shouldn't be police officers, not because they are violent, or criminals, or anything like that - just that they are not competent. Maybe that's a controversial thing to say like but it's true. I'm sure that happens in any profession. The problem is, if they are police officers, then they can do a lot more harm.' [ASU 4/197].

together with the logistical difficulties of freeing officers from their duties to undertake additional training but, in both of the forces which participated in this study, major legislation such as CPIA and HRA was introduced with only minimal training and often after the legislation itself was in force.<sup>5</sup> As a result, complaints over the paucity of such training were a recurring theme in the interviews with investigators, with the following being a typical example.

'Initially, I actually think that most people more or less ignored it. The training we had was woefully inadequate, it was a case of 'you will have to record everything' and then these schedules appeared with a few examples of what should go on them.'<sup>6</sup>

In the absence of formal training, and in the best tradition of the police service, the only alternative became to evolve working practices largely based on trial and error,<sup>7</sup> but the fact that officers were expected to assume the responsibility of disclosure officer with only a modest appreciation of what the role entailed<sup>8</sup> must raise questions over the evidential integrity of those early cases and is worrying in the extreme when considering the possible consequences of any flawed assessments of unused material.

Secondly, wider political pressure on the police service to adapt to a changing society has produced more structural changes in relation to the availability and delivery of training, and attempts to learn from the private sector<sup>9</sup> have produced a shift in priorities which, for many offices, has not been welcome.

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<sup>5</sup> A delay reflected in the comments of an ASU Sergeant at the end of 2000, '...the next thing is human rights and we haven't had any training on it yet. I'll be honest, I've been a bit of an ostrich with it but you know it is coming don't you?' [ASU 6/197].

<sup>6</sup> CID 5/17.

<sup>7</sup> The processes for this are explored further in Ch 11.

<sup>8</sup> The average training for disclosure officers surveyed by the Home Office was less than a day and fewer than half of those acting as disclosure officers had been specifically trained for their role. Plotnikoff. J., Woolfson. R. (2001) *A Fair Balance? Evaluation of the Operation of Disclosure Law*. London: HMSO. p.105.

<sup>9</sup> 'They tried to go down a Marks & Spencer type of training with, "This is what Marks & Spencer do with their career review so this is what we are going to do" and we had all this "Product based" and "Output based" training. Performance indicators and all that sort of thing.' [ASU 7/103].

'You don't get any training whatsoever on new legislation - or very minimal...there was only ½ a day or perhaps a day for the 1996 Act, which is not a lot considering what it was...the training now tends now to be, how can I put this, politically correct. You will get two days training on diversity or equal opportunities or something like that but we don't get much by way of broad training anymore and that is probably the response you will get from most officers.'<sup>10</sup>

This is a difficult area as the police clearly had much ground to make up in relation to issues of equality but, despite such benefits, the fact that this training has been at the perceived expense of substantive training on new legislation represents one of the key factors in undermining the implementation of CPIA and other key due process safeguards. A number of officers speculated, somewhat cynically, that the approach of the police service was that training would be made available in the aftermath of a major disclosure failure, but not before.

'It is well known that unused material is a problem, everyone in our force knows that and CPS knows that and it is a question of priorities - how far down the list of priorities is the relevant training for unused material and, if it ever gets to the top of the list then we will be OK. If it doesn't then it might be that "incident" that puts it at the top of the list.'<sup>11</sup>

If correct, this does little to assuage doubts over the probity of much police decision making in relation to disclosure. The repercussions of this training deficit are apparent in the approach of officers towards their disclosure obligations and underpin many of the conclusions of this work.

#### **6.4. operational policing and managerial policing**

Changes in both recruitment and training of officers are indicative of the structural changes to the police service which have come about in the past 20 years. Under the Conservative government of the 1980s questions were increasingly asked about police effectiveness, culminating in the Sheehy Inquiry and, although the police successfully resisted the more radical recommendations in the final report, the Police and Magistrates Courts Act 1994 dispelled any

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<sup>10</sup> ASU 10/53.

<sup>11</sup> ASU 10/165.

remaining illusions that the police were to escape the prevailing 'managerialist' ethos.<sup>12</sup>

For operational officers, the result has been a widening gulf between operational and managerial policing, leading to a degree of resentment, not only of the accelerated opportunities which changes to the police service have brought to some,<sup>13</sup> but also of the detachment from the realities of operational police work which many officers see in their supervision.

'We had a job on recently where we used an awful lot of covert surveillance footage and the comment from middle management was, "Fucking hell, there's no real work in that - you just have to sit and view the tapes." Well no, you don't just have to sit and view the tapes, you have to view the tapes but you have to make a written record of everything that occurs, you have to type and cross reference it, decide what's disclosable and what's non-disclosable, edit it. He just didn't understand that there's weeks of work in looking at that amount of tape.'<sup>14</sup>

The dangers of this in relation to disclosure are not difficult to appreciate, as the inevitable consequence of a sense of detachment from management is an increase in the application of operational autonomy. Officers who do not feel that the demands of their work are fully appreciated by the managerial levels of the police service are more likely to fall back on colleagues for support and to seek reinforcement of their decision making within the largely insular environment of their immediate working environment.

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<sup>12</sup> See Leishman. F., Loveday. B., Savage. S. (1996) *Core Issues in Policing*. London: Longman. p 12-17. and Brownlee. I. 'New Labour - New Penology? Punitive Rhetoric and the Limits of Managerialism in Criminal Justice Policy.' (1998) 25 *Journal of Law & Society* 313.

<sup>13</sup> 'Management, and by that we mean Superintendent and above, they have done very well with the organisation being the way it is - it has worked for them. They are the winners, they have gone through the promotion boards but, if you look at what a lot of them have actually done in their careers, there is very little police work, very little. By definition they have had to go through the ranks quickly with Maggie coming along and saying, "We want these superintendents within 7 years" - that takes some doing.' [ASU 12/148].

<sup>14</sup> CID 1/137. An ASU officer added his own view, 'It is remoteness. They become more and more remote at that level from actual practical policing and you can forget a superintendent or a chief inspector now. Even inspectors now have little to do with operational practical policing. Some sergeants maybe - depending on what they do - but that is about as close as it gets now and if you are removed from that policing then you are removed from the files and so there is no knowledge there.' [ASU 10/183].

## **6.5. specialisation and de-skilling**

A significant underlying factor in the erosion of police morale has been the extent to which police work has become fragmented, with increasing emphasis on specialisation within the police service. In part, this is a result of the increasing complexity of law enforcement and the range of expertise required as a consequence, but the result has been a management ethos which implicitly encourages officers to seek transfer to specialist units. This has become part of the prevailing culture of the police service, leading to the expectation that any officer with ability will wish to escape general policing and, instead, concentrate on niche areas of the police role.

'It's all part of the positive promotion ethos - "You've got to move, you've got to specialise, you've got to do this, you've got to do that".'<sup>15</sup>

This has also resulted in fears of 'de-skilling,' as officers immersed in specialist work gradually lose the basic skills essential to policing and, consequently, find themselves unable to return to front line duties.

'There's whole departments I could pick out that, if they were brought back into investigations, they wouldn't know what the hell they were talking about...if you brought them down, back into normal policing duties tomorrow, they wouldn't have a bloody clue - it's de-skilling.'<sup>16</sup>

## **6.6. 'civilianisation'**

Another significant development closely linked to fears of de-skilling within the police service, has been the process of 'civilianisation', as political pressures for more officers led to the increasing delegation of non-operational work to civilian staff in order to free officers for more specialised duties. Understandably, such civilianisation produced fears within the body of police officers that their work will be devalued but, aside from such professional anxieties, there are

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<sup>15</sup> CID 1/145.

<sup>16</sup> CID 1/141.

inescapable tensions when officers find themselves challenged by civilians, as illustrated by the following example.

'We had a man who has not been dealt with very well in a failure to stop RTA, where, I would say, someone REALLY neglected their duty. So we wrote a report saying that, in our opinion, we should pay this bloke from central funds or wherever to compensate him for the loss of his no claims discount – it was that bad. Then a civilian, and I don't mean that as a disparaging term, wrote back saying, "I don't think we should do this. Surely now that we know who is responsible we can investigate this offence and take the appropriate action". Now this was a civilian who was brought in to deal with specific areas on the basis that they would be better than police officers but now he is saying, "No! - investigate it this way". What about the continuity of evidence? What about the fact that all of the evidence has been destroyed? What about the fact that it is now more than 8 months old and, therefore, is statute barred? And all of that goes back to an issue of de-skilling. People now are doing very well in this job who have no knowledge of policing. So why should people with 3 or 4 years service, who see those people up there doing very well thank you, be interested in the difficult bits? They are much better off going on their diversity courses, talking to the community, being photographed at the schools or things like that. You know, they get much better recognition than actually getting stuck in on the estates, dealing with the drugs and all the potential problems which come from that.'<sup>17</sup>

This process has a direct impact on disclosure, as the police Admin Support Units were one of the first departments to undergo such changes. As a result, much of the routine decision making surrounding file preparation and submission is undertaken, not by police officers, but by civilians and even some police officers within the ASUs question the extent to which staff untrained in investigative techniques and procedures can adequately assess the value of material to be disclosed.

### **6.7. lack of status of uniformed officers**

The combined effect of factors such as increasing civilianisation, coupled with institutional pressure on officers to specialise, has been a gradual diminution in the status of uniformed officers, to the point where there are real concerns within the police service. The relatively low status of uniformed officers in the eyes of

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<sup>17</sup> ASU 12/150.

their CID colleagues has been well recognised for some time<sup>18</sup> but, within the present climate of specialisation, many fear that the ranks of the uniformed officers, who undertake a wide range of everyday duties, will eventually be made up by those who lack the ability or the ambition to move on. The prevailing culture within the police does little to dispel this view.

‘Relief offices tend to be looked at as the bottom of the ladder really. You often hear that people get disciplined – they are sent back to relief as if working relief is a punishment...you often hear that someone who is maybe in the CID and gets disciplined, and then gets sent back to uniform on relief and that’s classified as a punishment. We’ve probably got a standing slightly above a cadet and slightly below a police dog.’<sup>19</sup>

Inevitably, the dwindling status of the uniformed officer is most commonly measured by reference to the enhanced standing of detectives and it will be shown that this perception of professional superiority is an important underlying factor in the flawed operation of disclosure by the CID.

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<sup>18</sup> In 1967 the Home Office recognised the need to, ‘elevate the status of the beat constable in a way that would bring out the best qualities of a policeman.’ *Police Manpower, Equipment and Efficiency: Reports of Three Working Parties*. London: HMSO. Para 15. Cited in Weatheritt. M. (1986) *Innovations in Policing*. London: Croom Helm. p 91.

<sup>19</sup> Uniformed officer quoted in McConville. M., Shepherd. D. (1992) *Watching Police, Watching Communities*. London: Routledge. p 190.

## **7. culture & discretion**

### **7.1. culture**

Before examining the way in which the provisions of the 1996 Act are implemented by investigators, it is necessary to consider the role played by two largely unseen factors which exert a powerful influence over officers in the performance of their duties.

The existence of particular cultural values within the police service<sup>1</sup> has been a central feature of most recent studies into practical police work and it has long been acknowledged that the attitudes which officers bring to their duties have considerable impact on the way in which those duties are discharged. Although the aims of this work did not include yet another examination of 'police culture,' it became increasingly clear during discussions with officers and others within the criminal justice system that a major influences on the decisions made by investigators in relation to issues of disclosure were the norms and values which are specific to the police role.

'The art of successfully regulating policing practice is dependent on understanding the complex relationship between formal rules and procedures, the subcultural rules of the police themselves, the structure of the police organisation and the practical exigencies of the tasks of policing.'<sup>2</sup>

Of particular importance is the way in which officers perceive themselves, both as individual professionals, and as part of a unit, as the ideological barriers which this self image can create between the police and other limbs of the criminal justice system exacerbates many of the difficulties which have arisen in the implementation of CPIA disclosure. In following the decision making of officers though the investigation and file preparation stages of case construction it is clear that much of the process is governed by deeply held common beliefs within the

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<sup>1</sup> 'Accepted practices, rules and principles of conduct that are situationally applied and generalised rationales and beliefs.' Manning, P.K. (1977) *Police Work: The Social Organisation of Policing*. Cambridge Mass: MIT Press. p 360.

<sup>2</sup> Reiner, R. & Leigh, L. (1994) 'Police Power', in McCrudden, C., Chambers, G. (eds) *Individual Rights and the Law in Britain*. Oxford: Clarendon Press. p 79.

police service and that many of these beliefs are dictated by the 'crime control' agenda. It is, therefore, essential to consider something of the background to what has been seen as a communal 'working personality' of the police<sup>3</sup> and the interrelationship between the formal and informal rules governing police conduct, as these bring the 'crime control' ethos of the police service into direct conflict with the 'due process' safeguards which should underpin the operation of disclosure.

## **7.2. entering the environment**

In assessing the origins of 'the police mind,'<sup>4</sup> a key factor is the operational culture within the individual police station, which dictates what is viewed as acceptable conduct and attitudes on the part of officers. Learning about these official and unofficial structures begins when the probationer first joins the station during the all-important introductory period, where the fundamental lessons are learned which remain with officers throughout their careers. The new officer is pitched into an environment where reputations, favourable or otherwise, are quickly established and the desire to be accepted is acute. For this reason, much of the work on police culture has depicted an established and irresistible force which new recruits have no choice but to embrace, although Fielding argued that the process is far from inevitable:

'One cannot read the recruit as a cipher for the occupational culture. The occupational culture has to make its pitch for support.'<sup>5</sup>

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<sup>3</sup>Skolnick, J. (1975) *Justice Without Trial: Law Enforcement in a Democratic Society*. New York: Macmillan. Although it should be noted that his work failed to acknowledge both the variations between different police forces and the political factors governing police behaviour. For other views on the existence and origins of the 'police personality' see, for example, Lefkowitz, J. (1975) 'Psychological Attributes of Policemen: A Review of Research and Opinion.' *J. Soc. Issues*. 31(1): 2-25; Bahn, C. (1984) 'Police Socialisation in the Eighties: Strains in the Forging of Occupational Identity.' *J. Pol. Sci. & Adm.* 12(4): 390-394; Bennett, R.R. (1984) 'Becoming Blue: A Longitudinal Study of Police Recruit Occupational Socialisation.' *J. Pol. Sci. & Adm.* 12(1): 47-58.

<sup>4</sup> Colman, A., Gorman, L. (1982) 'Conservatism, Dogmatism and Authoritarianism in British Police Officers.' *Sociology*. 16/1: 11.

<sup>5</sup> Fielding, N. (1988) *Joining Forces: Police Training, Socialisation and Occupational Competence*. London: Routledge. p 135.

This suggests that the new recruit must be largely responsive to the values of the police from the outset if they are to absorb and conform to the operational culture<sup>6</sup> and, furthermore, that they retain the option of non-conformism. However there is evidence of considerable pressure on officers to gain acceptance within the essentially insular environment of the division.

'You've got to get accepted, it's your main worry. It's ridiculous, you come into work worrying about whether other people will accept you on the relief.'<sup>7</sup>

In an analysis of police socialisation, Reuss-Ianni<sup>8</sup> argued that four distinct structures were at work: Firstly, the 'socialisation structure', which teaches new officers 'the system' and transmits information on what is and is not acceptable behaviour in a particular division; secondly, the 'authority-power structure', which sets out the formal chain of command, represented by rank, but also the informal hierarchy of experience and status (which may or may not correspond with the official authority order); thirdly, the 'peer group structure', which governs the enculturation of acceptable peer mediated behaviour within smaller groups within the division and, as such, is partially specific to ranks or sub-units (such as CID); and fourthly, 'cross-group structures', which establishes codes of

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<sup>6</sup> This raises the question of to what extent police socialisation merely reinforces existing character traits and a number of American studies have suggested that the socialisation process has remarkably little influence on the values held by officers, which remain constant. Rokeach. M., Miller. M., Snyder. J. (1971) 'The Value Gap Between Police and Policed.' *Journal of Social Issues*. 27-2:155-171; Caldero. M. A. (1997) 'Value Consistency Within the Police: The Lack of a Gap.' Paper presented to the March 1997 annual meeting of the Academy of Criminal Justice Sciences, Louisville, KY; Zhao. J., He. N., Lovrich. N.P. (1998) 'Individual Value Preferences Among American Police Officers: The Rokeach Theory of Human Values Revisited.' *Policing: An International Journal of Police Strategies and Management*, 21:22-36. For a discussion of these findings see Crank. J.P., Caldero. M.A. (2000) *Police Ethics: The Corruption of Noble Cause*. Cincinnati: Anderson. p 54-62.

<sup>7</sup> Quoted in McConville. M., Shepherd. D. (1992) *Watching Police, Watching Communities*. London: Routledge. p 197. In relation to racism within the police Smith and Gray found that even officers who were sympathetic to the needs of ethnic minorities were prepared to adopt racist language in order to conform with the expectations of their peers, Smith. D.J., Gray. J. (1983) *Police and People in London IV: The Police in Action*. London: Police Studies Institute. p 115. see also Lea. J. (1986) 'Police Racism: Some Theories and Their Policy Implications.' in Matthews. R., Young. J. (eds) *Confronting Crime*. London: Sage. p 154.

<sup>8</sup> Reuss-Ianni. E. (1983) *Two Cultures of Policing; Street Cops and Management Cops*. London: Transaction. p 8.

behaviour for dealing with external bodies or individuals.<sup>9</sup>

There are clearly two main influences on the decision making processes of new officers. Firstly the formal education of the training school and, secondly, the informal training which occurs in the field. The former is within a professionally developed programme, but the latter is dependent primarily on the expertise of older officers supplemented by ever present peer pressure and, although the probationer enters the arena of operational policing as part of a formal training programme, it is this process of informal socialisation which appears to exert the greatest influence over the attitudes of the new officer, as the very nature of policework.

'Creates a condition whereby the recruit clearly sees the advantages of identifying with the occupational reference group.'<sup>10</sup>

This inculcation of cultural values may occur through a number of different processes, such as 'reinforcement', where an individual adopts certain values because they are rewarded for doing so; 'response to expectation', where they adopt the values expected of them by colleagues; 'identification', where the values of another with whom the individual identifies are assumed; straightforward 'imitation', or the rationalisation of action in such a way that requires the assumption of values consistent with those actions.<sup>11</sup> The process can also be remarkably swift. In his 1989 study<sup>12</sup> Chesshyre noted the speed with which recruits to the Met absorbed the culture and values of their more experienced colleagues and research conducted for the Royal Commission on Criminal Justice commented on the speed with which new recruits, '*...are sucked into it, almost without realising it.*'<sup>13</sup>

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<sup>9</sup> Similarly, the early work of Coser suggested that the origins of police culture lay in the routine conflict between the police and other groups with which they regularly interact. Coser, L. (1956) *The Functions of Social Conflict*. New York: Free Press.

<sup>10</sup> Bennett, R.R. (1984) *Becoming Blue: A Longitudinal Study of Police Recruit Occupational Socialisation*. *J. Pol. Sci & Adm* 12(1): 47-58. p 49.

<sup>11</sup> For further discussion of these processes see Feldman, M.S. (1992) 'Social Limits to Discretion: An Organisational Perspective', in Hawkins, K. (ed) *The Uses of Discretion*. Oxford: Clarendon. p 163-83.

<sup>12</sup> Chesshyre, R. (1989) *The Force: Inside the Police*. London: Sidgwick & Jackson

<sup>13</sup> Maguire, M., Norris, C. (1992) 'The Conduct and Supervision of Criminal Investigations'. Royal Commission on Criminal Justice Research Study No 5. p 108.

Here, the role of the tutor constable is of crucial importance as an officially endorsed source of practical knowledge during the all-important early patrol experience. This extends far beyond what is taught in training school and makes the tutor constable a powerful influence over the probationer.<sup>14</sup> This influence is especially significant in terms of the informal rules which they impart which, ultimately, have the potential to deflect or undermine external rules.

'The effectiveness of these rules arguably lies in their source and the means of communication. Because the rules are passed on by experienced street-level police officers engaged in "real" police work, their significance to the recent recruit is enhanced and legitimated.'<sup>15</sup>

In this way the informal rules learnt by probationers are portrayed as not only based on experience and also situationally justifiable.<sup>16</sup> In addition, their ubiquitous nature renders them instrumental in dictating the way in which the more formal rules are to be implemented, leading to the ascendance of peer, rather than institutional, values.<sup>17</sup>

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<sup>14</sup> 'The biggest effect on the probationer is the sergeant...if you've got a sergeant who is violent, you will get a shift of violent police officers. If you've got a good professional sergeant, you get a shift of good effective professionals.' Police instructor quoted from Fielding, NG (1988) *Joining Forces: Police Training, Socialization and Occupational Competence*. London: Routledge. p.80. See also, Van Maanen, J. (1975) 'Police Socialization: a Longitudinal Examination of Job Attitudes in an Urban Police Department.' *Administration Science Quarterly*. 20. 207; Brown, C.L. (1983) 'The Future Face of Police Training.' *Police Journal*. 56(2) 121. However, this notion of unquestioning compliance on the part of probationers was disputed by one ASU officer interviewed, 'You've got to give a lot of them some credit. They don't just "follow the leader" like sheep and they're quite willing to stand up and be counted and say, "well you might have 20 years service but this is how I'm doing it because this is how I've been told to do it and that's what I believe is the right way." So don't paint the picture that you've got all these impressionable young probationers that do everything that the senior PC on the shift says even if it's wrong, because I don't think that's the case.' [ASU 1/191].

<sup>15</sup> Goldsmith, A. (1989) 'Taking Police Culture Seriously: Police Discretion and the Limits of the Law', in Reiner, R. (ed) *Policing Vol II*. Aldershot: Dartmouth. p 315.

<sup>16</sup> This juxtaposition of past and present was also a feature of Chan's 1997 work, which argued for police culture to be understood in terms of the interaction between the conditions of police work (the field) and the cultural knowledge imparted by past experience (the habitus). Chan, J.B.L. (1997) *Changing Police Culture: Policing in a Multicultural Society*. Cambridge: Cambridge University Press. p 225.

<sup>17</sup> A process which Bahn termed 'counter training.' Bahn, C. (1973) 'The Problem of Counter Training.' *Personnel J*. 52(12): 1068-72.

'Much of this situated knowledge could not form an overt part of training because it is a "subversive" knowledge. It includes the details of practices generated by the ranks for coping with the work, and their operating ideology justifying these practices, which may well diverge from approved procedure.'<sup>18</sup>

It is precisely this conflict between the ideology of police culture and the more formal regulation of police procedure which creates the greatest cause for concern as, irrespective of the due process safeguards which are introduced, their implementation is left to police officers who are still largely influenced by crime control priorities.

### **7.3. sources of police culture**

In his analysis of the origins of generic organisational culture, Sackmann looked to the different forms of shared knowledge within the operational environment.<sup>19</sup> On this model organisational cultural knowledge is comprised of: 'dictionary knowledge', which provides definitions and labels within the organisation; 'directory knowledge', which dictates how routine work should be carried out and 'how things should be done'; 'recipe knowledge', which dictates the appropriate course of conduct in a specific situation; and 'axiomatic knowledge', which represents the basic assumptions about why things are done the way they are within the organisation. Particularly at the managerial level this final category of knowledge is used to provide the foundation for the future of the organisation as a whole. By contrast, precisely what constitutes the other types of knowledge is shaped more by the position and shared experience of subgroups within the organisation, reinforced by repeated application. In this way, rather than a single 'culture', there are recognisable subcultures within the organisation<sup>20</sup> which develop potentially different 'dictionary' and 'recipe' knowledge as part of the culture of specific group.

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<sup>18</sup> Fielding. NG (1988) *Joining Forces: Police Training, Socialization and Occupational Competence*. London: Routledge. p 92.

<sup>19</sup> 'The form of things that people have in their minds; their models for perceiving, integrating, and interpreting them; the ideas or theories that they use collectively to make sense of their social and physical reality.' Sackmann. S. (1991) *Cultural Knowledge in Organisations*. Newbury Park, Calif: Sage. p 21.

<sup>20</sup> See also Schein. E. H. (1985) *Organisational Culture and Leadership: A Dynamic View*. San Francisco: Jossey-Bass.

This emphasis on different 'cultures' for various groups or strata within an organisation has particular relevance within the police service and resembles the earlier work of Manning,<sup>21</sup> which suggested a three-tier police culture, divided by rank and with differing perspectives attributable to line officers, middle management and command. However, this difference of perspective may go even further as, even the axiomatic knowledge, which Sackmann argued forms the basis for the direction of the organisation as a whole, may not be uniform within a police service in which individual loyalty is not to the organisation, but rather to the norms and values associated with the job and to colleagues. On this model, protagonists within the police service and the wider criminal justice system may have markedly different views as to why things are done the way they are, according to their role within the investigative or prosecution process.

The fieldwork for this study provided considerable evidence in support of this view and this is particularly significant with a procedure, such as CPIA disclosure, which relies on effective cooperation and communication between the various stages of the process, from the OIC, through the ASU, to the CPS and the courts. The potentially harmful effects of the divergent cultural perspectives of the individuals involved are most apparent at the file preparation and submission stages and serve to exacerbate many of the problems with the disclosure regime. As with all other aspects of the process, however, it is with the initial police officer that such cultural imperatives exert the most far-reaching and pernicious influence.

There are several possible reasons for the development of a particularly powerful and pervasive culture within the police service, not least of which is the constitutional status of the individual officer who, in exercising his duties:

'...does so on his own initiative and is liable in law for any impropriety. His authority is original, not delegated, and exercised at his own discretion by virtue of his office.'<sup>22</sup>

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<sup>21</sup> Manning. P.K. (1976) 'Rules, Colleagues and Situationally Justified Actions', in Blankership. R. L. (ed) *Colleagues in Organisations: The Social Construction of Professional Work*. New York: Wiley.

<sup>22</sup> Royal Commission on the Police 1962, *Minutes of Evidence: Evidence of ACPO*, HMSO, London. 1962. p 256. From Baldwin. R. & Kinsey. R. (1982) *Police Powers and Politics*. London: Quartet.

This symbolic independence of the police officer is central to the ideal of policing by consent by emphasising the fact that officers discharge their duties free of political influence.<sup>23</sup> However, it has been suggested<sup>24</sup> that a less desirable consequence of this independence is that it enables the police to limit responsibility for mistakes or misconduct to individual officers rather than assume institutional culpability, with the result that the structures of the police service have, until recently, remained untouched.

The effects of this on serving officers is difficult to gauge, but the fact that decisions must be justified not only to the courts but also to superiors capable of distancing themselves from any lapse of judgment can only exacerbate the perception of many officers that they are, at the same time, the object of both admiration and antagonism from the public.<sup>25</sup> Working in an environment where the threat of physical danger is implicit and with the disruption caused by irregular shift patterns, leads many officers to distance themselves from civilian friends and turn instead to colleagues, who understand the particular pressures of the job, for social as well as professional contact. The effect of this is to reinforce the sense of professional isolation which shapes the police perspective towards the rest of the population, evidenced by the traditional reluctance of the police to share information<sup>26</sup> and the tendency of officers to develop '*what he believes to be a healthy and wise wariness towards the public.*'<sup>27</sup>

Having created this insular environment it is hardly surprising that operational culture should grow to dominate the attitudes of officers and, in this way, factors

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<sup>23</sup> Although events, most notably the policing of the miners' strike, have served to undermine this view.

<sup>24</sup> Baldwin. R. & Kinsey. R. (1982) *Police Powers and Politics*. London: Quartet.

<sup>25</sup> Westley. W.A. (1970) *Violence and the Police: A Sociological Study of Law, Custom and Morality*. Massachusetts: MIT Press. See also, Buzawa. E.S. (1979) *The Role of Selected Factors upon Patrol Officer Job Satisfaction in Two Urban Police Departments*. Unpublished Doctoral Dissertation. Michigan State University.

<sup>26</sup> See Chibnall. S. (1979) 'The Metropolitan Police and the News Media', in Holdaway. S. (ed.) *The British Police*. London: Edward Arnold; Bittner. E. (1970) *The Functions of the Police in Modern Society*. Washington: National Institute of Mental Health; Rubinstein. J. (1973) *City Police*. New York: Ballantine; Manning. P.K. (1977) *Police Work: The Social Organisation of Policing*. Cambridge, Mass: MIT Press; Manning. P.K. (1992) 'Information Technologies and the Police', in Tonry. M., Norris. N. (eds) *Modern Policing*. Chicago: University of Chicago Press.

<sup>27</sup> Bonifacio. P. (1991) *The Psychological Effects of Police Work: A Psychodynamic Approach*. New York: Plenum Press. p 46.

such as the pressure to be seen as a 'competent craftsman',<sup>28</sup> and the reliance on 'recipe knowledge' of the law gained from other officers and oral tradition (rather than familiarity with the actual provisions)<sup>29</sup> makes officers heavily dependant on their colleagues from the outset and therefore less likely to reject the culture which is presented to them.<sup>30</sup>

The importance of the oral tradition within the police should not be underestimated as a mechanism for the transfer and reinforcement of police culture, with stories and anecdotes used to restate the dominant cultural values and, at the same time.

'...present officers with ready-made schemas and scripts which assist individual officers in particular situations to limit their search for information, to organise information in terms of established categories, and to constitute a sensibility out of which a range of actions can flow, and which provide officers with a repertoire of reasonable accounts to legitimate their actions.'<sup>31</sup>

This facilitates the evaluation of complex and ambiguous situations in a short period of time, in order to produce an 'appropriate' response and, on this level, police culture appears intrinsically functional in providing a 'tool kit'<sup>32</sup> used to impose order on frequently chaotic events in circumstances where the police see themselves as making decisions and taking action where the proper authorities

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<sup>28</sup> Skolnick. J. (1975) *Justice Without Trial: Law Enforcement in a Democratic Society*. New York: Macmillan.

<sup>29</sup> Manning. P. & Hawkins. K. (1989) 'Police Decision Making', in Weatheritt. M. (ed) *Police Research*. Aldershot: Avebury.

<sup>30</sup> See for example Holdaway. S. (1983) *Inside the British Police: A Force at Work*. London: Basil Blackwell. The effects of such cultural pressure on recruits (in relation to issues of race) were highlighted in Holdaway. S., Barron. A. (1997) *Resigners? The Experience of Black and Asian Police Officers*. London: Macmillan.

<sup>31</sup> Chan. J.B.L. (1997) *Changing Police Culture: Policing in a Multicultural Society*. Cambridge: Cambridge University Press. In their work, Kappeler, Sluder and Alpert described a similar process of 'dynamic affirmation', with traditions and shared experience used to influence the approach to everyday activities. Kappeler. V., Sluder. R.D., Alpert. G.P. (1994) *Forces of Deviance: Understanding the Dark Side of Policing*. Prospect Heights: Waveland Press.

<sup>32</sup> Shearing. C.D. and Ericson. R.V. (1991) 'Culture as Figurative Action.' *British Journal of Sociology* 42:481-506. Swidler saw police culture as creating the essential elements of the 'tool-kit' used by officers to control their environment. Swidler. A. (1986) 'Culture in Action: Symbols and Strategies.' *American Sociological Review*, 51: 273-286, a concept further developed in the 'grounded aesthetics' of Willis. P. (1990) *Common Culture: Symbolic Work at Play in the Everyday Cultures of the Young*. Boulder: Westview Press.

either cannot or will not act.<sup>33</sup> Yet, despite such positive effects, the detrimental influence of police culture has featured in many critical assessments of police conduct<sup>34</sup> and, as will be shown, many aspects of this cultural 'tool kit,' which initially appears so functional, are based on little more than stereotyping<sup>35</sup> and this has potentially disastrous consequences when influencing officers' consideration of unused material.

In the context of the present work, the effects of police culture may be harmful in two ways. Most obviously it may legitimise lies<sup>36</sup> or other deliberate attempts to subvert the investigative process or to conceal wrongdoing,<sup>37</sup> but more pernicious is the influence which it may unconsciously exert on decision making by individual officers during the conduct of investigations and, later, during the file preparation process. Although, as Baldwin and Kinsey pointed out, if the police need to creatively apply their latitude to achieve the desired result then this must be done within the culture.

'There are rules about how to break the rules. These must be learned...and followed carefully.'<sup>38</sup>

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<sup>33</sup> For further discussion see, Cohen. H.S. (1985) 'Authority: The Limits of Discretion', in Elliston. F.A. and Feldberg. M. (eds) *Moral Issues in Police Work*. Totowa NJ: Rowman and Allenheld.

<sup>34</sup> Not least by 'left realists' such as Kinsey, Lea and Young who see only a radical and fundamental attack on police culture as capable of restoring the faith of alienated communities in the police.

<sup>35</sup> For further examples of this process see Muir. W.K. (1977) *Police: Street Corner Politicians*. Chicago: University of Chicago Press; Sacks. H. (1978) 'Notes on Police Assessment of Moral Character', in Manning. P. K., Van Maanen. J. (eds) *Policing: A View from the Street*. Santa Monica: Goodyear; Ericson. R. (1982) *Reproducing Order: A Study of Police Patrol Work*. Toronto: University of Toronto Press; Reiner. R. (2000) *The Politics of the Police*. Oxford: OUP.

<sup>36</sup> For a discussion of the various forms of police lies see Manning. P.K. (1978) 'Lying, Secrecy and Social Control', in Manning. P.K., Van Maanen. J. *Policing: A View from the Street*. Santa Monica: Goodyear.

<sup>37</sup> For example, Westley found that, of 16 interviewees, 11 would not envisage reporting a partner's misconduct. Westley. W.A. (1970) *Violence and the Police: A Sociological Study of Law, Custom and Morality*. Massachusetts: MIT Press.

<sup>38</sup> Baldwin. R. & Kinsey. R. (1982) *Police Powers and Politics*. London: Quartet. p 134. To some extent this resembles the distinction between 'enculturation' (learning the culture) and 'socialisation' (learning the rules of conduct) postulated in Reuss-Ianni. E. (1983) *Two Cultures of Policing; Street Cops and Management Cops*. London: Transaction. p 8. One ASU sergeant reiterated this point, 'Well that's the police full stop - you can't teach somebody to police, it's the experience that goes along with the paper side as well, but they've got to learn the system before they can use the short cuts.' [ASU 2/53].

The significance of police culture lies not in the fact of its existence *per se*, as such shared norms are an important influence within any hierarchical organisation, but rather in the pivotal role which police decision making plays within the criminal justice system, as it is the police version of events which, ultimately, forms the 'official' version of events for the prosecution. As will be shown, the way in which this account is prepared can alter dramatically the overall appearance and credibility of the case by means of a process which is largely invisible in its operation and the evolution of this operational culture within the police service serves to create an alternative and unofficial set of values to be employed by officers as part of the decision making process, thereby providing a competing rubric to the formal legal regulation of police conduct and with the potential to encourage value driven rather than rule driven decision making.

'Most of the people are good investigators and turn out good files and, if something is missed from one of their schedules, you can say that the other 99% of their files are so good that they have simply forgotten and when you confront them it will be, "Oh, yeah, it's lying underneath this piece of paper. How did I miss that? I can't believe it" and that happens. However, if they are *deliberately* putting the pieces of paper away and saying, "No there wasn't an informant on this case" or whatever, then there are ways to dig into it and find out about that and, if it turns out to be the case that there WAS an informant, then the culture has got to them and they are denying their responsibilities.'<sup>39</sup>

There are obvious parallels here with the due process / crime control dichotomy, with the police frequently characterised as governed more by popular morality than by the letter of the law<sup>40</sup> and prepared, if unable to achieve their objectives within the law '*to obtain the necessary powers by stealth and force.*'<sup>41</sup> On this model, when faced with borderline issues of judgment it is this shared belief in 'what is right' (a judgment which is, itself, dictated by cultural norms and values) which dictates an imaginative use of regulation in order to achieve an outcome which can not only be justified to superiors but also, and equally importantly, accepted by fellow officers. In essence this marks the distinction

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<sup>39</sup> ASU 8/16.

<sup>40</sup> See, for example, Banton. M. (1964) *The Policeman in the Community*. New York: Basic Books.

<sup>41</sup> Sir David McNee - submission to the Royal Commission on Criminal Procedure.

between deontological and teleological ethical systems, with the former is essentially means orientated and the latter essentially goal orientated. A deontological system is concerned solely with the inherent nature of the act and so, as under the 'due process' model, an inherently 'good' act will remain so even if the ultimate consequences of the act are 'bad.' Under a teleological system, however, the focus is the consequences of an act and so here, as with the 'crime control' model, there exists the potential for an apparently 'bad' act to be rendered 'good' solely by reference to its consequences.<sup>42</sup>

Reducing the debate momentarily to the simplistic terminology of 'good' and 'bad' raises the possibility of interpreting such behaviour in terms of a moral imperative which creates for officers a template of 'what is right.' Some, such as Van Maanen, regarded the police as simply enforcing the general moral values of the community which they serve.

'the police are both representatives of the moral order and part of it. They are thus committed ("because it is right") to maintain their collective face as protectorates of the right and respectable against the not so respectable.'<sup>43</sup>

For others, however, officers do not merely articulate the general moral order but rather embody an additional layer of moral values which are particular to the role of the police. In this way, Kleinig<sup>44</sup> saw the professional role of the police as encouraging a 'role morality,' distinct from the more generally held perception of morality or moral values, which was an additional, rather than an alternative, moral code. This suggested that the police do not reject the everyday value

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<sup>42</sup> For an overview of this discussion see Pollock. J.M. (1998) *Ethics in Crime and Justice*. London: Wadsworth. Ch 2. Punch described the process in terms of 'combative' or 'strategic' corruption, or 'using illicit means for organisationally or socially approved ends.' Punch. M. (1985) *Conduct Unbecoming: The Social Construction of Police Deviance and Control*. London: Tavistock. p 13.

<sup>43</sup> Van Maanen. J. (1978) 'The Asshole.' in Manning. P.K., Van Maanen. J. *Policing: A View from the Street*. Santa Monica: Goodyear. p 227.

<sup>44</sup> Kleinig. J. (1996) *The Ethics of Policing*. Cambridge: Cambridge University Press.

system but simply utilise an added layer of values to reflect the singular nature of their work.<sup>45</sup>

#### **7.4. discretion**

Whether it is the CID officer engaged in a protracted enquiry, or the uniformed officer on the beat, much of the work of the police is conducted in an environment free from direct supervision and, consequently, one of the most distinctive features of police work is the enormous discretion which is available to operational officers in the exercise of their duties. Any attempt to juxtapose the realities of police work with the theoretical background must acknowledge this use of such discretion and the potential which this presents for officers to soften the impact of regulation, either consciously or more subliminally as a response to shared values within the service.

Studies of police discretion have traditionally centred on arrest and enforcement decisions,<sup>46</sup> however the consideration of evidential relevance by officers under CPIA raises many similar issues.<sup>47</sup> At its simplest, it is possible to divide police discretion into two categories, depending on whether the decision making

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<sup>45</sup> ‘...group culture tends to reconfigure individual moral demands so that they sit more easily with the demands of group membership.’ Kleinig, J. (1996) *The Ethics of Policing*. Cambridge: Cambridge University Press. p 67.

<sup>46</sup> Most notably Bittner, E. (1967) ‘Police Discretion in Emergency Apprehension of Mentally Ill Persons.’ *Social Problems* 14: 278-92. and Davis, K.C. (1969) *Discretionary Justice: A Preliminary Inquiry*. Baton Rouge: Louisiana State University Press. But see also Goldstein, J. (1960) ‘Police Discretion not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice.’ *Yale Law Review*. 69:543; Kadish, S.H. (1962) ‘Legal Norm and Discretion in the Police and Sentencing Processes.’ *Harvard Law Review*. 75:904; LaFave, W. (1965) *Arrest: The Decision to take a Suspect into Custody*. Boston: Little Brown., Goldstein, H. (1967) ‘Administrative Problems in Controlling the Exercise of Police Authority.’ *Journal of Criminal Law, Criminology and Police Science*. 58:160; McCabe, S., Sutcliffe, F (1978) *Defining Crime: A Study of Police Decisions*. Centre for Criminological Research Occasional Paper No 9. London: Basil Blackwell. Discretion may include ignoring evidence of a lesser offence in order to safeguard sources of information relating to ‘higher status’ offences. Hobbs, R. (1989) ‘Policing in the Vernacular.’ in Downes, D. (ed) *Crime and the City: Essays in Memory of John Barron Mays*. Basingstoke: Macmillan. p 163.

<sup>47</sup> For consideration of the impact of police discretion in relation to the investigative and evidence gathering processes see Cooney, M. ‘Evidence as Partisanship.’ *Law and Society Review* 28, no. 4 (1994) pp. 833-58; McCoy, C. (1996) ‘Police, Prosecutors and Discretion in Investigation.’ in Kleinig, J. (ed) *Handled with Discretion: Ethical Issues in Police Decision Making*. Lanham, Maryland: Rowman & Littlefield.

process is reviewable and / or supervised.<sup>48</sup> The critical difference being that those decisions which are made in a non-reviewable situation are, by definition, largely invisible and so cannot be proven to have ever taken place.<sup>49</sup> In the context of disclosure, the decision whether material generated by the inquiry is classed as evidence or unused material is clearly a reviewable decision, unless the material has been physically destroyed or concealed. If it exists and has been recorded then it must be accounted for. By contrast, the decision of whether or not to pursue a line of enquiry or to produce the material in the first place is frequently non-reviewable,<sup>50</sup> particularly if made by an officer acting alone. If the material is not physically brought into existence (i.e. by the creation of a documentary record) then only the OIC is aware of that possibility and can exercise his/her discretion to ignore that line of enquiry.

Having made the simple distinction between reviewable and non-reviewable decision making, a number of more detailed models have been provided for the forms of police discretion. In 1977, Goldstein<sup>51</sup> suggested 6 categories:

1. choosing objectives (the allocation of resources).
2. issuing licences and other general policies.
3. the determination of field procedure and matters of internal administration.
4. choosing investigative methods.
5. choosing methods of intervention.
6. choosing methods of disposition (charge, caution, etc).

In terms of disclosure related discretion, the first three categories are clearly of limited value, but the others do indicate the types of discretionary decision making which allows officers to shape the form and quantity of unused material generated in a case. Similarly, two of the categories of police discretion

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<sup>48</sup> This has also been expressed in terms of 'provisional' and 'ultimate' discretion in Goodin. R.E. (1986) 'Welfare, Rights and Discretion.' *Oxford Journal of Legal Studies* 6(3): 232-61. p 236.

<sup>49</sup> A concept described by Bacarach and Baratz as the 'non-decision.' Bacarach. P., Baratz. M.S. (1970) *Power and Poverty: Theory and Practice*. Oxford: Oxford University Press. See also Lukes. S. (1992) *Power: A Radical View*. Oxford: Blackwell.

<sup>50</sup> Although, technically, non-consideration of relevant evidence is not a matter of discretion as it is forbidden and, as such, lies outside the scope of the officer's discretion .

<sup>51</sup> Goldstein. H. (1977) *Policing a Free Society*. Cambridge, Mass: Ballinger. p 94-106.

suggested by Kleinig<sup>52</sup> can be related to disclosure related discretion. 'Scope' decisions, which determine whether the matter falls within the police remit or, alternatively, can be ignored and left to another agency,<sup>53</sup> and 'interpretative' decisions, which dictate how an incident is to be resolved, have the potential to influence the evidence gathering process and, consequently, the generation of unused material.<sup>54</sup>

The reason why the initial discretion of the OIC is so critical to the operation of the disclosure regime is that this creates the 'official' version of events which serves as the prosecution template for the other elements of the criminal justice system. This emphasises the 'serial' view of discretionary decision making within the legal system which recognises the significance of the individual decision maker's position within the process.

'A decision made at one point in the system may profoundly affect the way in which a subsequent decision is made, owing to the structural position of the individual at the point at which prior discretion is exercised... What is described as a "decision" reached is sometimes nothing more than a ratification of an earlier decision... in such circumstances, matters such as the flow of information from one in the system to another become particularly important.'<sup>55</sup>

As will be shown, this is central to CPIA, as much of the so-called decision making employed in the consideration of unused material is little more than a confirmation of the assessments made at earlier stages, within a process built almost entirely on the initial judgment made by the OIC. This makes the underlying rationale for the exercise of officers' discretion of critical importance, a fact which McCoy recognised in his analysis.

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<sup>52</sup> Kleinig, J. (1996) *Handled with Discretion: Ethical Issues in Police Decision Making*. Lanham, Maryland: Rowman & Littlefield.

<sup>53</sup> This has been particularly contentious in areas such as domestic dispute, which many police officers consider should be outside the scope of police duties and left instead to the civil arena. For further discussion see, Edwards, S.M. (1989) *Policing Domestic Violence*. London: Sage.

<sup>54</sup> Kleinig's remaining categories, 'priority' and 'tactical' discretion, relate more to managerial allocation of resources.

<sup>55</sup> Hawkins, K. (1992) 'The Use of Legal Discretion: Perspectives from Law and Social Science.' in Hawkins, K. (ed) *The Uses of Discretion*. Oxford: Clarendon. p 28-9.

'The essence of police discretion is the legal capacity to make a choice between equally permissible alternatives...the main point is that the context in which a decision is made will itself mould how the decision maker understands the available choices. Put another way, discretion is exercised within an occupational and ideological mind-set. Applied to police and prosecutorial powers, the discretion we are discussing here shapes both the activity of gathering facts and the analysis of their meaning.'<sup>56</sup>

Studies of discretion have highlighted a number of issues which influence the decision making process, such as the relational distance between victim and offender (suggesting that the police may view as less serious those cases where the parties were known to each other<sup>57</sup> and devote greater energy to investigating those cases where the crime has been committed against a stranger)<sup>58</sup> and the relative social status of the protagonists.<sup>59</sup> Of greater importance, however, are the cultural imperatives which govern the decision making process as, where officers have discretion, it is the cultural 'tool kit' which provides the template.

'[Discretion] has embedded constraints – implicit understandings about the range of choice that is legitimately available...these constraints may be articulated by reference to institutional, moral and/or administrative norms, norms that may sometimes be mutually supportive, but which at other times may be in tension.'<sup>60</sup>

Research<sup>61</sup> has suggested a number of formal and informal rules used to govern

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<sup>56</sup> McCoy. C. (1996) 'Police, Prosecutors and Discretion in Investigation.' in Kleinig. J. (ed) *Handled with Discretion: Ethical Issues in Police Decision Making*. Lanham, Maryland: Rowman & Littlefield. p 165.

<sup>57</sup> In particular this has been suggested in relation to the investigation of rape allegations in the U.S.A. by Holmstrom. L.L., Burgess. A.W. (1983) *The Victim of Rape: Institutional Reactions*. New Brunswick: Transaction Books; and Klemmack. S.H., Klemmack. D.L. (1976) 'The Social Definition of Rape', in Walker. M.J., Brodsky. S.L. (eds) *Sexual Assault: The Victim and the Rapist*. Lexington, Mass: D C Heath.

<sup>58</sup> Black. D. (1980) *The Manners and Customs of the Police*. New York: Academic Press; Smith. D.A., Visher. C.A. (1981) 'Street Level Justice: Situational Determinants of Police Arrest Decisions.' *Social Problems* 29: 167-77.

<sup>59</sup> For an overview of the American studies on this area see Baumgartner. M.P. (1992) 'The Myth of Discretion', in Hawkins. K. (ed) *The Uses of Discretion*. Oxford: Clarendon. p 129-62.

<sup>60</sup> Kleinig. J. (1996) 'Handling Discretion with Discretion.' (introduction) in Kleinig. J. (ed) *Handled with Discretion: Ethical Issues in Police Decision Making*. Lanham, Maryland: Rowman & Littlefield. p 3.

<sup>61</sup> Smith. D. (1983) *Police and People in London*. London: Policy Studies Institute; Bottomley. A.K., Coleman. C., Dixon. D, Gill. M.L., Wall. D.S. (1991) *The Impact of PACE: Policing in a Northern Force*. Hull: University of Hull.

the exercise of police discretion: 'working rules' are those which are followed in practice, however they must first be internalised by officers; 'inhibiting rules' are the official legal or disciplinary rules which influence conduct primarily by means of threat of sanction; 'presentational rules' are employed to present, in an acceptable format, the product of the working rules and, as such, create something of a façade over the realities of policing. In addition, Bottomley *et al* identified 'routinised rules', which produce ritualised or routinised procedures (such as those associated with the role of custody officer) which frequently do not reflect or fulfil the original intentions of the provisions, and 'reactive rules', which are incident-generated rules used by officers to interpret perceived 'grey areas'.

### **7.5. culture, discretion and 'bending the rules'**

The purpose of highlighting some of the key aspects of police culture is to indicate some of the factors which can be seen to influence officers in the exercise of their obligations under the 1996 Act and also to suggest how the original provisions may, ultimately, have been adapted in practice by a combination of cultural pressure and practical expediency. This has the potential to bring into conflict the legal rules under which the police operate and the institutional rules by which they regulate their own conduct, and requires officers to make a judgment as to how to negotiate between the competing rubrics, a process facilitated by operational discretion.

Where the two sets of rules coincide there is little difficulty and the cultural values simply influence how any discretion available within the procedures is exercised, but this is dependent on the interpretation placed on the legal rules by individual officers who, like any other workers within a large organisation, interpret new provisions in light of their existing practices, a process which is all the more significant if (as in the case of CPIA) the change is perceived as unwelcome.

In this scenario Ericson<sup>62</sup> identified three possible responses:

1. A strategy to avoid the rule completely.
2. A strategy to implement with the minimum possible compliance.
3. A strategy to adapt the rule to fit existing *or desired* practice. (emphasis added).

It has been suggested that the latitude afforded to individual officers results from the 'permissive' drafting of legislation<sup>63</sup> but, even if this is the case, this is a marked shift from the perception of the police as passive subjects (or even victims) of statutory changes. The response is not the evasion of rules but rather their use in much the same way that officers have '*learnt to make PACE work for us.*'<sup>64</sup> The question of the extent to which the police deviate from the rule of law has been a persistent theme in police research,<sup>65</sup> with writers such as McConville<sup>66</sup> and Sanders and Young<sup>67</sup> concluding that police work is governed more by the working rules formulated informally by the police themselves than by the formal legal rules which purport to control their actions. This may be to overstate the degree of control available to individual officers, but even marginal discretion in the evidence gathering process creates the potential for important avenues of investigation to remain unexplored and crucial evidence to be either deliberately or inadvertently withheld by a certain type of officer.

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<sup>62</sup> Ericson. R.V. (1981) *Making Crime: A Study of Detective Work*. London: Butterworths. See also, Shearing. C.D. and Ericson. R.V. (1991) 'Culture as Figurative Action.' *British Journal of Sociology* 42:481-506.

<sup>63</sup> See, for example, McBarnet. D. (1978) 'False Dichotomies in Criminal Justice Research', in Baldwin. J., Bottomley. A. (eds) *Criminal Justice: Selected Readings*. Oxford: Martin Robertson; Brogden. M. (1982) *The Police: Autonomy and Consent*. London: Academic Press; Jefferson. A., Grimshaw. R. (1984) *Controlling the Constable: Police Accountability in England and Wales*. London: Muller; Grimshaw. R., Jefferson. T. (1987) *Interpreting Policework: Police and Practice in forms of Beat Policing*. London: Allen and Unwin; Smith. D.J. (1997) 'Case Construction and the Goals of Criminal Process.' *British Journal of Criminology*, 37/3: 319.

<sup>64</sup> Bottomley. K., Coleman. C., Dixon. D., Gill. M. & Wall. D. (1991) *The Impact of PACE: Policing in a Northern Force*. University of Hull. p 137.

<sup>65</sup> Notable discussions of the phenomenon as applied to the UK can be found in Cain. M. (1973) *Society and the Policeman's Role*. London: Routledge and Kegan Paul; Chatterton. M. (1979) 'The Supervision of Police Work under the Fixed Points System', in Holdaway. S. (ed) *The British Police*. London: Edward Arnold; Manning. P. (1979) 'The Social Control of Police Work: Observations on the Culture of Policing', in Holdaway. S. (ed) *The British Police*. London: Edward Arnold.

<sup>66</sup> McConville. M., Sanders. A. & Leng. R. (1991) *The Case for the Prosecution: Police Suspects and the Construction of Criminality*. London: Routledge.

<sup>67</sup> Sanders. A. & Young. R. (1994) *Criminal Justice*. London: Butterworths.

'...what we might term a "good operator" who is a bit street wise, and has an answer to everything – "Nah, that's not my job. Get the ASU to look into that." They are driven by results culture to become "good operators" and they are not idiots, they have an understanding of what the Act is about and of their responsibilities but they have not fully accepted it and they will bend the rules to suit.'<sup>68</sup>

It is hardly a cause for surprise that the police seek to use the law as a resource to achieve the objectives proper to them<sup>69</sup> and this is not necessarily to suggest that regulations are deliberately flouted, but simply that the latitude which invariably exists in such provisions is interpreted in a way which is favourable to the police. Again this is hardly surprising, as it echoes the response of most individuals or organisations to new restriction or regulation when.

'What a new set of rules is not likely to do is make any fundamental changes in an already organised set of practices.'<sup>70</sup>

However the significance in the case of police investigation and disclosure is to be found in the assertion of McConville *et al* that the latitude within provisions is generally sufficient to accommodate police cultural imperatives. They concluded that the police do not need to exceed their authority because they can utilise the discretionary element within the regulations to overcome the added obstacle (represented primarily by PACE) of being required to prove to a legal standard the guilt of an individual they 'know' to be a criminal. Some, such as Greenawalt,<sup>71</sup> have suggested that the process is one of innovation in response to changes which may be subversive<sup>72</sup> but need not necessarily be so and James went further by suggesting that innovations aimed at 'administrative

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<sup>68</sup> ASU 8/22.

<sup>69</sup> For further discussion see, Smith. D.J. 'Case Construction and the Goals of Criminal Process.' (1997) 37 Br J Criminol 319.

<sup>70</sup> Immersheim. A. (1977) 'Organisational Change as a Paradigm Shift.' *Sociological Quarterly* 18: 33-43.

<sup>71</sup> Greenawalt. K. (1974) 'Perspectives on the Right to Silence', in Hood. R. *Crime, Criminology and Public Policy*. London: Heinemann.

<sup>72</sup> As in the case of officers developing their own rules to counter the potential for increased supervision. Chatterton. M. (1979) 'The Supervision of Patrol Work Under the Fixed Points System', in Holdaway. S. (ed) *The British Police*. London: Edward Arnold.

professionalism' were transformed by officers to accommodate their existing practices or 'practical professionalism'<sup>73</sup>

This question of police susceptibility to external control has formed the basis for a number of theories of policing<sup>74</sup> and culturalist theories in particular have developed an essentially interactionist perspective to assess the effects of police culture and practice on the performance of their duties. Here the actual legal provisions are less a rigid template for police conduct than a resource utilised in conjunction with cultural norms<sup>75</sup> to achieve the desired result on the basis that, whereas the law may expressly prohibit certain conduct on the part of the police, it is less successful at defining precisely what the police *must* do. Ericson, in his observations of detective work,<sup>76</sup> noted the skilful use of the rules by detectives in order to achieve the desired objective and concluded that rules of due process, far from restricting crime control, became instead '*frameworks for justification and ultimately legitimation*'<sup>77</sup> and thus an aid to crime control. Furthermore, he argued that the process of rule manipulation was particularly significant in shifting cases from the largely invisible environment of the initial investigation, to the higher visibility surroundings of the courts.<sup>78</sup>

This is crucial as it permits the police sufficient latitude to shape the law to suit existing practice and it might be argued that coercion through such 'inhibitory' rules is essential as it is unrealistic to expect the police to uphold due process values voluntarily when their entire operational ethos is ruled by the goals of

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<sup>73</sup> James. D. (1979) 'Police Black Relations: The Professional Solution', in Holdaway. S. (ed) *The British Police*. London: Edward Arnold.

<sup>74</sup> For a useful overview of the debate see Dixon. D. (1997) *Law and Policing: Legal Regulation and Police Practices*. Oxford: Clarendon.

<sup>75</sup> Reiner. R. (2000) *The Politics of the Police*. Oxford: OUP.

<sup>76</sup> Ericson. R.V. (1981) *Making Crime: A Study of Detective Work*. London: Butterworths.

<sup>77</sup> p 134. echoing the oft quoted assertion of McBarnet that 'due process is for crime control.' McBarnett. D.J. (1979) *Arrest: The Legal Context of Policing*. in S Holdaway (ed) *The British Police*. London: Edward Arnold. p 156.

<sup>78</sup> For more on this see, Duff. P. 'Crime Control, Due Process and the Case for the Prosecution: A Problem of Terminology?' (1998) 38 Br J Criminol 611., who argued that, whereas the crime control / efficiency model dominates police thinking at the 'sharp end' of the criminal justice system, it is in the more abstract and measured atmosphere of the courts that due process values assume greater significance. Here there are echoes of McBarnet's characterisation of the conflict inherent in Packer's models as between the 'rhetoric of justice,' based firmly on concepts of due process, and the 'law in action,' which conforms more to crime control imperatives. Although it could be argued that the result of this analysis is to produce a conflict between ideology and pragmatism, rather than the ongoing tension between competing values which Packer envisaged.

apprehending and successfully prosecuting offenders.<sup>79</sup> However some, such as McConville, go as far as to suggest that supervisory control is effectively rendered ineffective by operational culture. In this way, as Sanders and Young suggest,<sup>80</sup> the police conform to the regulatory system rather than being controlled by it.

This is in keeping with the initial concerns of this study, by acknowledging the influence which the police themselves have on the implementation of new provisions, rather than a more legalistic or bureaucratic approach which sees practical policing as dominated by legal regulation and with problems addressed by means of further legal reform. The difficulty with this somewhat conventional approach is that it places the police in the role of implementation but, in doing so, is largely unquestioning of both the efficacy of the provisions and the influence which the police themselves may exert. Perhaps a more accurate view is that of Ericson who concluded that detectives exercise a form of 'property rights' over the investigative process, using the resources provided by law and police regulation to achieve the desired result.<sup>81</sup>

The does not resolve the issue of whether the perceived shortcomings in disclosure arise from deliberate misconduct or, alternatively, simply from the imaginative use of police discretion in the interpretation of the Act in order to lend legitimacy to an approach which is fundamentally based on crime control

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<sup>79</sup> For the role of such 'inhibitory' rules see Smith. D.J. (1986) 'The Framework of Law and Policing Practice', in Benyon. J., Bourne. C. (eds) *The Police: Powers, Procedures and Properties*. Oxford: Pergamon. p 89. The requirement for such rules was illustrated by research conducted for the Royal Commission on Criminal Justice which questioned the extent to which detectives who, it was accepted operated largely within the boundaries imposed by PACE, had actually internalised the values which underpinned the Act. Did the detectives implement the new regime because they believed in it or simply because they had to? The study concluded, 'If there is a "new breed" of CID officer, he or she has not been fully converted into a supporter of the "due process" model of investigations as understood and advocated by most lawyers; the procedures are followed out of respect for the law, not out of conviction that they are right.' Maguire. M., Norris. C. (1992) *The Conduct and Supervision of Criminal Investigations*. Royal Commission on Criminal Justice Research Study No 5. p 42.

<sup>80</sup> Book review. *Modern Law Review* [1994] 57 675.

<sup>81</sup> It appears that officers have considerable confidence in their capacity to follow the informal rather than the formal rules as research has shown that officers will continue to breach regulations even when they are aware of the presence of researchers. For example, Sanders. A., Bridges. L. 'Access to Legal Advice and Police Malpractice.' [1990] *Crim LR* 494. where, in some 10% of cases, which the police knew were being observed, the police breached codes of practice in relation to legal advice. See also Ericson. R.V. (1981) *Making Crime: A Study of Detective Work*. London: Butterworths. p 38.

values, but the question of whether the provisions of CPIA have produced real change, rather than simply being adapted by the police to incorporate existing practice is central to the impact of the disclosure regime. In the aftermath of PACE a similar discussion emerged between those who argued that PACE had made a real difference in restricting the police and in protecting suspects' rights, and those who saw the changes are largely cosmetic,<sup>82</sup> neither eradicating nor reducing the unwanted conduct of the police but simply shifting it so that direct pressure on suspects was replaced by more subtle coercion such as the 'informal' interrogation. Much of the research following the introduction of PACE suggested a climate of resignation rather than any concerted attempts at evasion,<sup>83</sup> but the post PACE discussion provides some useful parallels with the implementation of CPIA and the question of whether the result is any real change to the police approach, or simply an adaptation of existing practice to fall within the discretion afforded by the legislation.<sup>84</sup>

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<sup>82</sup> Such as one detective who commented (Post PACE) 'Any rules they want me to work with, I work to find a way round them.' Dixon. D. (1990) Safeguarding the Rights of Reports in Police Custody. *Policing & Society* 115-40.

<sup>83</sup> Bottomley. A. K., Coleman. C., Dixon. D., Gill., M. L., Wall. D. (1991) *The Impact of PACE: Policing in a Northern Force*. Hull: Centre for Criminology and Criminal Justice, although one detective offered a slightly different view of such changes, 'Police officers don't like change at all and we're very slow to adapt to it. I remember when PACE came in, everybody was dubious about it and when tape recorded interviews came in, basically what was happening was no-one was interviewing. Interviews were being done on the streets in pocket books under "miscellaneous notes". It took a while before it built up again. We just don't like change and we're very slow to adapt I think.' [CID 4/39].

<sup>84</sup> As in the response to Barrie's study on post PACE interviewing (which found a high level of compliance with the codes of practice) 'A detective inspector shrugged this off, arguing from "practical mastery" and "insiders' knowledge," that the practices of "doing the business" remained undisturbed.' Young. M. (1991) *An Inside Job*. Oxford: Clarendon.

## **8. the CID**

### **8.1. why focus on the CID?**

There were a number of factors which dictated that a study of the operational implementation of CPIA disclosure would, ultimately, centre on the work of the CID. Most importantly, the nature of most of the cases dealt with by uniformed officers mean that they rarely encounter the more complex disclosure related issues which are commonplace for the CID, not least because those cases which are seen as more protracted or involved are generally passed to the CID at an early stage. Similarly, although the provisions of CPIA apply equally in the Magistrates' court, attempts to do so are modest when compared to proceedings in the Crown Court, where disclosure is raised far more frequently.

There are also more fundamental reasons for looking to the CID for indications as to why CPIA disclosure has proved to be so problematic. As the most experienced investigators, the CID represent perhaps the most forceful embodiment of the police culture discussed in the previous chapter and the effects of this can be seen in their attitudes towards the investigative process in general and disclosure in particular. It is, therefore, necessary to understand something of the nature of the CID in order to provide a context for the way in which they approach their duties and during interviews with officers a number of underlying factors emerged which may assist in explaining the perspective which investigators bring to the cases they construct.

### **8.2. the status of CID**

The singular status of the CID arises, in large part, from the fact that entry to the CID remains the ultimate objective for a large proportion of police officers, a situation which has intensified with the increasing demands for specialisation within the police service and the corresponding diminution in the status of the uniformed officer. Despite the best efforts to portray detectives as merely the plain clothes equivalent of their uniformed counterparts, there remains an

unspoken hierarchy within the police service which views the CID very clearly as the elite.<sup>1</sup>

‘The transfer from the uniform branch to the CID marks an escalation of the police officer’s power and represents a deliberate switch in his function from mundane to crucial aspects of policing, from the maintenance of order to thief-taking.’<sup>2</sup>

Understandably, CID officers themselves do little to dispel this perception and are justifiably proud of their role as investigators and the respect and freedom associated with it. The danger, however, is that this combination of high status from their peers and considerable latitude in the conduct of investigations, leaves officers free to exercise wide ranging discretion in relation to issues such as disclosure within a climate where challenges to their judgment are likely to be minimal. This possibility is explored in greater detail when considering the approach of detectives towards the processes of investigation and file preparation, but the singular status of CID clearly represents an important factor in lending legitimacy to their decision making.

### **8.3. grappling with change**

Although the CID enjoy something of an elevated status this is not to suggest that they have been immune from the changes undergone by the rest of the police service. On the contrary, because the work of the CID is the epitome of ‘real’ police work, much of the legislation, such as CPIA, aimed at redressing the balance within the criminal justice system, has impacted most directly on detectives. One of the principal objectives of this work is to examine how officers have responded to the changes brought about by CPIA, which, unlike much of the overtly ‘due process’ legislation, actually returned an element of control to the police. However, this rare empowerment of officers must be

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<sup>1</sup> This is even more so in the case of the specialist units such as the National Crime Squad.

<sup>2</sup> Hobbs. R. (1989) ‘Policing in the Vernacular’, in Downes. D. (ed) *Crime and the City: Essays in Memory of John Barron Mays*. Basingstoke: Macmillan. p 170.

viewed against a background of almost continual change for the CID, most of which is perceived in negative terms.

The fact that such change does not always translate into practice as envisaged has already been noted, together with the influence of cultural norms and values in determining the extent to which new formal procedures are accommodated with existing, informal, working practices.<sup>3</sup> The sheer pace of change, however, produces an air of grudging acceptance on the part of some officers.

'You've got to remember it's got to set against the fact that, for the last 15 years, the police have gone through continual revolutionary change, so it's now a case of we're all just used to it and we accept that there is going to be change and you have to get on with it.'<sup>4</sup>

For others, however, there is a palpable irritation, not only at the pace of change but also at the direction of reform. Significantly, these, more seasoned, officers have sufficient experience and personal identification with the investigative process to raise the prospect of challenge to the fundamental principle of disclosure.

'Well we've had a lot of changes in a short period, a lot of changes, and it takes a lot to sink in, you know, it takes a lot to get off your old ways and adapt to these new ways - like disclosure. A young police officer would be told "You have to disclose all of this" and they would do it, whereas we would look at it and say, "Why? You know I don't really want to do that - I don't want to disclose".'<sup>5</sup>

The extent to which this kind of ideological resistance to the basic concept of disclosure translates into active subversion of the procedures is difficult to assess, but such comments serve to illustrate the way in which the philosophy of many CID officers is fundamentally governed by crime control values.

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<sup>3</sup> As one ASU officer explained in relation to the 1984 Act, 'When PACE came in some police officers said, "this is the end of policing - we will not be able to cope with this, all the rules and regulations". But it didn't really change much because all it did really was encompass what we were doing already.' [ASU 10/119].

<sup>4</sup> CID 1/17.

<sup>5</sup> CID 2/97. The nature of the task was described by one ASU Sergeant, 'Those who are really set in their ways...just to modify their behaviour a little bit is a step forward.' [ASU 8/129].

As the fieldwork for this study progressed officers were also having to adjust to the impact of the Human Rights Act 1998 and the Regulation of Investigatory Powers Act 2000. Both had enormous implications for policing<sup>6</sup> and provoked the same frustrations as CPIA.

#### **8.4. changing recruitment**

Change is not confined to legislation and the investigation of offences. Many of the institutional changes undertaken by the police in recent years have had a direct effect on the working conditions of CID officers and, consequently, their morale.

One contributory factor to the status of CID has traditionally been the aura of exclusivity which surrounded entry to the world of the detective. The fact that an element of the process was based on personal recommendation meant that this was seen as reward for those who had not only shown their competence as police officers but who had also impressed their peers and supervision. As such, acceptance to the ranks of the CID marked the culmination of years of work spent demonstrating mastery of the 'craft' of police work,<sup>7</sup> as part of a process which was highly visible to other officers, with the result that officers entered CID with their credibility already established and their value already recognised. Having been seen to have proved themselves in this way is a facet of the pride which CID officers have in their position.

For detectives, the effects of this proving process extend beyond merely proving themselves in the eyes of their peers. Acceptance into CID elevates not only the officer but also the officer's opinions to that of the 'expert', equipped by their experience and length of service to adopt a more autonomous role towards their

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<sup>6</sup> Some sense of the trepidation felt by the police towards HRA came in a light-hearted comment from one senior officer, 'I'm upset now - two hours without mentioning Human Rights and you had to spoil it.' [DDC 1/22].

<sup>7</sup> This might also involve 'pseudo-specialisation,' where the officer mimics the work style & practices of the desired promotion department (e.g. the officer seeking transfer to CID replicates their hours and concentrates on detection work in uniform in order to demonstrate suitability at selection interview). Jones. J.M. (1980) *Organisational Aspects of Police Behaviour*. Westmead: Gower.

own investigations and to advise 'less experienced' (i.e. uniformed) officers. This institutional respect within the police service acts to enhance officers' self belief and confidence in their own decision making, essential prerequisites to the exercise of their discretion. In addition, membership of the CID sends a message to others, both inside and outside the police service, that this is an individual with considerable experience of investigation and case preparation.

This cultural benefit enjoyed by CID officers is dependent on general acceptance of the difficulty of the selection process, however recent changes designed to increase opportunities for new officers mean that the length of service required to apply for CID has reduced radically, leaving relatively inexperienced officers eligible for transfer. As one detective appointed under the old system explained, the system is not universally popular.

'I expressed an interest in CID after 8 years service and it took another 7 years to get in - A long time. They have changed the entire selection process now to speed things up and, if you are fortunate enough to pass, then you should have to wait no more than 12 months. When I did it my boss had been looking at me for about 6 or 7 years - "He is a good worker, his shift inspector thinks he's brilliant, the lads in his office think they can work with him." Now you're going to get someone with 2 years service and they just don't know enough. They are an unknown quantity. Gone are the days here the boss would say, "Let's leave him in uniform for another two years, see how he does, but keep a close eye on him" - that's gone. You might get someone who is appalling on the streets but is shit hot in interviews and exams [laughs] you know what I mean?'<sup>8</sup>

There are potentially harmful consequences of this change in policy, not least in terms of morale within the CID, as officers who have succeeded under the more rigorous system are joined by those who have benefited from the more relaxed regime. More importantly from the perspective of disclosure, officers with relatively limited experience may find themselves required to make assessments of unused material in more complex cases (frequently involving informants) and within an environment where the consequences of error could be catastrophic.

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<sup>8</sup> CID 4/111.

## **8.5. performance culture**

Another key change to the policing environment over recent years has been the growing pressure caused by ever increased expectations from Government and public for improvements in arrest and detection rates. With the introduction of performance monitoring, this pressure has become even more pronounced, with constant statistical evidence used to make comparisons between forces and individual divisions. The CID are in the frontline of delivery for such targets and the stresses this generates were explained by an ASU officer.

'Particularly in CID, there's a huge amount of pressure on. Crime figures come out all the time, you know. If the detection rate is bad for burglaries within the division then woe betide the DI - he gets his arse kicked from above and he's kicking other arses below him. He's under that pressure and the DS's and the DC's, they are under an enormous amount of pressure to get results. If your detection rate goes down by 5% for burglaries within the division then, "what's going on?" and it might be some simple thing like there's a lad just been released from custody, he's committed 50 burglaries and hasn't been caught yet, so your detection rate is really poor. A month later he might be caught and admit all those burglaries and then you've got a fantastic detection rate.'<sup>9</sup>

Although there is nothing new in calls for improved results on the part of the police, the performance indicators used to measure success have, themselves, been seen as flawed,<sup>10</sup> not least because their construction remains under the control of the police. Also, the pressure to meet targets may have a detrimental effect on the consideration of unused material. The emphasis in police work lies in the number arrested and in charged, not in convictions which may or may not be secured at some point in the future and, for this reason, there must be the suspicion that officers are less concerned with matters which might weaken the case at court than with presenting a clear case to justify the initial charge.

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<sup>9</sup> ASU 4/105.

<sup>10</sup> Loveday. B. (1999) 'The Impact of Performance Culture on Criminal Justice Agencies in England & Wales.' *International Journal of the Sociology of Law*. 27 351. The rules governing crime recording which were in operation during the fieldwork for this study were also open to question. For examples, offences from the previous financial year could not be cancelled even where they proved to be spurious, thereby distorting the statistics for unsolved crimes. These were known affectionately within the office as the 'Home Office Barking Mad Rules.'

Furthermore, at least one detective was prepared to acknowledge the threat to investigative impartiality posed by the pressure to produce results.

'You have to say to yourself, "We are gatherers of evidence", but it is a very complex question because, if your detection rate is plummeting, it isn't much use saying, "I am a gatherer of evidence" [laughs]. But, ethically, that is what you should do.'<sup>11</sup>

### **8.6. resistance to CPIA**

'The initial reaction was that it was going to be a pain in the arse and it IS a pain in the arse.'<sup>12</sup>

There is little doubt that CPIA was not well received by the majority of investigators and even after some years, there is, at best, an air of weary acceptance within the ranks of the CID.<sup>13</sup> In discussions with detectives it is clear that those initial concerns have, if anything, grown with time and the resentment which officers have for the disclosure regime visibly underpins many of the strategies which are employed during the investigation and file preparation stages of the process. It is, therefore, useful to consider the two principal objections voiced by officers when considering CPIA disclosure.

### **8.7. resistance to paperwork**

The increasingly administrative nature of the criminal justice system has already been noted and will be examined in greater detail when considering the file preparation and submission stages, but from the outset many complaints about CPIA have centred on the additional administrative burden which it represents.

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<sup>11</sup> CID 13/158. The tensions created by the drive for results was also commented upon by HMI. 'The increasingly aggressive and demonstrable performance culture has emerged as a major factor affecting integrity, not least because for some years there has been an apparent tendency for some forces to "trawl the margins" for detections and generally use every means to portray their performance in a good light. The questionnaire replies from chief constables...highlighted the performance culture as a cause for lapses in integrity. A CID trainer offered the view, "The performance culture forces you to operate at the edge of the ethical envelope".'<sup>11</sup>

<sup>12</sup> CID 7/6.

<sup>13</sup> 'Disclosure is with us, it is a fact of life and will not go away.' Sir John Hoddinott, C Con Hants, ACPO. *Disclosure and the CPIA: Implementation in Practice*. Police Staff College Seminar, 12/5/98 (unpublished).

'I mean, the politicians all talk about reducing the workload on the police and more bobbies on the beat and all that, but this was more work. At its simplest level it was more forms to fill in on the file. The man on the street doesn't like extra work and this was extra work - that's the bottom line.'<sup>14</sup>

As will be seen, paperwork represents the antithesis of all that is regarded within the police service as 'real' police work and so it is unsurprising that legislation which requires officers to document material in detail will be regarded as a source of irritation and it is undeniable that many officers do resent the time that is spent in compiling the schedules and in dealing with subsequent requests for disclosure. However, such practical complaints are overshadowed by more fundamental objections to the disclosure regime under CPIA.

### **8.8. resistance to 'doing the defence's job for them'**

One of the most consistent criticisms of CPIA voiced by CID officers was the extent to which they felt that, by complying with the provisions of CPIA, they were 'doing the defence's job for them' and this reveals something of the ideological resistance which many officers feel towards the legislation.<sup>15</sup> This becomes particularly important at two stages of the process: firstly, in considering potentially contradictory lines of enquiry; secondly, when the time comes to record such information on the schedules. At each point, officers are faced with the prospect that they may be assisting the defence by highlighting material which may undermine the prosecution case, as the comments of two detectives reveal.

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<sup>14</sup> ASU 13/6.

<sup>15</sup> One detective explained how complaints about the administration involved in disclosure might conceal a more basic objection to the principle of disclosure, 'You might hear the view, "Oh bloody hell, something else, more to learn, more to tie our hands", but you might also hear a different point of view like, "This is shit and we shouldn't have to deal with it".' [CID 1/135]. However a CPS lawyer offered a different perspective, 'I don't think it is ideological, they just can't do it. A lot of the time it is obvious that there will be unused material and we find ourselves asking, "Where did this come from?"' [CPS 4/26].

'We are certainly providing them with ammunition. Previously, if you provided the evidence in the file that was the 'best evidence' if you like. What we weren't providing were the holes and the chinks in the armour. But, with disclosure, that's exactly what you are doing, you are providing everything. The prosecution file is supposed to be 'the case' and then you supply another package and that WILL contain ammunition for them.'<sup>16</sup>

'I don't resent what I have to do with unused material but yeah, disclosing things to the defence, I do resent that. I do resent having to give that to the defence. Why we should have to show our hand? Because, from a personal point of view, I think that everything is organised for the benefit of the criminal – sorry, I mean 'the suspect'. A lot is in his favour.'<sup>17</sup>

Whether such resentment is sufficient to subvert the professionalism of detectives and cause them to actively evade disclosure is open to conjecture but, at the very least, it illustrates the difficulty which many officers have experienced in distancing themselves from the interests of the prosecution and acting as an impartial evidence gatherer. As such, these cultural preconceptions act as a subconscious impediment to even handed investigation and disclosure .

### **8.9. atonement for past disclosure errors**

Another interesting insight into the approach of CID officers towards disclosure is provided by their views on the miscarriages of justice which originally prompted the 1992 Royal Commission and, in turn, CPIA. Of the detectives interviewed, most recognised that there had been a need for reform of the disclosure system, but that did not necessarily entail an acceptance that the original convictions had been unsatisfactory.

'I don't know what was going on when those cases happened but, in the majority of cases, it doesn't seem to be that the police didn't do this or that but rather that the evidence can't be backed up and my thought is that, because of a small number of cases a lot of years ago, all police officers are having to go through this now and that seems a very high price to pay.'<sup>18</sup>

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<sup>16</sup> CID 10/295.

<sup>17</sup> CID 3/21.

<sup>18</sup> CID 8/138. Similar sentiments were expressed in a 1996 speech by David Phillips, Chief Constable of Kent and Secretary of ACPOs Crime Committee, who spoke of a criminal justice system, '...reeling from supposed miscarriages' and 'acquittals of the plainly guilty,' concluding that, '...disclosure has become the leverage to seek out "due process" defences.' Speech to the British Academy of Forensic Sciences Seminar, London. 10/12/96.

This seemingly unshakeable belief of officers in their ability to 'know' the guilt of suspects is an essential element of the police decision making process and will be shown to represent one of the most powerful obstacles to the impartial consideration of potentially undermining evidence. Presumably this same instinctive knowledge of guilt underpinned the investigations which produced the miscarriages of justice of the past thirty years but this seems a remote prospect to officers dealing with routine disclosure in regional forces.

'I don't think bobbies think as deep as that. If a serious case had happened locally, everybody knew that person was guilty and he had walked out of prison on a technicality because of non-disclosure, then everybody here would have been emotionally involved and we would have seen the seriousness and the implications of it but, because it is someone at Guildford Crown Court or at the Old Bailey – "so-and-so walks free because statements weren't disclosed at the trial in 1970 whatever" - it doesn't mean a thing to us.'<sup>19</sup>

Once again, this apparent inability to appreciate the immediacy of disclosure as an operational issue allows officers to follow their policing 'instincts' without the fear that their case will be the next injustice based on non-disclosure.

#### **8.10. disillusionment with 'the system'**

The factors outlined above, together with more structural changes within the police service, have done little to enhance the morale of many CID officers, but it is the changing nature of the broader criminal justice system which provoked the greatest criticism from the officers interviewed. Most were highly critical of a system which they saw as stacked against them and overly governed by a 'due process' agenda and, although there is little new in such complaints from the police, the level of disillusionment revealed by some detectives was striking, as in the following instance.

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<sup>19</sup> ASU 7/51. A colleague added, 'I think there was an element of, "Well does it matter for THIS case? for every shoplifting or whatever, does it really matter? It's not the Birmingham 6".' [ASU 6/13].

'I simply play the game and I do it to the best of my ability, taking the view that, if I keep doing that, then I keep drawing the wage at the end of the day. If people are getting off because the system that we are operating works in a particular way then why should I worry about it? I keep doing what I can the best I can. Just play along and when you finish work you go home and have a nice time. I've got to the stage where I stop moralising now, I used to feel really uptight if someone got off at court - it was like, "What an insult it is that this person is obviously guilty and they have got off". Now you think, "Well there is the jury, the judge and the barristers - if they didn't like it why should I care?" It is not because of an inadequacy in what I have done, it's the system that we have and I haven't created it - get on with it!'<sup>20</sup>

It is important to recognise that this frustration is not with the police but with the operation of the other aspects of the criminal justice system, which detectives see as undermining the work they do. This sense of the investigator as 'fighting against the odds' will recur throughout the following examination of the investigation and file preparation processes and plays a significant part in explaining some of the judgments made by officers as the process of case construction proceeds.

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<sup>20</sup> CID 5/103.

**SECTION 3.**

**AN ANALYSIS OF CPIA DISCLOSURE IN PRACTICE**  
**WITHIN TWO POLICE FORCE AREAS**

## 9. materials and methodology

### 9.1. aims and objectives

The initial aims of the study were relatively straightforward: firstly, to assess the integrity of the regime for advance disclosure introduced by the Criminal Procedure and Investigations Act 1996, with particular reference to its operation in two force areas; secondly, to consider the potential impact of the attitudes and working practices of individual police officers on the effectiveness of the disclosure procedures. Inevitably the latter requires some detailed examination of the motivations and value systems of officers, but it is important to emphasise at the outset that the focus of this study is not to provide yet another account of 'police culture', except where this can be identified as a factor which militates against the effective operation of the disclosure provisions.

As the work progressed it became clear that this was indeed the case in a number of key areas and those facets of the operational culture are examined where they arise. However the objective remained to explain the operation of pre-trial disclosure by reference, in part, to police culture – not vice versa.

At the outset, the distinction has to be made<sup>1</sup> between 'policing' research and 'police' research for, whereas the former is concerned more with the processes of order maintenance which may be carried out by a number of social institutions including the police, the latter suggests the institution of the police itself and the performance policing functions<sup>2</sup> by those:

'employed by modern states to be specialist professionals organised on a permanent basis, for policing with specific training and capacity for the use of legitimate coercion and force if necessary.'<sup>3</sup>

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<sup>1</sup> Reiner. R. (1997) 'Policing and the Police' in Maguire. M., Morgan. R., Reiner. R. (eds) *The Oxford Handbook of Criminology*. Oxford: OUP.

<sup>2</sup> Rawlings. P. (1999) *Crime and Power: A History of Criminal Justice 1688-1998*. London: Longman.

<sup>3</sup> Reiner. R. (2000) 'Police Research' in King. R., Wincup. E. (eds) *Doing Research on Crime and Justice*. Oxford: OUP.

In making this point it is, perhaps, useful to consider the some of the recognised categories of academic police studies.<sup>4</sup>

1. Purpose of the police; functional definitions; measurements of police activities.
2. Identity of the police; demographics; gender; ethnicity and educational characteristics.
3. Police effectiveness; crime prevention; management style; community policing; domestic violence.
4. Management and control of the police; constabulary independence; constitutional issues; complaints; accountability; policy making.
5. Public views about the police; public attitudes; evaluation of police-public encounters; minority perspectives.
6. Historical perspective; revisionist views.
7. Police culture; street cops versus management cops; inter-departmental rivalries; sexism; racism and homophobia.
8. Impact of training; informal socialisation processes; community policing ethos.
9. Police deviance; impacts of PACE; interviewing techniques.
10. Police fairness; use of discretion; discrimination.

Of these, 1-6 are of little direct relevance to this work. However 7-10 can all be seen to have some bearing on the procedures for disclosure employed by the police and encompass some of the key issues identified as impacting on the operation of CPIA. For example, the influence of police culture has already been acknowledged and an essential element of this is the perceived distinction between 'street cops' and 'management cops' which frequently manifests itself in the low-key antagonism which exists between the various departments within the police and, most notably, between the police and CPS.

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<sup>4</sup> Leishman. F., Loveday. B., Savage. S. (1996) *Core Issues in Policing*. London: Longman. p 185.



Similarly, the inadequacy of formal disclosure training, which was repeatedly identified during this research, has the effect of increasing the significance of the informal socialisation processes which operate within the divisions. As will be shown, the solution to the absence of formal training is frequently the sharing of pooled knowledge within the CID office and this provides the basis for many of the problems with the disclosure regime in practice. Finally, the issues of police discretion and police deviance are central to the way in which information is either considered for disclosure or ignored completely during the investigation and file preparation processes.

## **9.2. theoretical approach**

Chapter 2 provided a brief overview of the development of police research in the UK and illustrate that studies of how the police approach key aspects of their work have been subjected to both 'structuralist' and 'interactionist' analyses over the past two decades. The former, examining behaviour in the context of the restrictions imposed by social structures, has generally been favoured in studies into the criminal justice process and police abuse of power,<sup>5</sup> whereas the latter, which concentrates instead on human interaction to explain social behaviour, has been employed more by those interested in police administration and police misconduct.<sup>6</sup>

To some degree this work borrows from both traditions, in that a central theme of the study is the extent to which the process of case construction by the police, and the subsequent adoption of this version of events by the other agencies within

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<sup>5</sup> McBarnet. D.J. (1981) *Conviction: the Law, the State and the Construction of Justice*. London: Macmillan; McConville; Sanders. A., Leng. R. (1991) *The Case for the Prosecution: Police Suspects and the Construction of Criminality*. London: Routledge; Sanders. A., Young. R. (2000) *Criminal Justice*. London: Butterworths; Reiner. R., Leigh. L. (1994) 'Police Power', in McCrudden. C., Chambers. G. (eds) *Individual Rights and the Law in Britain*. Oxford: Clarendon Press.

<sup>6</sup> Wilson. J.Q. (1968) *Varieties of Police Behaviour*. Cambridge, Mass: Harvard University Press; Bittner. E. (1975) *The Function of the Police in Modern Society*. New York: Jason Aronson; Holdaway. S. (1983) *Inside the British Police*. Oxford: Basil Blackwell; Smith. D.J. and Gray. J. (1985) *Police and People in London*. London: Police Studies Institute; Maguire. M. Corbett. C. (1991) *A Study of the Police Complaints System*. London: HMSO; Skolnick. J.K., Fyfe. J.J. (1993) *Above the Law: Police and the Excessive use of Force*. New York: Free Press.

the criminal justice system, artificially distorts the status of unused material collected during the course of the investigation. There are parallels here with the essentially structuralist approach of McConville *et al.*,<sup>7</sup> in their quest to establish whether miscarriages of justice '*were simply aberrations or rather were the natural result of our adversarial process and the autonomy of the police*'<sup>8</sup> to design and construct the case at an early stage and in a form which heavily influences the later stages of the prosecution. A crucial flaw in this analysis, however, is that it largely ignores the opposition to the police version of events presented by others, such as the defence and the courts, and so presents a picture of the criminal justice system as a largely linear process, programmed by the police and relatively unaffected by others.

The evidence of this study suggests that, certainly in relation to disclosure, this is far from the case and that the other elements within the criminal justice system do have a significant impact on case construction. Moreover, it will be argued that a critical factor for the police in formulating their approach to issues of unused material is anticipation of the likely actions of others within the system (most notably the CPS and defence) and that, consciously or otherwise, this exerts a powerful influence over the way in which any unused material is presented.

To some extent this undermines any structural analysis, as it suggests that the police approach to disclosure is governed, in part, by interpretation and negotiation between the agencies involved, and is therefore more reminiscent of symbolic interactionism and its view of individual behaviour and self-concept as dependent on internal processes reinforced through interaction with others and by which:

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<sup>7</sup> McConville., Sanders. A., Leng. R. (1991) *The Case for the Prosecution: Police Suspects and the Construction of Criminality*. London: Routledge.

<sup>8</sup> McConville., Sanders. A., Leng. R. (1991) *The Case for the Prosecution: Police Suspects and the Construction of Criminality*. London: Routledge. p 3.

'humans interpret or "define" each others actions instead of merely reacting to each others actions. Their 'response' is not made directly to the actions of another but instead is based on the meaning which they attach to such actions. Thus human interaction is mediated by the use of symbols, by interpretation, or by ascertaining the meaning of one another's actions.'<sup>9</sup>

This concept of reciprocity between individual action and meaning is not confined to symbolic interactionism,<sup>10</sup> but also underpins social constructionist phenomenology,<sup>11</sup> which argues that our 'knowledge' is the result of a process of construction of meanings, subject to continual redefinition and renewal, which imbues our, essentially subjective, interpretations with a degree of objectivity.<sup>12</sup> This not only enables the individual to impose a sense of order and meaning on their surroundings but also serves to legitimise the broader institutional order. This second point is of great significance within the police environment, as it acknowledges the possible implications of the combination of two factors, an introspective police culture and its espousal of the ideology of the 'crime control' model.

'frequently an ideology is taken on by a group because of specific theoretical elements that are conducive to its interests...every group engaged in social conflict requires solidarity. Ideologies generate solidarity.'<sup>13</sup>

Many of the interviews conducted during this research illustrated the pivotal role of such ideological cohesion in defining the 'correct' course of action within the decision making process. However, determining the way in which individual police officers attribute meaning to their own working environment may be

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<sup>9</sup> Blumer. H. (1969) *Symbolic Interactionism*. Berkeley: University of California Press. p 78. 'Valid knowledge is held to reside neither in the subject nor in the object but in the transactions that unfold between them...it represents the emerging product of active encounters between consciousness and the materials which consciousness surveys'. Also see Rock. P. (1979) 'The Sociology of Crime, Symbolic Interactionism and Some Problematic Qualities of Radical Criminology', in Downes. D., Rock. P. (eds) *Deviant Interpretations*. Oxford: Martin Robertson.

<sup>10</sup> See, for example, Blumer (1969) *Symbolic Interactionism*. Berkeley: University of California Press; Plummer. K. (1979) 'Misunderstanding Labelling Perspectives', in Downes. D., Rock. P. (eds) *Deviant Interpretations*. Oxford: Oxford University Press.

<sup>11</sup> Berger. P., Luckmann. T. (1966) *The Social Construction of Reality*. London: Penguin.; Douglas. J. (1971) *American Social Order*. New York: Free Press.

<sup>12</sup> Giddens' structuration theory takes this one step further by arguing that societal power is central to the process. Giddens. A. (1984) *The Constitution of Society*. Cambridge: Polity Press.

<sup>13</sup> Berger. P., Luckmann. T. (1966) *The Social Construction of Reality*. London: Penguin. p 141.

considerably more complex. Possible factors may include the social context of policing,<sup>14</sup> the position of the officer within the hierarchy of the police,<sup>15</sup> their particular role or specialism<sup>16</sup> or the concerns of the particular police organisation<sup>17</sup> but, whatever the causes, it became apparent early in this research that in order to explain the failures in the disclosure regime it was necessary to understand something of the attitudes and perceptions of the officers at the centre of the decision making process.

This focus on how the participants themselves describe and conduct their activities has been central to all of the 'classic' ethnomethodological studies of the criminal justice system, such as Sudnow's analysis of 'normal crimes,'<sup>18</sup> Bittner's examination of the policing of 'skid row',<sup>19</sup> and Wieder's work on the 'convict code' of prisoners.<sup>20</sup> In his research into the reasoning processes of jurors Garfinkel<sup>21</sup> saw how juries produced for themselves rules of 'correct' behaviour which were frequently inconsistent with those prescribed by the court and there are parallels here with many of the unofficial disclosure related strategies employed by officers in this study.

To explore fully the origins of such conduct necessitated some expansion of the original thesis, but this 'discovery based approach'<sup>22</sup> allowed theory and

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<sup>14</sup> Cain. M. E. (1973) *Society and the Policeman's Role*. London: Routledge.

<sup>15</sup> Reiner. R. (1991) *Chief Constables: Bobbies, Bosses or Bureaucrats*. Oxford: Oxford University Press; Reuss-Ianni. E. (1983) 'Street Cops and Management Cops: The Two Cultures of Policing', in Punch. M. (ed) *Control in the Police Organisation*. Cambridge Mass: MIT Press.

<sup>16</sup> Punch. M. (1985) *Conduct Unbecoming: The Social Construction of Police Deviance and Control*. London: Tavistock.

<sup>17</sup> Ericson. R., Haggarty. K. D. (1997) *Policing the Risk Society*. Oxford: Clarendon; Wilson. J.Q. (1968) *Varieties of Police Behaviour: The Management of Law and Order in Eight Communities*. Cambridge Mass: Harvard University Press.

<sup>18</sup> Sudnow. D. (1965) 'Normal Crimes.' *Social Problems*, vol 12. p 255-276.

<sup>19</sup> Bittner. E. (1967) 'The Police on Skid Row: A Study of Peace Keeping.' *American Sociological Review*, vol 32 p 699.

<sup>20</sup> Wieder. D.L. (1974) *Language and Social Reality*. The Hague: Mouton.

<sup>21</sup> Garfinkel. H. (1967) 'Some Rules of Correct Decision Making that Jurors Respect', in Garfinkel. H. *Studies in Ethnomethodology*. Englewood Cliffs NJ: Prentice Hall.

<sup>22</sup> In the style of 'grounded theory', Strauss. A.L. (1990) *Basics of Qualitative Research: Grounded Theory Procedures and Techniques*. London: Sage. and 'sequential analysis', Becker. H.S. (1970) *Sociological Work*. London: Allen Lane.

observation to develop from the research data and, to some extent, this echoes the 'situational analysis' of Reuss-Ianni<sup>23</sup> which:

'takes prior observations and concepts into the field and uses them as guidelines for observation. We do not preplan and prebuild an elaborate framework into which we fit all of the observations...we go out and observe the social action and then build the boxes in the field as part of the process of the research.'<sup>24</sup>

The result is, essentially, an ethnographic account of operational policework which, unlike previous works,<sup>25</sup> is narrowly confined to a specific aspect of the investigative and file preparation process. The objective, however, remains the same:

'to achieve deeper insight, to search for commonalities across the study participants or sites, to explore uniqueness and to interpret the meaning of the discovered patterns.'<sup>26</sup>

### **9.3. the nature of police research**

'You're not a fool. You know that things are not done properly in this job at times. Now I'm not going to do anything seriously wrong in front of you, but you must know that we all have in the past. I'm prepared to be as honest as I can with you. In other words, I'll give you 90% of the truth.'<sup>27</sup>

'How much do you think that you found out when you were with us?...We only let you see what we wanted you to see. You only saw about fifty per cent. We showed you only half the story.'<sup>28</sup>

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<sup>23</sup> Reuss-Ianni. E. (1983) *Two Cultures of Policing; Street Cops and Management Cops*. London: Transaction.

<sup>24</sup> p 127.

<sup>25</sup> See, for example, Foster. J. (1989) 'Two Stations: An Ethnographic Study of Policing in the Inner City', in Downes. D. (ed) *Crime and the City: Essays in Memory of John Barron Mays*. Basingstoke: Macmillan.

<sup>26</sup> Tesch. R. (1991) 'Computer Programmes that Assist in the Analysis of Qualitative Data: An Overview.' *Qualitative Health Research*, 1(3), 309-325. p 319.

<sup>27</sup> Smith. D. J., Gray. J. (1983) *Police and People in London IV: The Police in Action*. London: Policy Studies Institute. p 12.

<sup>28</sup> Punch. M. (1979) *Policing the Inner City: A Study of Amsterdam's Warmoesstraat*. London: Macmillan. p 13. This may be contrasted with the study for the RCCP conducted by Barrie Irving in which he claimed to have been so much accepted by officers that his presence did not cause them to alter their behaviour in any way. Irving. B. (1980) *Police Interrogation: A Case Study of Current Practice*. RCCP Study No 2. London: HMSO.

As a low visibility activity, policework is not ideally suited to positivistic or empirical analysis, particularly in relation to areas such as compliance with new procedure. Researchers who succeed in establishing themselves within the operational environment and gaining the trust of individual officers may be rewarded with anecdotal or even firsthand evidence of minor procedural transgressions,<sup>29</sup> but this candour is unlikely to extend to cases involving serious suppression of evidence which may involve conduct unknown even to superiors within the division. Decisions to manipulate or conceal evidence may be attributable to an individual officer or even to tacit agreement between a small number of colleagues, but in any event, the secrecy which will inevitably surround such conduct, together with the relative ease with which it can be concealed from outsiders, renders speculation as to the incidence of such procedural abuse largely academic. As McConville and Sanders recognised,<sup>30</sup> the key determinant is not the extent to which police powers are actively abused (as this is effectively impossible to measure) but rather their capacity or ability to do so.

Disclosure under CPIA is no more resistant to concerted efforts to suppress evidence than the regime which it replaced and the three years of this study were punctuated by a number of nationally reported cases which had collapsed due to flagrant breaches of disclosure procedure, eliciting judicial comment highly critical of individual officers. During the fieldwork there was nothing to suggest such activity, but it would be naive in the extreme to conclude that it could not conceivably have occurred. Admittedly this is hardly a startling conclusion, but it does serve to illustrate that a more profitable exercise might be to concentrate on evidence of genuine error in the evidence gathering process rather than deliberate malpractice and this shift in focus raises a number of interesting issues, not the least of which is the influence of occupational culture which may be

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<sup>29</sup> Sanders. A., Bridges. L. 'Access to Legal Advice and Police Malpractice.' [1990] Crim LR 494. Despite the fact that officers knew they were being observed they continued to breach codes of practice in relation to legal advice in 10% of cases.

<sup>30</sup> McConville. M, Sanders. A. (1995) 'The Case for the Prosecution and Administrative Criminology', From Noaks. L., Levi. M., Maguire. M. (eds) *Contemporary Issues in Criminology*. Cardiff: University of Wales Press.

significantly more subtle than many studies have recognised. This may be particularly important in relation to such issues as the question of 'relevance' as defined by the Act, and a central theme of this research is the extent to which cultural factors may lead to flawed judgments relating to what is seen as relevant to a particular line of enquiry and which lines of enquiry are viewed as worthy of further investigation.

In terms of the reaction of the police to this enquiry into their working practices, initial approaches, whether at headquarters or divisional level, were welcomed and there was a noticeable eagerness on the part of senior officers to be seen as open and to actively welcome such scrutiny of their work.<sup>31</sup> All requests for access and information were acceded to and, on the one occasion where officers within a division appeared suspicious and unwilling to acknowledge any difficulties with the operation of disclosure, an alternative (and much more cooperative) location was immediately made available. From the outset it was made clear to all concerned that the research was motivated by a desire to appreciate the difficulties of CPIA, rather than to pursue any particular agenda, that positive findings were equally valid and that, as in the work of Chesshyre, 'my aim...was not to expose but to examine and report.'<sup>32</sup> Equally, however, the case was made for an honest recognition of any difficulties which were discovered and this appeared to be accepted as a useful and independent avenue through which officers could voice their concerns.<sup>33</sup>

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<sup>31</sup> There are parallels here with Punch. M. (1979) *Policing the Inner City: A Study of Amsterdam's Warmoesstraat*. London: Macmillan. and a contrast with Ericson. R.V. (1981) *Making Crime: A Study of Detective Work*. London: Butterworths, which detailed considerable resistance from the officers on the ground who were suspicious of the purpose of the study and the fact that the researchers had been introduced by the senior management (as in our case). See also Reiner. R. (1979) 'Assisting with Enquiries: Problems of Research on the Police', paper presented to the British Sociological Association, Survey Research Group Colloquium on 'Survey Research and the Law', Warwick University; Ericson. R.V. (1981) *Making Crime: A Study of Detective Work*. London: Butterworth. An interesting account of the resistance of the CID within the Met can be found in Smith. D. J., Gray. J. (1983) *Police and People in London IV: The Police in Action*. London: Policy Studies Institute.

<sup>32</sup> Chesshyre. R. (1989) *The Force: Inside the Police*. London: Sidgwick & Jackson. preface p x.

<sup>33</sup> For a similar approach in relation to the RUC see Brewer. J.D. (1991) *Inside the RUC: Routine Policing in a Divided Society*. Oxford: Oxford University Press.

Notwithstanding the high degree of cooperation encountered, it was vital to acknowledge that perhaps the greatest hazard inherent in police research is gullibility. The police are all too aware that they are the object of constant scrutiny, against a background of urban myths of police malpractice, miscarriages of justice and endemic corruption. It is, therefore, hardly surprising that the appearance of a curious stranger should be regarded by some as a threat<sup>34</sup> and by others as a welcome opportunity to 'spin a yarn' with the result that the intruder is always vulnerable to credulity.

'He left after two weeks, delighted with the information he had been allowed to record, while the officers were happy that the despised sociologist had got nowhere near the truth, or the real meat of what goes on.'<sup>35</sup>

For the researcher who also happens to be a police officer such exaggeration is easy to recognise.<sup>36</sup> However, for the true outsider the position is somewhat more hazardous<sup>37</sup> and, if genuinely candid comments are not to be ignored along with the 'fisherman's tales,' then the only realistic protection is a healthy degree of scepticism. However, as all of the key findings of this study are based on comments by a number of officers from different divisions, supported by either documentary evidence or discussions with others such as CPS and defence practitioners, it is felt that the overall risk was minimal.

#### **9.4. methodology and data sources.**

This study was conducted over the period 1999-2001, with the cooperation of two police forces in the North of England and, as an examination of the processes

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<sup>34</sup> After one, unproductive interview with a senior detective his (more cooperative) colleague offered the following assessment, 'He's very guarded you see. He's a bit of a cutie and he knows what he's doing. He will have thought, 'Who's this suit? He's getting nowt out of me'. That will be his attitude.' [ASU 4/203].

<sup>35</sup> Young, M. (1991) *An Inside Job: Policing and Police Culture in Britain*. Oxford: Clarendon. p 77.

<sup>36</sup> See for example Holdaway, S. (1983) *Inside the British Police*. London: Basil Blackwell.

<sup>37</sup> Holdaway recounts that, when police officers swap tales, 'the finale is generally a description, in fine detail, of the last sociologist who tried to research them.' p 138.

of file preparation is, essentially, a study of the unseen, administrative, face of police work. As such, is to some extent detached from the day to day experiences of officers on the street and, for this reason, a conscious decision was made not to shadow officers on patrol, in an attempt to avoid the standard 'on the beat' narrative which appears as a recurring theme in many studies of the police. Instead. Instead, data was drawn from two main sources: firstly, a series of extended interviews were conducted with police officers and others directly concerned with the operation of the disclosure regime; secondly, an examination was made of documentary sources, most notably case files prepared for prosecution. In addition, there were numerous informal conversations with officers, observation of disclosure training sessions and, ultimately, an invitation from one of the forces studied to participate in policy planning on disclosure. Cumulatively this provided a comprehensive overview of how disclosure was implemented within the two forces studied.

### **9.5. interviews.**

The focus of this research was a series of lengthy semi-structured interviews conducted with 40 serving police officers of all ranks<sup>38</sup> over the period 1999-2001, supported by similar interviews with others, most notably the CPS, over the same period.

There were a number of reasons why this was used as the primary data collection method. As a less overtly confrontational mechanism, it assisted in establishing a rapport with the interviewee, which was seen as particularly important, not least because the police were the primary subject group and the questioning would inevitably include some potentially sensitive topics. It was also necessary to acknowledge the professional sensitivities of a service which frequently

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<sup>38</sup> In their 1995 study on specialist investigative interviewing in the police Bull and Cherryman noted a greater level of complexity in the responses of senior officers but also that the complexity of response decreased corresponding to length of service. This, apparently contradictory, situation was explained by the fact that the experienced officers who furnished the less complex responses were those who had remained in the lower ranks rather than being promoted. Bull, R., Cherryman, J. (1995) *Helping to Identify Skills Gaps in Specialist Investigative Interviewing: Enhancement of Professional Skills*. Psychology Dept: University of Portsmouth.

considers itself to be under siege and that police officers in general (and detectives in particular) are far more experienced interrogators than the average researcher. For this reason, it was felt that the more relaxed style of interview, conducted over a prolonged period<sup>39</sup> and based largely on open-ended questions, would prove to be more productive in allowing officers to examine not only their working practices in relation to file preparation and the consideration of issues of unused material, but also the underlying issues which influence how officers approach their work in general. Addressing such issues by means of a more tightly structured interview format, or by questionnaire, would not only have necessitated reducing many of the points to crude characterisations but would also have prevented the respondents from elaborating on their answers in precisely the way desired.

In terms of the selection of interviewees, it was left to individual inspectors to canvass for volunteers within their departments which, to some extent, undermined the random nature of the survey. However, early attempts by senior officers to nominate candidates aroused considerable antagonism from some of the officers concerned and reduced the likelihood of any meaningful contribution. It soon became clear that the call for volunteers had the effect of attracting those who had experienced the greatest difficulties with the disclosure provisions or who had the strongest views on the subject and, on balance, this was felt to be the most efficient method of selection. As the main focus of the work was the way in which CID officers address issues of disclosure and the way in which they liaise with the officers of the ASU, the interviewees were drawn almost exclusively from these two groups.

A judgment had to be made early in the study as to the most effective 'persona' to present to the police and a balance had to be struck between professionalism, which might enhance the credibility of the researcher in the eyes of those studied but which might also increase defensiveness on the part of those who felt

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<sup>39</sup> Interviews were, on average, one and a half hours in length.

threatened by a semi-official intervention in their work, and a more amenable *acceptable incompetence* which to some extent plays to the authoritarian information-giving aspect of the police character. In this way the researcher was viewed as *one who had to be taught* and this was rapidly confirmed as a wise decision.<sup>40</sup> Officers were able to distance themselves from any potentially damaging revelations by portraying infractions as occurring elsewhere, rather than in their own area,<sup>41</sup> and this was not challenged as it appeared to encourage openness. One other factor which provided considerable assistance was that a number of the officers in the study had themselves undertaken part-time degrees and so, from the outset, were interested in the notion of their work being the subject of academic study and conscious of the requirements of such research.

Once the interviews were transcribed, the responses were pooled and categorised by means of coding and content analysis, undertaken with the assistance of the QSR NUD\*IST qualitative text analysis package. This software enabled large quantities of data from a range of interviews to be collated and cross-referenced, as well as compared with other material from case files and secondary sources (which had also been stored electronically) in order to identify recurring themes. In some instances, such themes were 'semantic' or manifest, but there was also much which was 'latent' or inferred and it is this data which provided some of the contextual background to the interviewees' responses. This is critical for, as recognised by Blumer,<sup>42</sup> the researcher must seek to ascertain how the actors behave towards the world on the basis of how they view it themselves, rather than how it appears to the observer and, in doing so, it is necessary to alternate

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<sup>40</sup> for examples of researchers who exploited their status as 'outsider' see Ditton. J. (1977) *Part-time Crime*. London: Macmillan; Taylor. A (1984) *The Politics of the Yorkshire Miners*. London: Croom Helm.

<sup>41</sup> The following comments from two detective being typical, 'In the force I work in I haven't seen much in the way of malpractice, but I'm not blind to the fact that it goes on elsewhere.' [CID 1/9]. 'As I've said I was always up front but, aye, there are lads who do keep things back - they forget about things.' [CID 4/32]. Similar sentiments were noted in Morton's research into corruption in the Met. 'As far as the Met was concerned any corruption happened in another division from the one in which the questioned officer was serving.' Morton. J. (1993) *Bent Coppers*. London: Warner. p.xiv.

<sup>42</sup> Blumer. H. (1966) 'Sociological Implications of the thought of G.H. Mead.' *American Journal of Sociology*, 71, 535-544. p 542.

between the 'etic' perspective of assumptions and explanations, and the 'emic' perspective of observation and interview data, testing the former against the latter and employing the methodology of constant comparison usually associated with grounded method theory.

'each segment of data is taken in turn, and, its relevance to one or more categories having been noted, it is compared with other segments of data similarly categorised...as this process of systematic sifting and comparison develops, so the emerging model will be clarified.'<sup>43</sup>

As part of this process, characterised by Tesch,<sup>44</sup> as one of 'decontextualising' and 'recontextualising' text data, themes developed from individual interviews were compared with the views of other officers of similar rank and background to establish recurring themes. These were later examined in relation to the comments of others, such as the CPS and defence, and documentary evidence which was provided by the contents of the case files. At each stage the objective was to identify both the procedures which officers employ in fulfilling their obligations under CPIA and the underlying factors which motivate them in the performance of their duties.

## **9.6. case files**

In addition to the interview data, it was felt that, where possible, documentary evidence of the operation of CPIA disclosure should be examined and this led to the Crown Court files as the most detailed record of the operation of disclosure in individual cases. Two categories of material, in particular, were used as indicators of possible difficulties: firstly, the unused material schedules; secondly, the correspondence between police, CPS and others.

The advantage of examining the full file is that it frequently contains early drafts of the MG6C (schedule of non-sensitive unused material) and MG6D (schedule of sensitive unused material) which could be compared with the final versions to

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<sup>43</sup> Hammersley. M., Atkinson. P. (1983) *Ethnography: Principles in Practice*. New York: Tavistock. p 180.

<sup>44</sup> Tesch. R. (1990) *Qualitative Research: Analysis Types and Software Tools*. New York: Falmer.

highlight items of unused material which had arisen later in the file preparation process. Also the presence of the MG6E (disclosure officer's report) indicates any aspect of the unused material which is seen as problematic in terms of its capacity to undermine the prosecution case or assist the defence. At the outset, the intention had been to compare the initial schedules, provided to the ASU by the OIC, with the final versions which were forwarded to the CPS by the ASU. However this proved to be impossible for a number of reasons. In many cases the initial schedule had not been retained in the completed file, and so could not be compared with the final version, and in others the OIC had clearly worked with the ASU throughout the early stages of file preparation and so it was impossible to determine the extent to which the officer's personal judgment had been corrected as the case progressed. In addition, it was common for the schedules to be both unsigned and undated, making it impossible to chart the chronology of events in relation to their construction.<sup>45</sup>

The CPS research into disclosure encountered similar difficulties.

'unused material was mixed in with correspondence and we found schedules at various random locations on the file. In some cases no copies of the relevant documents could be found, although correspondence indicated that they had been present at some stage. In others there were several copies of the same schedule, not all of which had the same endorsement and there was no clear master schedule.'<sup>46</sup>

'some files contained separate folders for the storage of unused material, and correspondence about unused material...but we found that in practice these were not used fully. Material was still mixed in with other documents, and correspondence that related to decisions on disclosure was kept in the general correspondence bundle. Sometimes this was because it was a mixed letter dealing with disclosure and other matters, and sometimes not.'<sup>47</sup>

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<sup>45</sup> In the Home Office study, undated schedules were found in 37% of post CPIA cases containing an MG6C and 40% of those with an MG6D. In 8% of cases where an MG6E was present, this schedule was undated and in 8% it was unsigned. Plotnikoff, J., Woolfson, R. (2001) *A Fair Balance? Evaluation of the Operation of Disclosure Law*. London: HMSO, p.25

<sup>46</sup> Para. 10.3.

<sup>47</sup> Para. 10.4.

The result was that the file analysis failed to produce the hard statistical data which had been hoped for and what remained was an essentially qualitative assessment of the extent to which some of the schedules had been amended as the case progressed, supported by other documents and correspondence held within the file. The most significant of these were the correspondence and e-mails from CPS, which recorded both the problems which had arisen during the investigation and the actions taken as a consequence, but there were also numerous notes, memos and marginalia from the ASU staff and other officers which served to illustrate the range of issues which could impact on the conduct of the investigation and the process of case construction. The result was a great deal of information about the judgments of the OICs, together with valuable insights into the operational culture and the lines of communication which underpin investigations.

In terms of the selection of cases for scrutiny, an early decision was made to focus on Crown Court cases as those most likely to reveal the operational difficulties of disclosure. Although the provisions of CPIA are also applicable in the Magistrates' Court,<sup>48</sup> the relative severity of cases heard dictates that the greatest consideration of issues of evidence and unused material occurs in the Crown Court. Lessons were also learned from the earlier work of Ericson, who found in his 1981 study<sup>49</sup> that he was presented with cases that had been identified as potentially 'interesting' as part of a selection process conducted largely at the whim of the police themselves. Ericson countered this by moving between types of offence however, in the present work, the problem was addressed by the simple expediency of examining all of the Crown Court files produced by two police divisions over the three year period from 1997 to 2000.<sup>50</sup> Although more time consuming, this removed any concerns over the non-random nature of the sample.

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<sup>48</sup> s 1(1).

<sup>49</sup> Ericson. R.V. (1981) *Making Crime: A Study of Detective Work*. London: Butterworths.

<sup>50</sup> The first three years of CPIA disclosure.

Between the two divisions sampled, a total of approximately 1,300 files were examined, encompassing the full range of offences, apart from those major enquiries which entailed the appointment of a dedicated disclosure officer from the outset and the use of the HOLMES computer system. These were deliberately excluded as, in such cases, a dedicated exhibits officer and disclosure officer are appointed from the outset of the investigation and, therefore, issues of disclosure are subject to a far greater degree of scrutiny than occurs in more routine cases where the roles of OIC and disclosure officer are frequently combined. That is not to say that such cases do not present difficulties, however they fall outside of the range of cases which cause the greatest concern in terms of defective disclosure practice.

The data taken from the files was used, along with the supporting interviews with CPS and defence practitioners, to support and challenge the points made by the police officers, in an attempt to gain an overview of how the disclosure provisions were implemented and, equally importantly, the officers' own perceptions as to how this was done. In the process, the study also provided a number of insights into the operational ethos of the CID which may have broader resonance, outside of the narrow scope of disclosure research.

## **10. Stage 1 – Investigation**

### **10.1. disclosure and the investigative process**

The central focus of this work is the investigative stages of the criminal justice system and the way in which the cultural background of officers may significantly impact on the considerations of evidential relevance required under the 1996 Act. If the judicial process represents the most public element of the criminal justice system then it is this initial police investigation which is most shielded from the public gaze. The decision to charge, together with the numerous subsequent decisions concerning the avenues of investigation to be pursued, are the culmination of a largely invisible<sup>1</sup> process of discretion and value judgment on the part of individual officers. They must decide who to interview, what to ask them, what to include in their report and what to exclude in order to produce the objective ‘facts’ which are the basis for the subsequent prosecution and this process is conducted against the background of the shared norms and institutional pressures which makes up ‘the commonsense theory of policing.’<sup>2</sup>

Although discussion of disclosure tends to concentrate on the post-investigation stages of file preparation and submission, it is important to recognise that an essential element of disclosure under CPIA is that consideration of unused material is intended to operate as an ongoing process. As such, the Act provides that the status and value of any unused material should be monitored not only throughout the investigation, but also after the file has been submitted, to take account of any material which has come to light subsequently.<sup>3</sup> As will be shown, this has not materialised in practice and consideration of disclosure remains predominantly confined to the file preparation stage, discussed in the next chapter, but that is not to say that unused material does not influence the

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<sup>1</sup> ‘The exercise of discretion is usually not known to any person who might be motivated to challenge it’ LaFave. W. (1965) *Arrest: The Decision to Take a Suspect into Custody*. Boston: Little Brown.

<sup>2</sup> Manning. P.K. (1977) *Police Work: The Social Organisation of Policing*. Cambridge Mass: MIT Press. p 142.

<sup>3</sup> s. 9(1).

conduct of the enquiry and the way in which operational practice has evolved to accommodate the duties imposed under CPIA contributes to many of the later problems.

By definition, the precise nature of the unused material generated during the inquiry is shaped by the conduct of the investigation itself, most obviously by means of the OIC's discretion as to which avenues to pursue and which to ignore. Consequently, it is necessary to understand something of the investigative process in order to appreciate the types of unused material which are generated and the particular dilemmas which such material presents.

### **10.2. types of investigation**

From the beginning of this research, it became clear that officers did not treat all cases in the same way when it came to assessing unused material and making decisions relating to disclosure. As a result of these early discussions, a decision was made to divide cases into three specific categories, based on the seriousness of the case, as this represents the single most important factor in determining the amount of effort which is likely to be expended in fulfilling the disclosure requirements.

### **10.3. summary cases**

There are a number of reasons why the question of disclosure in summary cases is not explored more fully in this work. Although it has been recognised for some time that the principle of disclosure should apply equally in the magistrates' court<sup>4</sup> and CPIA itself is clear that the disclosure provisions apply equally to summary cases,<sup>5</sup> there is widespread acceptance within the police, CPS and defence that the practice of disclosure is largely illusory in the

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<sup>4</sup> *R v Bromley MC ex parte Smith and Wilkins* (1995) 2 Cr App R 285 DC.

<sup>5</sup> s. 1(1).

magistrates' court<sup>6</sup> and the result is a system which neither expects nor demands disclosure in the manner envisaged under the Act. The relatively minor nature of most summary cases mean that they are unlikely to be investigated in great depth and their investigation is usually conducted by uniformed officers rather than detectives. As a consequence, they rarely generate the quantity and diversity of unused material found in more complex enquiries and it was therefore decided at an early stage to focus on those cases which were more serious in nature.

#### **10.4. major inquiries**

At the other end of the spectrum, disclosure has become a central feature of the most protracted and complex enquiries and the way in which such investigations are conducted produces difficulties which are seldom found in more straightforward enquiries.

At its simplest, major inquiries benefit from a level of resources and manpower which could never be expended on the majority of more routine enquiries and within an environment where far greater attention is given to recording both the conduct of the enquiry and the material generated. Usually such cases have the benefit of a dedicated disclosure officer and exhibits officer who are nominated at the outset of the enquiry and the management of both evidence and unused material is assisted by the use of the HOLMES system to record and cross reference the material generated by the inquiry team.<sup>7</sup> Unused material is

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<sup>6</sup> The CPS review concluded, '...others, particularly in magistrates court cases, take little interest in unused material...we found it rare for a defence statement to be served in summary trial cases, or for non-disclosure to be pursued.' Crown Prosecution Service Inspectorate. *Report on the Thematic Review of the Disclosure of Unused Material*. 2/2000 (March 2000) para 9.3. One ASU officer summed up the situation in the following terms, 'Very little gets queried about unused material or disclosure in magistrates cases, you know, it just seems to be overlooked and accepted.' [ASU 3/116].

<sup>7</sup> One detective admitted, 'In our office we say that we "play" at disclosure because, unless it is a major enquiry where everything is generated in computer form, we don't really cover things as well as we probably should do.' [CID 11/146], although even this is not without difficulty. In one police force area which was contacted, six officers attended the initial training on HOLMES & disclosure. However, of these, three admitted to knowing nothing at all about disclosure. [DDC 2/21].

recognised throughout the investigation as a potential weak link in the final case and, consequently, a much more rigorous approach is taken.

One reason for this is that, with a team of investigators, the potential for material to be lost before it is even recorded is far greater than in a smaller investigation and one of the most difficult aspects of the disclosure officer's role in complex or protracted enquiries is simply to keep control of the, often voluminous, material generated and there were numerous examples in the current work of the burden which this placed on the enquiry team in general, and the disclosure officer in particular.<sup>8</sup> This is particularly important as an enquiry lasting months or years inevitably sees changes to the composition of the team, as one ASU Inspector explained.

'We've got an operation at the moment which is called operation Y which came from operation X, which was another long drawn out drugs thing. Now, from the beginning of starting operation X to the final hit date of operation Y, just about all that staff had completely changed.'<sup>9</sup>

If the disclosure officer is not fully aware of the unused material generated then this knowledge may leave along with the officer. It is therefore critical that an accurate record is kept of the work of the inquiry team and any material generated as a result.

### **10.5. 'middle' cases**

At the beginning of this research it rapidly became clear that the principal area of difficulty was not in the summary cases, where, in reality, little attention was paid to disclosure by any of the protagonists, or in complex enquiries, where staff and resources were available from the outset, but rather in the bulk of cases which lie between these extremes.

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<sup>8</sup> 'I mean I've got a case that I'm working on at the moment and we're talking about 150 officers' notebooks, some of whom have retired now, and they want copies of the relevant entries in the notebooks which concerns surveillance over a period of 12 months so it's an absolute nightmare.' [ASU 2/17].

<sup>9</sup> ASU 1/33.

The principal reason why this broad band of 'middle' cases presents perhaps the greatest threat to the effective operation of the disclosure regime is that, with relatively few cases justifying the additional manpower and resources devoted to the most complex enquiries, the vast majority of such cases are left to the discretion of a single OIC who is often also the disclosure officer in the case. It is clear that this high degree of autonomy in relation to the conduct of the investigation and the construction of the committal file is the basis of many of the subsequent failures in the process.<sup>10</sup>

Another problem with placing the case in the hands of a single officer is that it also places the entire repository of unused material generated in the case in the mind of one individual. If the case is transferred to another OIC (which is not uncommon) the final assessment of the material to be disclosed is left to an officer who may not have conducted the initial stages of the enquiry and, unlike more complex cases, there is no dedicated disclosure officer or HOLMES team to ensure continuity. Potentially undermining material may never be discovered because its existence is known only to the original OIC who, ultimately, has no involvement in compiling the schedules. The resulting uncertainty can make effective disclosure almost impossible.

'Sometimes investigations are started and then passed on to another officer, because one officer has gone on long-term sick or whatever, and it's like Chinese whispers. By the time you get to the end of the investigation, the officer who is finally in charge says, "Well I don't know what unused there is, Joe Bloggs had it before me and Stan Smith had it before him, how can I complete the unused?" and I have to say, "Well how the bloody hell can I complete the unused? - I haven't been involved in the investigation at all".'<sup>11</sup>

Clearly the schedules will still be produced and so some attempt will be made to list all the known material, but the possibility that material will remain undiscovered is difficult to ignore. Such factors will be examined in more detail when considering the processes of file preparation and submission but, at the

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<sup>10</sup> As one CPS lawyer recognised. 'In the magistrates court the question of unused material is dealt with appallingly...it is much more of a priority in the Crown Court. With the most serious enquiries at least you are dealing with a disclosure officer who will be collating the material from the start. But, in that "middle" area, it is very bad.' [CPS 4/112].

<sup>11</sup> ASU 4/117.

outset, it should be made clear that it is the handling of these 'middle' cases which forms the basis for this study.

### **10.6. what exactly is unused material?**

'It's not important to their case, it's subsidiary to their case, it's not needed, it's not used. I mean it's probably the worst title you could ever have - "Unused material". I mean, what is the point?'<sup>12</sup>

In a disclosure regime which is ultimately dependent on the initial judgment of the OIC as to what material falls to be disclosed, it is somewhat disconcerting to recognise that there is far from universal agreement within the CID as to precisely what is meant by the term 'unused material', a fact recognised by detectives themselves.

'A while ago a Sergeant I was working with, got all of us on his team to write down what items we felt were likely to be unused material and which schedule they should go on and the lists that he got back varied wildly. Some people saw things as potentially unused things which others just had not considered, and that was at CID level.'<sup>13</sup>

Although, as will be seen, detectives employ a range of strategies to conceal or accommodate this lack of understanding, it is clear that this widespread uncertainty over what material falls to be disclosed can do little to enhance the

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<sup>12</sup> ASU 2/177.

<sup>13</sup> CID 5/47. Another detective added, 'On a day to day basis I know that things aren't being disclosed which arguably should be. There is massive variation between offices, never mind between forces, and a lot of that is down to the different perceptions of what is "relevant".' [CID 13/9]. ACPO also highlighted the basic inability of officers to recognise unused material from the implementation of CPIA, 'Almost immediately at training seminars it was being flagged up that no-one could conclusively say what material was in fact primary or indeed secondary disclosure...police officers found it extremely difficult to interpret what material could impact on a prosecution when they have limited knowledge of what a prosecution is. The police perspective is that of investigator not prosecutor.' ACPO. Disclosure and the CPIA: Implementation in Practice. Police Staff College Seminar 12/5/98. An indication of how confused matters can become can be gained from the disclosure officer on a major enquiry, 'Recently a DI had SOCO photograph a whiteboard which had some notes on it in pen. When we asked why, he cited unused material and you think, "Well, he's either very tired or he's completely lost the plot with this" and then it develops into a "best evidence rule" argument with SOCO arguing that, if that's the case, you should keep the board itself, being pedantic about it, and you think, "No, no way". I mean, it depends what the contents of the notes were of course, and I don't know what they were within the context of the investigation, and he is a competent DI, but that is frightening isn't it?' [CID 9/50].

credibility of the process, particularly as CPIA relies on a *subjective* test for primary disclosure. To some extent the problem is exacerbated by the terminology of the disclosure debate and the historical emphasis on issues of 'relevance'. Inevitably, the temptation for officers is to interpret 'relevance' in terms of that which is useful to prove the case against the accused and the question of what material might be 'relevant' to the defence is often ignored. This is not the product of an overt desire to conceal material, but rather a narrow interpretation of the provisions viewed from the perspective of the investigator and the confusion this generates in the minds of some officers illustrates the conflict which some still experience in coming to terms with their modern role as seekers of truth rather than agents of the prosecution. Against this background, and coupled with the high degree of operational autonomy of investigators, the possibility that material will not be scheduled cannot be ignored.

'He came to see me say that he had conducted another interview with the suspect but hadn't produced a ROTI and hadn't scheduled it. When I asked him why not, he said, "Well, it wasn't relevant". We are at trial on Monday and he comes in to tell me that he did interview this lad but it wasn't relevant! So now he is going to have to explain to CPS why it wasn't included in the first place, because it looks as if we have tried to hide something, and a lot of officers can't see that.'<sup>14</sup>

This inability to recognise that 'relevance' extends beyond that which is valuable to the prosecution is only one of a number of factors which influence the decision making processes of investigators. Some attempt to employ a strict interpretation of the provisions in order to restrict the volume of material they feel compelled to disclose. This is not a failure to recognise what is relevant but rather a determination to stick rigidly to what they consider to be the wording of the statute.

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<sup>14</sup> ASU 14/65.

'Now I have my own ideas of what disclosure meant and one of the things that I have always tried to hang on to is that, in any type of enquiry but particularly something like a murder, you come into possession of an awful lot of information and a large proportion of that has no impact at all and has no relevance to the case in any way. It is stuff we collect from intelligence sources, from our computer system, whatever, and I have always been of the opinion that, if it is not relevant to the case and it is not capable of having an impact on the case, then it is not disclosable, it doesn't become "unused material" and it doesn't become disclosable.'<sup>15</sup>

The difficulty with this view is that it fails to acknowledge the possibility that material will be rendered relevant at a later stage of the prosecution. The OIC has decided that it is superfluous and so it is removed.

In this way it can be seen that the approach adopted by the OIC towards the investigation, together with the discretion exercised at all stages of the inquiry, allows the final case file to be shaped in a way which not only emphasises those aspects of the case most favourable to the prosecution but also limits the potential challenges posed by any unused material.<sup>16</sup> It is possible to illustrate this process by reference to some of the key categories of material that regularly cause difficulty.

### **10.7. non-sensitive unused material**

Any non-sensitive unused material which qualifies for primary disclosure under s.3 is made known to the defence by means of the MG6C schedule. Typical items include routine police documentation which, rather than being gathered as part of the investigative process is produced *by the process itself*, such as crime report forms and officers' pnb entries, together with what might be termed 'strictly unused material' (i.e. material gathered as potential evidence but ultimately not used) such as witness statements and CCTV.

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<sup>15</sup> CID 11/33.

<sup>16</sup> In his study of detectives at work Ericson characterised this as a process of 'information control', '...the investigations they do or do not undertake; the questions they do and do not ask; the interpretations they do and do not give to the answers; the written accounts they give and what they leave out.' Ericson, R.V. (1981) *Making Crime: A Study of Detective Work*. Toronto: Butterworths.

In the case of internal police documentation there is relatively little discretion available to the OIC, as procedures generally dictate the accompanying paperwork to be produced, and it might be thought that such material presents little opportunity for defective disclosure as anyone with a working knowledge of police documentation will know what forms are likely to have been generated during the enquiry. However, it is precisely this certainty which leads many officers to ignore such material.

'The view is, "Well why bother, I have other things to be doing that are more important. I have a prisoner in the cells, I've got to prepare for my interview - I haven't got time to be going to COMS to ask about unused material - I have other things to do which are more important and more pressing, I can get that later".'<sup>17</sup>

To some extent this view was initially encouraged by forces mindful of the time and expense caused by copying documents purely for the purposes of disclosure and, particularly with the increasing computerisation of police record keeping, it was felt that the routine inclusion of such documents was unnecessary as a hard copy could easily be produced if it was actually needed. The difficulty with this, as the police soon learned, was that retrieving such information was not always as simple as it first appeared and, even where the document could be obtained, the system itself may have inadvertently altered its status as unused material.<sup>18</sup>

It is in relation to the category of 'strictly unused material', however, that the greatest discretion exists as it is relatively straightforward for the OIC to exclude material such as witness statements, not by refusing to disclose it, but by choosing not to record it at all.

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<sup>17</sup> ASU 4/123.

<sup>18</sup> 'In the early days we used to say to people, "Look, there is a general incident there on the computer. Don't generate a paper copy just for disclosure," so you stopped people from going to the computer and printing off a hard copy of the entry to put on the file just to satisfy unused material. But we found that we were going to trial 6 months later and we were being asked for the record and, when we went to get it, it had been archived because it was more than 4 months old. Also, if it was something like a pnc record, again we used to say, "Don't print off a hard copy just for the sake of it". But, when we get to court we can't even get a copy of that if we wanted to because the pnc will have changed - the stolen car is no longer stolen or whatever, so the entry we would print today wouldn't be the entry that started the enquiry so we can't go to someone at HQ and say, "Can you go through the hard disks in the archive and find out what a check run 6 months ago would have said about this car?" So now we have to generate the hard copies just to cover ourselves and 95% of the time, it is a total waste of time - you get a guilty plea or it is NFA'd or whatever, but it is not worth the chance.' [ASU 13/24].

'They might knock on the door where she says, "No, it was a bloke in a white shirt" and the response is, "Well that's not what I am trying to prove here so thanks very much missus". It should be going down that the woman in number 33 has given a contradictory description but it just won't happen.'<sup>19</sup>

Although there are clear parallels here with the selective preparation of the schedules which follows, this is a discrete strategy as the OIC is seeking to limit at source the possible unused material by restricting the documentation which is generated during the investigation. Whether the OIC also performs the role of disclosure officer or not, it is almost impossible to detect this kind of selective evidence gathering as the statement is never taken, which makes the task considerably easier when the case reaches the file preparation stage. The OIC avoids having to make a decision on disclosure because the statement does not exist and so the potentially harmful impact of a contradictory statement is negated by largely invisible means. The extent to which this manipulation of the evidence gathering process is the result of a deliberate attempt to deny the defence access to possibly useful material, rather than simply an unconscious focus on those aspects of the case which are most advantageous to the prosecution, remains to be considered but, even adopting a generous interpretation, such examples demonstrate the way in which selectivity on the part of the OIC can ultimately distort the consideration of unused material in the case.

Similar problems exist in the case of CCTV, where considerations of relevance have proved to be especially difficult and, although usually non-sensitive, this category of material highlights many of the most practical dilemmas in relation

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<sup>19</sup> ASU 12/32. Two examples from the case studied serve to illustrate the unconscious process by which the OIC can devalue potentially harmful evidence when it conflicts with the preferred version of events. In one assault case the IP's recollection of another witness being present at the time of the alleged assault was dismissed as an 'error' on her part and not investigated further. [PCI 1/3]. In another case the OIC concluded of one witness, 'I would reckon that XXX's statement is relatively weak, and her attitude is "anti police". Therefore it probably isn't worth very much in evidential terms.' [PCI/59]. It is also interesting that, although loyalty to colleagues is seen as central to police officers, similar conduct on the part of suspects is viewed very differently, with one memo from the OIC to the CPS requesting that a defendant's refusal to name his accomplice be brought to the attention of the court, '...thus providing a clear and true insight into XXX's pathetic character.' [PCI/158/52].

to disclosure.<sup>20</sup> Recent years have witnessed a dramatic increase in the number of cases involving consideration of video evidence, partly as a consequence of the growing popularity of urban surveillance systems, installed as a response to city centre public order offences, but there has also been a proliferation of CCTV within private premises such as shops, etc. Potential disclosure problems centre on a number of problematic categories of video evidence.

For example, at the police station it is now routine for exchanges between police and public to be recorded on video. At many stations CCTV is employed to record dealings at the front enquiry desk and, more importantly, within the station custody area to record the processing of suspects and to counter any allegations of police misconduct. As such, the tapes provide protection for officers and suspects alike, notwithstanding that, in the vast majority of cases, they record little or nothing of interest to either side. For this reason, together with issues of storage and cost, tapes are recycled on a rolling basis after a period of time has elapsed however this leaves the police vulnerable to later requests from the defence for disclosure of the tapes. If the initial circumstances of the enquiry have not indicated that the custody video might be significant it is quite possible that a defence request for copies might arrive after the tape concerned had been erased and, with it, any evidence which it contained. It therefore falls to the OIC to assess not only whether the custody tape might contain potentially contentious material but also whether there is any reason to suspect that the accused may make a false allegation. In both cases the tape must be retrieved and stored before it is re-used.<sup>21</sup>

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<sup>20</sup> For another aspect of the influence of video evidence see *R v Roberts (Michael)* (1998) *The Times*, 2 May CA. where a police officer was permitted to alter his statement after watching video tape of the alleged incident but still put forward the statement as evidence.

<sup>21</sup> 'We haven't really talked about custody tapes but I know that very few people list those but then they are wiped every 4 weeks anyway. So all someone would need to do is delay the request for 5 weeks and we would be in real trouble because we would have wiped it.' [CID 13/373].

It is important to realise that the implications of a failure to adequately safeguard the tape in such circumstances extend beyond the potential loss of evidence as it is not unknown for officers to include the custody video on the MG6C. Including a custody video in the schedule when the tape itself is no longer in existence could have serious consequences should the defence later request sight of the tape.

If the procedures for handling police videos places undue emphasis on the foresight of the individual officer, then the position in relation to third party material is even more hazardous. With the increasing use of urban CCTV systems it is inevitable that a large proportion of street crime, public order offences and commercial thefts will involve video evidence which is rarely, if ever, under the direct control of the police. The potential destruction of material by third parties raises additional difficulties in that, whereas the third party may be summoned to present the evidence in court,<sup>22</sup> there exists no general prosecution duty to preserve the evidence beyond a requirement to make the third party aware of the existence of the investigation and to make the prosecutor aware of the existence of the third party material.<sup>23</sup>

This can create problems for the investigator which are both chronological and geographical in nature. If an incident is caught on CCTV then it is conceivable that the defence may request earlier tapes on the basis that they record events which are relevant to the proposed defence. Similarly, an assertion that the accused was not present at the scene may lead to a request for CCTV footage from an entirely different location. The critical point in each case is that, even though the tapes in question may have little or no evidential value, if the police are unable to produce a copy for the defence, then this may be sufficient to

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<sup>22</sup> *Re: Barlow Clowes Gilt Managers Ltd* [1992] Ch 208.

<sup>23</sup> Codes of Practice Para 3.5. 'The requirement to list a CCTV recording on the appropriate schedule will arise if it is inspected by the investigator or obtained from a third party. There appears to be no requirement under the codes of practice to list the item on a schedule if the investigator is merely aware of the existence of the material, although the JOPI provides that its existence should be noted on the form MG6.' Crown Prosecution Service Inspectorate. *Report on the Thematic Review of the Disclosure of Unused Material*. 2/2000. para 8.4.

generate doubt in the minds of the jury.<sup>24</sup>

To complicate matters even further, the police will frequently find themselves in the possession of a quantity of video tape far in excess of that required for evidential purposes and this makes the process of compilation central to the status of CCTV as unused material. Such situations arise following continuous video surveillance of a given area by a single camera over a period of hours or even days, where tapes from a number of different sources have been examined or (as in many commercial premises and city centre CCTV systems) where the tapes are from a 'multiplex' systems which records images from a number of cameras simultaneously. The common factor in each case is that the investigator is left with a wealth of tape of which only a small proportion is likely to be of relevance to the case. Two examples reveal the practical difficulties presented by such cases.

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<sup>24</sup> As one CPS lawyer commented, 'There can be nothing at all on the schedule and then the defence say, "Well there could have been CCTV". You write to the police and then get the response, "Oh yes there was, but we watched it and there was nothing on it." I bet we have lost a dozen cases because we didn't have the CCTV to prove that there was nothing on it. Because they haven't preserved it and it has gone. They either watch the tape and there is nothing relevant on it, so they don't even think about putting it on the MG6C, or they just don't put it on. Sometimes I think it is a genuine mistake. They don't think of putting it on the schedule because they have watched it and, as far as they are concerned, there is nothing relevant on it but, other times, I think they haven't even thought about the possibility of CCTV until weeks after the event.' [CPS 1/253]. This was also noted by the CPS Thematic review. 'At all the sites, concern was expressed about how this type of material is dealt with. In particular, interviewees expressed concern about whether the existence of this type of material was being noted correctly. In some cases the existence of the CCTV recording came to light after the material had been erased by the third party. We were told of examples of CCTV material that had not been dealt with correctly and when the contents of the tape was revealed at a later stage it was undermining of the prosecution case. These experiences had eroded confidence in the disclosure officer and the system itself.' Crown Prosecution Service Inspectorate. *Report on the Thematic Review of the Disclosure of Unused Material*. 2/2000 (March 2000). para 8.5.

'We had tons of it - town centre CCTV from both towns and all the garages on the motorway. We had a team of 4 people just working on the videos for about a month and we ended up with a compilation video of about 2 ½ hour video of the victim and the murderer in various places. When it came to disclosure, the defence wanted to see all the videos so we said, "There are 160 of them but if you want to have a look at them you will need a multiplex system". Then they realised just how complicated it was going to be and that it probably wasn't going to be worth the bother.'<sup>25</sup>

In another case, involving the installation of covert camera, the file revealed a lengthy discussion over whether the defence should be given copies of the tapes, rather than rely on the police compilation. However, to provide one copy in real time of the 12 tapes (each of 24 hours in duration) required 288 hours of videotape. This equated to 41 working days and 96 standard 3 hr tapes. The only alternative was to allocate 3 weeks for the defence to view the tapes at police station.<sup>26</sup>

This raises important questions over how the remaining portions of the video are handled. Clearly the primary evidential issue is identification of the pertinent segments of the tape and their assembly for use in court, however, of equal importance is what happens to the remainder of the tape, by virtue of its status as unused material. As has been shown, the selection of the relevant sections of any video evidence lies solely in the hands of the investigator and the principal danger for the prosecution is that a police failure to retain and disclose unused video material will, at best, undermine the prosecution case by raising the prospect that the lost segments contain material which could assist the defence or, at worst, be judged sufficient to justify a stay of proceedings on the grounds of abuse of process.<sup>27</sup>

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<sup>25</sup> CID 11/551.

<sup>26</sup> NCI/136. During this study it also became clear that many stations had no formal procedure for the storage of tapes as one officer commented, 'They are in cupboards and drawers everywhere' [DDC/1/45].

<sup>27</sup> *R v Derby County Council ex parte Brooks* (1985) 80 Cr App R 164. See also *R v Latif (Khalid)* [1996] 1 WLR 104. Although in *R v Feltham Magistrates Court, ex parte Ebrahim, Mouat v DPP* (2001) *The Times* 27<sup>th</sup> February DC, the court reiterated that the basis for any claim lay in the prosecution duty to retain the video evidence in question and concluded, 'If in all the circumstances there was no duty to obtain and/or retain that videotape evidence before the defence first sought its retention then there could be no question of the subsequent trial being unfair on that ground.'

Perhaps the most straightforward grounds for such an application arise where there has been a total failure by the police to disclose video evidence to the defence, as in *R v Birmingham & Ors*,<sup>28</sup> where it emerged that, although the video tape in question (recording a fracas outside a nightclub) had been viewed by the police in the immediate aftermath of the incident, it had not been retained and its existence had not been revealed to the CPS or the defence, despite numerous requests for access to any remaining unused material and specific requests for copies of any video tapes. Having concluded that the tape would have been valuable in relation to the alibis asserted by some of the defendants the court held that to allow the trial to continue would constitute an abuse of process.

It is significant that, in reaching this conclusion, the court was influenced not only by the actions taken by the police (in concealing the existence of the tapes from both the defence and the CPS) but also by the fact that the officer in the case justified his actions on the basis that he had viewed the tapes and was '*satisfied that they were of no evidential value to our case*'.<sup>29</sup> This clearly ignored the potential value of the tapes to the defence and emphasised the difficulty which some investigators experience in recognising the broader relevance of unused material.<sup>30</sup> This can be contrasted with the later case of *R v Swingle*<sup>31</sup> where the police had acted on the erroneous assurance that a video surveillance system was not operational at the relevant time and had, consequently, not seized the tape before it became lost. In dismissing an

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<sup>28</sup> [1992] Crim LR 117 (albeit before the implementation of the Criminal Procedure and Investigations Act 1996).

<sup>29</sup> A similar approach was adopted in *R v Medway* [2000] Crim LR 415.

<sup>30</sup> The way in which such material could be mishandled by the police was demonstrated by a rape case in which the alleged victim claimed that the accused had frogmarched her from the night club where they had met before raping her. The defence asserted that the sex was consensual. The exit from the club was covered by CCTV and it was this tape which was at issue for, although the tape itself was listed on the unused schedule, no mention of its content was made. When the tape was viewed at the request of counsel it showed the pair leaving the club hand-in-hand and pausing for a cigarette before leaving together. Following disclosure of the tape the case collapsed and the judge was highly critical of the investigating officer who, when questioned, did not appear to have any conception of the undermining effect of the tape. [J 2/1]. In another case, involving an assault and a police officer, the CPS asked for a CCTV video which was listed in the unused material. By mistake, the ASU sent the original and when the defence, in turn, asked the CPS for a copy, they too were given the original tape, which was subsequently lost, '...so when it came to trial we had to stand up and say "The original tape is lost" and we lost the case as a consequence because we couldn't give the expert witness appointed by the defence access to that tape, which was of no evidential value whatsoever, and when it was the defence which had lost it in the first place. It was our own fault.' [ASU 13/20].

<sup>31</sup> 10<sup>th</sup> July 1998 (unreported).

application for a stay on grounds of abuse of process in this case, Rougier J noted:

'Before there can be any successful allegation of an abuse of process based on the disappearance of evidence there has to be either an element of bad faith or at the very least some serious fault on the part of the police or prosecution authorities before an application can possibly succeed. That was the situation in the case of *Birmingham*..., if it were otherwise every time a significant piece of evidence by accident were not available, a defendant facing a serious charge, which might be supported by other cogent evidence, would effectively be able to avoid it on this somewhat technical ground.'<sup>32</sup>

The issue, therefore, was one of good faith or egregious fault on the part of the investigator and, whereas, this may be relatively simple to ascertain in cases of total non-disclosure, such as *Birmingham* and *Swingler*, however the position is considerably less clear in cases based on the selective compilation of tapes. In *R v Stallard*<sup>33</sup> the Court of Appeal, in considering the impact of a compilation tape made from an in-store multiplex system, returned to the question of good faith as highlighted in *Swingler* and accepted the evidence of the OIC that the missing portions of the store tape did not show anyone else in the vicinity of the alleged theft. Clarke L J saw no reason to doubt this, stating that it '*would have been quite clear [to the officer]*' if another potential suspect had been identified on the tape.<sup>34</sup> This generous acceptance of the investigator's assessment of the evidence has not been confined to consideration of video evidence, with the court adopting a similar approach in *R v Beckford*<sup>35</sup> towards the police destruction of the defendant's car before it could be examined by a defence expert, but it must be contrasted with the comments of Buxton L J in *DPP v Chipping*<sup>36</sup> who concluded that:

'it was not good enough in this case, any more than it was good enough in the *Birmingham* case, for the Crown to rely upon the simple assertion of a police officer that the video did not reveal anything of relevance or assistance.'

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<sup>32</sup> Page 6F.

<sup>33</sup> 13<sup>th</sup> April 2000. (Transcript No. 199904391/X3, 99905674/X3).

<sup>34</sup> A similar approach was taken in the pre CPIA case *R v Reid (Hainsley)* 10<sup>th</sup> March 1997 (Transcript 9605572/Y3).

<sup>35</sup> [1996] 1 Cr App R 94 (CA).

<sup>36</sup> 11<sup>th</sup> January 1999 (unreported).

This raises the question of whether a police officer's assertion that only the unimportant sections of a tape have been discarded, as in *Stallard*, in any way differs from an assurance that a tape *in its entirety* contains nothing of relevance, as in *Birmingham*, and the result is a degree of uncertainty over the extent to which any tape can safely be edited without the risk of a later challenge from the defence. Clearly one solution would be to copy for the defence *all* video tape in the possession of the prosecution as a matter of procedure, however the logistical implications of such a policy would be daunting, particularly as this would, inevitably, require the defence to be provided with tapes in a format which they could view. In the case of a tape from a 'multiplex' system this could entail the production of a separate tape for each of the four or more cameras recorded on each tape. Multiply this by the number of defendants, if they are represented separately, and the scale of the problem soon becomes apparent.

#### **10.8. sensitive unused material**<sup>37</sup>

"I am sure that there are a lot of cases where there are informants involved and we are never ever told about it. I am sure that happens. We are not making the PII applications that we should be in that, if there is an informant involved, the police are not putting that down...sometimes you are sitting there thinking, 'I know that this is wrong - it should be on the schedule'."<sup>38</sup>

With all categories of unused material there is a risk that the OIC will either conduct the investigation in such a way as to minimise the production of potentially undermining material or, alternatively, will fail to adequately recognise such material at the file preparation stage. With sensitive material, however, the dilemmas become far more acute.<sup>39</sup> This is particularly significant due to the increasing use of informants and the way in which officers deal with material provided by such covert sources provides some of the clearest examples of the conflict which underpins the operation of CPIA disclosure.

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<sup>37</sup> Parts of this section were reprinted in 'In the Public Interest: Public Interest Immunity and Police Informants.' *Journal of Criminal Law* (2001) 65 435.

<sup>38</sup> CPS 1/118.

<sup>39</sup> Certain categories of information gained from intrusive surveillance under a warrant is inadmissible as evidence and is protected from disclosure. RIPA s. 17

One anomaly within CPIA is that, although the Act provides the three-stage disclosure procedure in the case of non-sensitive unused material, the treatment of sensitive material remains largely with the common law and public interest immunity (PII).<sup>40</sup> In cases where the prosecutor is unwilling to disclose material to the defence because of its sensitivity the procedure may take one of three forms:<sup>41</sup> Firstly, and wherever possible, the defence should be notified of the intention to apply to the court for a ruling and of the category of material concerned, in order that the defence may make representations at the hearing. Secondly, where the prosecutor considers that revealing the category of material concerned would, itself, be contrary to the public interest, the defence should be notified of the intention to apply to the court for a ruling but not of the category of material concerned. The hearing is then held without the defence to determine whether or not they should be present and, if not, to consider the application in their absence. Thirdly, in those cases where the prosecutor considers that even to make the defence aware of the intention to make an application would be contrary to the public interest, the application is made without notice to the defence. The court will then consider whether either of the other two procedures should have been used instead and, if not, then considers the application for non-disclosure.

Although the procedure remains largely unchanged by CPIA, the combined effect of the Act and the Codes of Practice is to produce a considerable widening of the potential grounds for withholding material in such cases, most notably providing for non-disclosure of 'material given in confidence,'<sup>42</sup> a category broad enough to encompass virtually all information provided to the police. Similarly, where informants are involved, the Codes of Practice permit non-disclosure for:

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<sup>40</sup> Although the procedure was codified by CPIA.

<sup>41</sup> CPIA s.21(2) and the Crown Court (Criminal Procedure and Investigations Act 1996) (Disclosure) Rules 1997 (SI 1997 No 698) made by the Crown Court Rule Committee, following the procedure set out by Taylor LJ in *R v Davis, Johnson and Rowe*, at 114.

<sup>42</sup> CPIA Code 6.8.

'material relating to the identity or activities of informants, undercover police officers, or other persons supplying information to the police who may be in danger if their identities are revealed.'<sup>43</sup>

The use of such broad categories of material are reminiscent of a class based approach to PII but, even leaving aside the generous scope of 'material given in confidence', it will be noted that the second category encompasses not only the identity but also the *activities* of informants, thereby providing far broader grounds for non-disclosure than under the previous common law. However the greatest concern is not the apparently inclusive wording of the Act in relation to the categories of material for which PII may be claimed, but the way in which the increasing incidence of cases involving the use of informants are handled within this statutory framework. The fact that the final decision is for the court rather than the prosecutor should present an adequate safeguard for the accused, however structural defects in the disclosure regime make this far from assured.

The increasing reliance on intelligence data can be seen as a direct consequence of the changing nature of police work. A central feature of the widely implemented crime management model is the management of resources on a proactive basis, in accordance with intelligence led objectives<sup>44</sup> and central to this process is the work of the Intelligence Unit.<sup>45</sup> As a result, the traditional reactive style of policing, based on responding to crime after the event, has been replaced in many cases by a more proactive strategy, often centred on targeting the activities of known offenders. Such operations are characterised by an increased reliance on intelligence gathering, most notably through informants and, whereas certain types of policing, such as drugs operations, have traditionally relied on such methods, now even everyday policing frequently

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<sup>43</sup> *ibid.*

<sup>44</sup> Barton. A., Evans. R. (1999) 'Proactive Policing on Merseyside.' Police Research Series Paper 105. London: HMSO.

<sup>45</sup> Amery. P. et al. (1996) 'Development and Evaluation of a Crime Management Model.' Police Research Series Paper 18. London: HMSO.

entails the use of informants. The extent to which informants have become an everyday aspect of policing was revealed by one detective.

'I'll have informants on the phone to me tonight and then I'll probably have some more tomorrow. I'll forget by tomorrow night what I've been told - there's just that much coming in that basically it's just a matter of getting it straight on paper. You don't even read it properly. You put it on paper and you bung it in...some days that's all we take - phone calls on information - who's doing what and when. I mean today I've been on duty half an hour and I've had four different informants with information, "We've got this, we've got this, we've got this" and I honestly won't have time to do it all tonight. Bits and pieces I might but I very much doubt it. I've come in today and I've got a basketfull like that and then I've got the DS's work as well.'<sup>46</sup>

This change in operational policy has been reflected in the attitudes of the police themselves as, until relatively recently, the use of informants was seen as the exclusive province of senior detectives, whose experience was seen as essential to deal with such secretive and potentially unreliable sources. Now the use of informants has spread from the CID to the ranks of uniformed officers and even relatively inexperienced officers are actively encouraged to cultivate such intelligence gathering.<sup>47</sup> Although such intelligence-led policing is viewed as extremely cost efficient and productive, the expansion in the use of informants has, inevitably, raised ethical issues which extend far beyond disclosure<sup>48</sup> and even officers themselves recognise the hazards.

'Being a policeman and dealing with villains I know how these people work and it is not inconceivable that someone who is being paid to give information could create that situation in order to get paid. Although our guidelines say that we have to satisfy ourselves that he wasn't involved in the crime before we can pay the reward. Our rules say the informant shouldn't procure the offence but he might say to someone, "If you go round the corner there is a bloke there who has some cannabis resin" and the person is nicked, then the informant has procured the offence. The defendant gets to court and pleads guilty but the defence don't seem to appreciate that he might have been set up.'<sup>49</sup>

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<sup>46</sup> CID 4/83.

<sup>47</sup> 'In the past it was senior detectives only but it's right across the spectrum now...you've even got PCs with only a couple of years service dealing with informants.' [CID 1/22].

<sup>48</sup> HMIC concluded, '...in the context of a potential lack of integrity, the use of informants is possibly the highest-risk area in the work of the modern police service.' HM Inspectorate of Constabulary (1999) *Police Integrity: Securing and Maintaining Public Confidence*. London: Home Office Communications Directorate.

<sup>49</sup> CID 11/875.

Yet, despite such concerns, informant information is a feature of an increasing number of cases, as part of a process which leaves a high degree of discretion to the individual officer. Clearly the term 'informant' encompasses a wide range of potential sources, from the neighbour who reports suspicious activity in their street and the drug user who provides the police with the names of his suppliers, to members of organised criminal operations.<sup>50</sup> The motivation may or may not be financial<sup>51</sup> but, in each case, the assurance of anonymity is vital.<sup>52</sup> In many cases the contribution of an informant will form only a minor part of an otherwise compelling prosecution case and will have served no role other than to alert the police that a particular individual may be involved in criminal activity. However this is not always the case and this raises the question of to what extent documents should be withheld merely because they reveal that the prosecution is based, at least in part, on the information of an informant.

For obvious reasons an informant report is unlikely to be presented in evidence and, consequently, as sensitive material, it should be recorded on the MG6D.<sup>53</sup> What became clear from the cases studied was the resistance of many investigators to adequately scheduling intelligence and informant information as part of the disclosure process<sup>54</sup> and the range of strategies which are employed to

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<sup>50</sup> The National Criminal Intelligence Service define an informant as, '...an individual whose very existence and identity the law enforcement agencies judge it essential to keep confidential and who is giving information about crime or about persons associated with criminal activity or public disorder. Such an individual will typically have a criminal history, habits or associates, and will be giving the information freely whether or not in the expectation of a reward, financial or otherwise.' National Criminal Intelligence Service (1999) Use of Informants: Code of Practice. [www.ncis.co.uk/web/publications/September](http://www.ncis.co.uk/web/publications/September).

<sup>51</sup> 'Informants these days, and this is something that I've learned, they're not so much in it for the money. The informants that have come to me over the past year, they have come to me to be looked after. They are in trouble with someone else, police wise, and if they get sent to court there are things we can do at court to help them.' [CID 4/95].

<sup>52</sup> This anonymity has also been extended to premises used by the police for surveillance operations. *R v Rankine* [1986] 2 All ER 566; *R v Brown* [1995] 1 Cr App R 191.

<sup>53</sup> In many cases examined as part of this study, schedule entries are left deliberately vague, with references to 'informant contact sheet' providing little or no indication of the content or the impact of the report.

<sup>54</sup> 'When I did my initial CPIA training with police officers I had a superintendent say to me, "Well I wouldn't tell you" and I said "But you might lose the case or it might end up in the Court of Appeal" and he still said, "I don't care, I wouldn't tell you" and that was the attitude of a senior officer in front of a group of more junior officers.' [CPS 3/210].

minimise the possibility that such information will be revealed.<sup>55</sup> The mechanisms by which this is achieved will be examined as part of the file preparation and submission stages but, even during the investigative stages, the way in which officers process such material can create difficulties.<sup>56</sup>

As with non-sensitive material, some officers struggle with the concept of relevance, assuming that the term is confined to that information which benefits the prosecution, but it is the nature of such intelligence data that, in addition to that which is ultimately presented in evidence, there may be a considerable amount of other material which may have an impact on the overall conduct of the prosecution.

'We've just had a case of a guy doing some minor street dealing in heroin and he was under surveillance on about 8 occasions, but it was only on one of those days that there was really a lot of movement. The case is ultimately based on the evidence of that one day but what the OIC couldn't get his head around was the fact that there were these other 7 days of surveillance logs which, from his point of view, were irrelevant because nothing happened, but from the defence point of view could be used to argue that their man wasn't a regular dealer and therefore wasn't the level of dealer that we were suggesting.'<sup>57</sup>

Here it is a failure on the part of the OIC to appreciate the broader relevance of the material generated during the inquiry which threatens to distort the version of events presented by the prosecution. However, it will be shown that other cases reveal more deliberate attempts to conceal the existence of intelligence material.

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<sup>55</sup> The Home Office study found that, of those surveyed, nearly 60% of barristers (72%) of defence barristers, 50% of defence solicitors and 15% of judges believed that non-sensitive unused material which should have been disclosed to the defence was frequently not. Plotnikoff, J., Woolfson, R. (2001) *A Fair Balance? Evaluation of the Operation of Disclosure Law*. London: HMSO. p 71.

<sup>56</sup> The Home Office study found that only 14% of forces had special arrangements for the scheduling of sensitive material. Plotnikoff, J., Woolfson, R. (2001) *A Fair Balance? Evaluation of the Operation of Disclosure Law*. London: HMSO. p 25.

<sup>57</sup> CID 13/311. A similar absence of understanding on the part of some officers when dealing with such sensitive material was noted by one CPS lawyer, 'You get cases where you ask, "Where did this information come from?" and you are told "From surveillance" and you have to say "Well where is that recorded because there is no mention of any surveillance on the MG6?" – "well it didn't come to anything" and that is the problem, because I genuinely don't think they saw that as unused material. They just didn't understand and I don't know how we get around that really.' [CPS 3/44].

### 10.9. specialist squads

Particular difficulties are posed by those inquiries conducted by specialist squads such as the National Crime Squad (NCS) where there is often an overt reticence to make even the ASU aware of the material in their possession. In part this stems from the widely recognised elitism attached to membership of such units and it was frequently commented upon by ASU staff that unused material schedules from the crime squad brought with them a certain degree of uncertainty.<sup>58</sup>

'Crime squad has this impression of being a bit elitist and their approach tends to be, "There's your paperwork. That's what you've got. That's as much as you're going to get to know." It might all be in there, but I think you always have this hidden fear that there's something that's either missing or not written down...you've got to be wary and think, "Well is there anything else that I'm not being told?" because it has happened before. People hide things from each other and they expect us to just do whatever we need to do to and then pass it on.'<sup>59</sup>

There are also more justifiable reasons for secrecy on the part of specialist units, based on the often very serious nature of the inquiries, especially where informants are involved. In some prosecutions, the very existence of an informant may have to be concealed and, in such cases, the matter is handled directly between a senior police officer and a Senior Crown Prosecutor.

In such instances it may be obvious to experienced officers within the ASU that an informant must be involved and yet the very existence of documentation relating to the informant is denied by the senior investigating officer. It may be that such a high degree of secrecy is warranted in view of the risk to the informant concerned but the result is that the ASU, which is central to the preparation of the file and the schedules of unused material, is deliberately not told of a vital element of the prosecution case. The result can be a climate of

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<sup>58</sup> [specialist squads can breed] '...a closed culture with risks of ethical failings or even corruption.' Home Office (2001) *Criminal Justice: The Way Ahead*. Cm 5074. London: HMSO. para 3.139. See also *Gurney* [1998] 2 Cr App R 242 CA.

<sup>59</sup> ASU 5/74. this view was supported by CPS, 'The NCS really can be quite difficult. And you often have disclosure officers say to you, "They have this all this stuff and they just won't let me have it - they won't give me a copy." You have got to check it, but I know that there are officers who won't tell me anything unless I press really hard.' [CPS 3/210].

half-known facts which make the process of disclosure precarious in the extreme, as the disclosure officer in one case which was heavily reliant on intelligence information explained.

'I had to deal with stuff that I wasn't allowed to see...I had to go through security vetting just to tell me that certain things existed, not to see them, but I still had to put something in the disclosure schedule. I have been involved before with informants, where we have said, "No, we are not going to tell anyone about that" and we have gone PII to the judge and we have got the orders. What was different here was that, if the judge had asked me questions about the papers, I have never seen them - that was a bit unnerving. I knew there were things like policy books that contain sensitive material on police methods and stuff, they were OK, but there was stuff from special branch and that sort of thing...I was never asked but, if an issue had been raised before the judge, I would have to say that I hadn't seen them and that they existed in such-and-such and office. I hadn't been given access to them and, if he said, "Well I want to see them," then that's fine, we would have to have worked that out somehow. But it never became an issue - fortunately.'<sup>60</sup>

#### **10.10. imposing limits on the investigation**

Whatever the nature of the inquiry, the OIC must make a judgment as to how far to pursue the investigation. Paragraph 3.4 of the Codes of Practice states:

'in conducting an investigation, the investigator should pursue all reasonable lines of enquiry, whether these point towards or away from the suspect.'

Initially this appears a logical requirement however, in deciding how far to extend the scope of the investigation, the OIC not only dictates the evidence that will be available to support the charge but also has a very real effect on the quantity and character of the unused material generated. Enquiries which do not serve to bolster the prosecution version of events become, by definition, unused material which, at best, exacerbates the administrative burden and, at worst, undermines the prosecution case.

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<sup>60</sup> CID 10/163.

The result is a largely subjective judgment as to when 'sufficient' has been done and the approach of officers towards this task illustrates how the duty to pursue all reasonable lines of enquiry is distorted in practice.

Whereas major enquiries are conducted under the supervision of a senior investigating officer (SIO) and with the benefit of a policy book to record the decision making process, most cases are left to the individual OIC who exercises enormous discretion over both the investigation and the form in which it is recorded. This requires an ongoing assessment of what is reasonable in terms of time and expense, for the type of case in question and, although the provisions make no distinction between serious and relatively routine enquiries, officers are acutely conscious of the pressures of time and resources which make it impossible to expend the same degree of effort on all cases.

'The truth is that, if we had a robbery of a jewellers with a sawn-off shotgun and they made off down the high street, then the OIC would, I'm sure, impound all the tapes from all 25 CCTV cameras in the town, because he would be looking for the escape route and descriptions and whatever. But, under the Act, there is no allowance made for what is practical or cost effective because disclosure applies to so many types of offence. So there has to come a point where we say, "Hang on. We can't seize 25 videos and copy them for each defendant," because we have had that where there are 6 defendants, each with a separate solicitor, and there are the logistics of it and the storage implications.'<sup>61</sup>

The OIC must decide how far to extend the scope of the enquiry, conscious that, wherever this line is drawn, the defence can seek to undermine the case by suggesting that more should have been done.<sup>62</sup> The result is that the OIC incorporates within the investigation a balancing exercise, by seeking to do enough without doing too much.

The effect of CPIA is to make this value judgment all the more acute by causing the OIC to view additional enquiries, at least in part, in terms of the status of any

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<sup>61</sup> ASU 13/8.

<sup>62</sup> 'The trouble is, if there is a burglary I might do house-to-house enquiries in the street. Then the defence are going to ask me, "Why didn't you do house-to-house enquiries in the next street, and the next street?" Where does it end? That is the problem.' [CID 13/116].

information which is generated as a consequence as 'unused material'. The statute itself<sup>63</sup> compounds the problem by requiring disclosure of any material:

- (a) which in the prosecutor's possession, and came into his possession in connection with the case for the prosecution against the accused, or
- (b) which, in pursuance of a code operative under Part II, he has inspected in connection with the case for the prosecution against the accused.

The question, therefore, is whether the material is "in the prosecutor's possession" for, if the police do not possess the material, then they are not required to disclose it to the defence. This may appear a somewhat obvious point, but by emphasising the possession of material, rather than knowledge of its existence, the Act creates a situation where the more the OIC asks the more (s)he is required to disclose.<sup>64</sup> This point has not been lost on detectives, as at least one ASU Sergeant recognised in relation to the CID officers he dealt with.

'They tend to think, "I wish I hadn't asked that question because that wouldn't have raised that issue",'<sup>65</sup>

This recognition by officers of the possible burden of disclosure produced by pursuing a broader enquiry can be seen to influence the conduct of investigations in a number of ways and this can be seen most obviously in relation to the taking of statements. The way in which this is done can be crucial in terms of unused material, as a statement drafted without sufficient thought may later compel the OIC to make additional enquiries, however experienced officers have learned

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<sup>63</sup> s. 3(2).

<sup>64</sup> This view is supported by the Codes of Practice which provide, 'If the officer in charge of an investigation or the disclosure officer believes that other persons may be in possession of material that may be relevant to the investigation, he should inform them of the existence of the investigation, and the disclosure officer should inform the prosecutor that they may have such material. However, the officer in charge of an investigation and the disclosure officer are not required to make speculative enquiries of other persons: there must be some reason to believe that they have relevant material.' [Para 3.5].

<sup>65</sup> ASU 5/136. Similar sentiments were echoed by a CPS lawyer working within another force area. 'They are very conscious of the amount of time involved and the fact that they might come across something that they don't really want to hear. So, once they have their nice little package, then that is that and hopefully no one will ask any questions.' [CPS 4/79] and by the comments of one detective recounting the collapse of a case, '...the result was that the disclosure which we had quite rightly made scuppered the case - we did our job too well. Now I am very conscious that, the more you do, the more you have to disclose and the more problems you cause for yourself.' [CID 13/153].

how to avoid such problems by ensuring that the way in which information is been initially recorded actively precludes further investigation. In some cases this arises from a conscious or subconscious devaluation of any evidence which runs contrary to the police perspective and, as such, is to be discarded or downplayed if at all possible.

'Police officers tend to look at prosecuting somebody and all they look towards is getting the evidence to secure the conviction...For example, the defendant had 2 mates who witnessed the assault, shall we interview them? Well, they are going to back the defendant aren't they? So the investigators don't bother going to see them and, of course, that presents a problem. Even if someone does go to see them, "They will back the defendant so don't take a statement." That's not a new thing - it's been going on for years.'<sup>66</sup>

In other instances, the apparent motivation is not to actively prevent contradictory information from coming to light, but rather to render impossible additional enquiries which the OIC has concluded, at a very early stage, to be irrelevant. Here the objective is to remove the likelihood of further paperwork.

'An assault in a pub is a common one where statements would be taken. One officer will list all the people there but another officer taking that statement would just say, "There were about 15 other people in the pub" and not name them in the statement...because then they would have to go back and try and trace those people. But, like I say, they will get statements from the ones who are going to help their case.'<sup>67</sup>

Whatever the motivation and quite apart from the dubious investigative skills which they demonstrate,<sup>68</sup> the use of such strategies indicates the willingness of some officers to curtail enquiries which they see as superfluous and provides further evidence (if any were needed) of officers' ability to reach a practical accommodation between the legislation which governs their conduct, such as CPIA, and the demands of practical policework.

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<sup>66</sup> ASU 6/7.

<sup>67</sup> ASU 3/44.

<sup>68</sup> 'We have those who take a blinkered view - 'He's in the street. He must have done it'. that type of investigation.' [ASU 7/77].

The willingness of investigators to pursue those lines of enquiry which do not directly support the prosecution version of events is one of the most fundamental issues when considering the role of the police in the implementing the disclosure regime and it is clear that, for many officers, the instinctive reaction is still to seek the evidence which supports the charge. The critical impact of this enduring cultural perspective remains to be considered but, at the outset, it can be seen to exert a powerful influence over the way in which investigations are conducted.

Similar value judgments arise in the case of the intelligence held by all forces which provides valuable data for use in targeting offenders but which also leaves a large reservoir of, potentially undermining, material. The relative ease with which such databases can be consulted means that investigators can quickly amass a large quantity of material which, it could be argued, should be acknowledged in terms of disclosure. However, the very fact that records are computerised means that an actual document is rarely produced. For this reason the search is a largely invisible process and so a decision not to formally record the information on the disclosure schedules is far easier, as one detective explained.

'Again, it is back to how far do you go with these things. If I am going to deal with a particular criminal, one of the things I might do is to look on the intelligence system to see what reports there are relating to that person. Now, you could say that each of those reports is unused material because, if I have looked at a report to see if it is relevant. For instance, you might be looking at somebody for burglaries and it might say that he is a heroin addict...you might argue that he is committing the burglaries in order to feed his heroin habit, therefore, the fact that you have that intelligence to suggest that he is a heroin addict might actually be relevant but who decides that? In truth, most of the time I would look at something like that and say, if I don't write it down who is going to know it was there? And usually you haven't got time because you have to get the file in and you want to get it in before your days off...so you do it and think, "I will have a look at all them when I come back off leave." But when you come back you are dealing with something else and so they never get done. I don't know. Are we fulfilling the duty? – probably.'<sup>69</sup>

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<sup>69</sup> CID 5/55.

A further complicating factor is that an individual may also feature in the intelligence records of other forces. The dilemma for the OIC then becomes whether or not to expend the time required to make enquiries of other forces in order to locate and secure such information. Once again, whereas a major enquiry would undoubtedly entail such cooperation between forces, it is unlikely that this effort would be expended on more routine investigations, thereby leaving the OIC in a position where they may suspect that information exists but where it is easily avoided.

'If we don't have the information then we can't list and schedule it. What is to say that the person you have arrested doesn't have a record on a local intelligence system in a neighbouring force area which says that they are believed to be travelling here to commit this type of crime? Unless you were to go there and start sorting through their intelligence systems you wouldn't know. It could be argued that you have a responsibility to do it but where do you draw the line?'<sup>70</sup>

### **10.11. guilt or truth?**

'Police officers can be very blinkered, right? Especially if you've seen a case right from the outset. You've been to the scene and that lad you've got locked up in the cells gave you a good pasting. You've had a fight with him in the car, you've had a fight with him at the station, you've fought with him in the cells. He's told you to fuck off three or four times and he won't answer any of the questions - so you become blinkered, you're bound to, it's only natural.'<sup>71</sup>

The 1996 Act creates a fundamental conflict for the police for, although officers are required to conduct their investigations with all diligence they must also actively seek out and disclose information which assists the defence. Inevitably, many officers regard this as undermining their work by reducing the chances of

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<sup>70</sup> CID 5/37. The difficulties posed by enquiries involving more than one force can be very real. One defence solicitor interviewed described a case of alleged rape where, on further enquiry, it was discovered that the IP had previously made a number of similar allegations against other family members which were investigated and found to be unfounded. The previous allegations had been properly documented by social services, but were missed by the police because the family had been living in a different police and social services area at the time. The effect of the previous allegations on the credibility of the IP was such that the case was subsequently dropped. [DQ 1/6]. At the time of this research the crime recording computer in one of the forces studied permitted very limited searches and, although all stations had the same system, they were not linked. This meant that, if anyone wished to call up data from another division, the crime records clerk at one station was forced to call his/her counterpart at the other station to retrieve the data manually.

<sup>71</sup> ASU 2/92.

achieving what they see as their primary objective of securing a conviction,<sup>72</sup> leading to the common perception that, by providing adequate disclosure, the police are 'doing the defence's job for them'. CPIA is predicated on the modern role of the police officer, as a gatherer of evidence rather than an agent of the prosecution,<sup>73</sup> but this role does not come naturally to many officers and creates tensions which one Bramshill lecturer recognised in the following terms.

'If it is the proper role of the police service to bring people whom it believes to be persistent or outrageous criminals to court, and to gather and present its evidence in such a way that there is a very strong likelihood that they will be convicted, then that demands a certain sort of behaviour and recognises a certain set of values. If, on the other hand, we believe that the proper role of the police service is to make even handed inquiries into the background and circumstances of a crime, so that a proper conviction may be achieved if the evidence, fairly gathered, is sufficient, then that requires a different approach and a different set of values. The police officer becomes more like a scientist whose job it is to examine the evidence and to see in which direction it leads him, rather than to rely upon his intuition in reaching conclusions.'<sup>74</sup>

In discussing with officers their approach towards investigation and the treatment of unused material, it is clear that many have experienced considerable difficulty in adapting to this new emphasis within the investigative process. Of the detectives interviewed, almost all identified with the new 'even handed' model, but there is considerable evidence that this apparent change of approach is often little more than cosmetic.

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<sup>72</sup> 'Most police officers have one very specific goal in mind, to produce guilty people before the courts and see them justly convicted.' Chesshyre. R. (1989) *The Force Inside the Force*. London: Sidgwick & Jackson. p 5.

<sup>73</sup> The principle of the prosecutor as working for the furtherance of justice is well established. *R v Thursfield* (1838) 8 C & P 269.

<sup>74</sup> Villiers. P. (1997) *Better Police Ethics: A Practical Guide*. London: Kogan Page. p 48. Although he also concluded that the ACPO Statement of Common Purpose and Values were, 'Fine words. They cannot always be achieved; but their utterance is necessary.' [p 53]. Similar calls for the police to adopt a more impartial approach have also come from a former Chief HMI who recommended that the police '...must cease to believe that they are solely the agents of the prosecution and become what...they were originally designed to be, the gatherers of evidence.' Woodcock. J. (1992) 'Why We Need a Revolution.' *Police Review* 16<sup>th</sup> October 1929-32.

'You are up against unpleasant people in lots of cases. You are up against people who you know, whether or not you get it to court, you *know* that they are guilty. You *know* that they have broken into someone's house and stolen this-that-and-the-other.'<sup>75</sup>

In theory the contradictory burdens are reconciled by the investigating officer's belief in the fairness of the charge as a reflection of the evidence, but this only serves to highlight the difficulty of the task, for it is precisely this certainty of suspicion which presents the greatest potential obstacle to the impartial presentation of conflicting evidence.

This places the investigator in an invidious position for, although there is clearly nothing sinister in acknowledging a genuine belief of the suspect's culpability on the part of the police (indeed to do so would be to suggest that the police should zealously attempt to convict where even they are unconvinced of guilt) there must, by definition, come a defining moment in the investigation when the guilt of the accused ceases to be a matter of conjecture and instead becomes such as to constitute an objective fact of the investigation and some have gone as far as to suggest that this acceptance of the guilt of the accused renders the subsequent investigative process largely irrelevant<sup>76</sup> for, as Holdaway (himself a police officer) explained:

'Officers suppose that they have access to privileged knowledge because they "know" that the suspect is guilty and therefore accept some responsibility for seeing that justice is done, even if that means helping the evidence along a little.'<sup>77</sup>

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<sup>75</sup> ASU 12/42.

<sup>76</sup> Smith. D.J. (1997) 'Case Construction and the Goals of Criminal Process', *British Journal of Criminology*, 37/3: 319. Sykes and Brent saw this as a process of 'confirmation or redefinition'. Sykes. R., Brent. E. (1983) *Policing: A Social-Behaviorist Perspective*. Princeton: Rutgers University Press. p 80.

<sup>77</sup> Holdaway. S. (1983) *Inside the British Police*. London: Basil Blackwell. p 112. This paternalistic approach to the criminal justice system is frequently expressed by police officers, as articulated by one Chief Inspector, 'The feeling is that the rules of evidence are weighted [against the prosecution] and need help. There's the honest belief that the fellow is guilty and the law needs a bit of help to ensure the right result is achieved.' Morton. J. *Bent Coppers*. London: Warner. p 275., and lies at the root of much so-called 'noble cause corruption', 'There is some moral justification for getting around the rules if it increases the likelihood of getting men convicted whom they believe to be guilty.' Sir Robert Mark (Observer interview, May 16<sup>th</sup> 1975).

Even leaving aside Holdaway's allusion to 'helping along', the point at which the guilt of the suspect becomes viewed as an objective fact must represent is a critical juncture in the investigation, as it marks the point at which contradictory evidence and lines of enquiry will, inevitably, be devalued and less attractive in the eyes of the police.<sup>78</sup> This leads to the question of how early in the investigative process this threshold is reached and the extent to which it may influence the subsequent collection and presentation of the case.<sup>79</sup>

Once the police have satisfied themselves of the culpability of the suspect many would suggest that the cultural attitude of the police is inherently inconsistent with the subsequent even handed assessment of contradictory evidence. This is not the consequence of some individual decision but is a reflection of institutional working methods which draws on many of the cultural and training issues already touched upon, together with operational pressure to achieve results in the form of suspects charged and convicted. It is the interrelationship between such cultural and practical pressures which forms a theme within this research.

Doubts have persisted over whether there exists any real incentive for investigators to critically examine 'friendly' witness evidence<sup>80</sup> and it is impossible to address the question without recognising the influence of cultural factors and training for, as Bankowski noted.

'The facts we know are constructs, partly determined by the procedures of discovery which in turn depend on procedures of justification.'<sup>81</sup>

Case construction occurs within a structured environment, where the cultural norms dictate the emphasis which may be placed on particular facts and those

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<sup>78</sup> It has also been argued that this allows the police to portray the evidence they produce as information which has been 'found' (such as 'voluntary' confessions) and so to depict such information as a 'truth', existing independent of the exercise of any police power. Green. A. (1997) 'How the Criminal Justice System Knows.' *Social and Legal Studies*. 6/1 11.

<sup>79</sup> Even Sir Paul Condon recognised the temptation to, '...elaborat[e] on things that were said in a way to make sure that the case had the strongest chance of going through to a conviction.' *Panorama* interview. BBC 5/4/93.

<sup>80</sup> The question was also posed by the Royal Commission on Criminal Justice. Maguire. M., Norris. C. (1992) 'The Conduct and Supervision of Criminal Investigations'. Royal Commission on Criminal Justice Research Study No 5. p 51.

<sup>81</sup> Bankowski. Z. 'The Value of Truth: Fact Scepticism Re-visited' (1981) 1 *Legal Studies*, 257.

individuals who are more or less likely to be believed. The police create generalised typologies of the public in order to refine operational strategies to be targetted on 'appropriate' individuals in order to facilitate the definition of situations and the construction of an 'appropriate' response<sup>82</sup> and it will be seen that this process is highly influential at the file preparation stage, where case files are worded in such a way as to conform with existing types of cases in order to make them more compelling. This process also impacts on the investigation itself by making the evidence of certain individuals appear inherently more or less believable to the OIC. In effect this amounts to negative stereotyping, which is hardly a new problem within the police service,<sup>83</sup> but, whereas it is issues of race which have usually attracted attention in relation to such labelling, it is the much simpler categorisation of the suspect as 'guilty' which undermines the impartial collection of contradictory evidence. Although the temptation is to view this in terms of deliberate conduct, with group culture condoning the manipulation or obfuscation of evidence, it is more likely that the 'working rules' of the police, the importance placed on 'previous' and the fact that suspicion is frequently seen as a matter of instinct mean that more unconscious processes may be at work, as McBarnet acknowledged:

'Given their own involvement, interests, and indeed beliefs in the case the police are likely to create, with the best will in the world, a sense of pending conviction.'<sup>84</sup>

This is a significant interpretation, not least because it recognises that the environment in which officers approach the task of investigation is subject to

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<sup>82</sup> Shearing. C. (1981) 'Subterranean Processes in the Maintenance of Power.' *Canadian Review of Sociology and Anthropology*. 18:3; Shearing. C. (1981) 'Deviance and Conformity in the Reproduction of Order', in Shearing. C. (ed) *Organisational Police Deviance: Its Structure and Control*. Toronto: Butterworths.

<sup>83</sup> 'Few police officers would be so naïve, I suspect, as to state in an attributable context that because someone is known to be a gypsy, that is sufficient cause to know him to be a thief. However, in police folklore it is generally accepted that gypsies *are* thieves.' Villiers. P. (1997) *Better Police Ethics: A Practical Guide*. London: Kogan Page. p 122. (original emphasis). It should be noted that Villiers is himself a lecturer at Bramshill.

<sup>84</sup> McBarnet. D. (1981) *Conviction: the Law, the State and the Construction of Justice*. Oxford Socio-Legal Studies. London: Macmillan. p 61. 'The adversarial system itself moulds a context for the discretionary decision...the great benefit is to win; the great cost is to lose...discretionary actions made under this cost/benefit assumption will invariably tend toward presumption of guilt in assessing the meaning of facts.' McCoy. C. (1996) 'Police, Prosecutors and Discretion in Investigation', in Kleinig. J. (ed) *Handled with Discretion: Ethical Issues in Police Decision Making*. Lanham, Maryland: Rowman & Littlefield. p 166.

cultural and professional factors, such as operational culture within the police service and the pressure of public expectation, which combine to produce a preconception of guilt without, necessarily, any conscious attempt to subvert the investigative process.

In assessing the origins of this culture of preconception it is clear that one of the most powerful influences is the high level of recidivism which exists within most areas.<sup>85</sup> The reality of police work means that officers spend a large proportion of their time dealing with the same pool of persistent offenders<sup>86</sup> and the perception of a 'hardcore' of offenders underpins the approach of officers towards the communities which they police. An obvious manifestation of this is officers' pride, not only on their knowledge of their local criminal community but also their ability to identify likely suspects.

'Without a doubt, I can go out to a house burglary and within two to three days of going to house burglaries in a certain area I can tell you who has done it by the MO, by things that are left at the scene, just the way it is, the time of day, everything. If you study the MO and you go to a job and you get a feel for it and you will, any detective worth his salt on a fairly small patch can put it down to two or three people, without a doubt.'<sup>87</sup>

Initially, this appears to typify all that the public might expect from the police and such instinctive policing is certainly recognised within the culture of the police as a central characteristic of the 'good' officer. Dangers arise with such an approach, however, if the OIC's certainty of guilt influences the subsequent

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<sup>85</sup> 'Our recidivism levels are such that, 7 or 8 times out of 10 you have dealt with that person before so, if you make that initial judgment, then practically nothing is going to sway you from it.' [ASU 8/107].

<sup>86</sup> 'If you gave me a sheet of A4 I could write down 15 or 20 names and, if you took those people off the streets, your crime rate drops - I don't care what anybody says.' [CID 1.33].

<sup>87</sup> CID 2/33.

investigation by minimising the importance of any conflicting evidence<sup>88</sup> and, in the interviews conducted for this study, both ASU officers<sup>89</sup> and CPS lawyers<sup>90</sup> saw this as a major cause for concern in many of the files that they encountered which demonstrated on the part of some investigators the single-minded pursuit of a prosecution, evidenced by the desire for premature closure and the adoption of what might be termed a 'confirmatory bias' in seeking only that information which supports the version of events which the officer 'knows' to be true<sup>91</sup> and minimising the opportunity for contradictory material to come to light.<sup>92</sup>

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<sup>88</sup> The potentially detrimental impact of such police preconceptions has received attention in relation to the interviewing of suspects. '...their minds are made up before the interview starts and, once on these tramlines, they are not easily derailed. Denials are brushed aside and alternative perspectives and explanations disregarded...the interviewer does not consider false confession in such cases even as a remote possibility because the assumption of guilt is honestly held.' Baldwin. J. 'Police Interviewing Techniques: Establishing Truth or Proof?' (1999) 33 Br J Criminol 325. Such findings mirror a 1992 study which found that 75% of the sample of police interviewers were certain of the guilt of the suspect prior to the commencement of the interview and, in 80% of cases, the stated aim of the interview was to simply to obtain a confession. This was particularly so where the suspect had previous convictions. Moston. S., Stephenson. G.M., Williamson. T.M. 'The Effects of Case Characteristics on Suspect Behaviour During Police Questioning.' (1992) 32 Br J Criminol 23. A later study by the Police Research Group censured officers for appearing to have prejudged the outcomes of cases and for failing to be impartial. Many were judged to be biased or 'blinkered', in their unwillingness to consider all aspects of the case or to accept the possibility of any deficiency in their investigation. Police Research Group (1995) *The Presentation of Police Evidence in Court*. London: HMSO.

<sup>89</sup> [do OICs look for conflicting evidence?] 'No I don't think that happens. The police officer goes out there, gets the evidence to support the charge and that's your lot! Up to the point of charge, up to the point where they get "enough", they will probably look at things which will actually go down on the disclosure forms. But I think that's your lot.' [ASU 12/48].

<sup>90</sup> 'People are innocent sometimes and that comes as a revelation to some officers, but it is a culture thing. Once someone is charged, they are not interested after that.' [CPS 4/30].

<sup>91</sup> 'Confirmatory bias is endemic in the police service. The situation is made all the worse by many officers being unaware of it and when made aware of it, many arguing that it is a sensible and natural way to solve problems and, in particular, to conduct investigations.' Ede. R., Shepherd. E. (2000) *Active Defence*. London: Law Society. p 115. Such concerns are hardly new with the Fisher Report concluding that, once officers became convinced of the guilt of the accused (through the subsequently discredited confessions) then 'enquiries continued only to strengthen the evidence against them.' Home Office. (1977) *Report of an Enquiry by 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*. London: HMSO. p 203. In the current study, one CPS lawyer interviewed recalled requesting an ID parade and being told, 'Why do we want that? She might not pick him out and that wouldn't help our case would it?' The lawyer concluded that the OIC had satisfied himself of the guilt of the suspect and so did not want to do anything which might undermine that. [MCPS/4].

<sup>92</sup> This can manifest itself in a number of ways as one CPS caseworker explained, 'If another suspect is arrested at the time but is subsequently nfa'd. You can virtually guarantee that there will be something to undermine there but, usually, they won't even reference the tape or produce a copy of it. If you query that they say, "We haven't got the time. We have enough of a job getting the tapes for the defendant". The best we can do then is to make the defence aware of it so that they can get a copy of it.' [CPS 2/104].

'detectives do not work from facts to identification of suspects; they work from identification of suspects back to the facts that are necessary to prosecute and convict them. The primary job of the detective is not to find unknown suspects, but to collect evidence required for a successful prosecution of known suspects. Although fictional detectives are constantly warning against the danger of forming a hypothesis too early, that is precisely what real detectives do most of the time.'<sup>93</sup>

In this way, the officer's early acceptance of the guilt of the suspect is reinforced by the confirmatory bias of the subsequent evidence gathering process and the process is even more pronounced in the case of the known offender.<sup>94</sup> The fact that a suspect has previous convictions has been cited in numerous studies<sup>95</sup> as an important factor influencing the exercise of discretion and the view that.

'nothing makes [the police] more enthusiastic about a case than to find out the assailant has other charges against him or a prison record.'<sup>96</sup>

With almost total discretion over the evidence gathering process, the instinctive approach for most OICs remains to direct the inquiry in order to seek that evidence to support that initial assessment of guilt before, at the file preparation stage, bringing that evidence together to create a convincing case. It is at this stage that the practicalities of the investigation are replaced by the administrative

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<sup>93</sup> Bayley. D.H. (1998) *What Works in Policing*. Oxford: Oxford University Press. p 72. '...none of this is intended to allege that the police regularly arrest and prosecute people they know to be innocent. But, given a moment or two, we could all think of examples of cases in which the police have objectively focused upon a possible suspect and then readily accepted interpretations of fact congruent with conviction, rejecting those pointing to acquittal.' McCoy. C. (1996) 'Police, Prosecutors and Discretion in Investigation', in Kleinig, J. (ed) *Handled with Discretion: Ethical Issues in Police Decision Making*. Lanham, Maryland: Rowman & Littlefield. p 167.

<sup>94</sup> Officers are more cynical still where both alleged offender and alleged victim are known to the police, 'the lad who did it is shit and the lad he did it to is shit - it's shit on shit isn't it?' [PO/2/11/28].

<sup>95</sup> Wertman. C., Piliavin. I. (1967) 'Gang Members and the Police', in Bordua. D.J. *The Police: Six Sociological Essays*. New York: Wiley; Cicourel. A. (1968) *The Social Organisation of Juvenile Justice*. New York: Wiley; Spradley. J.P. (1970) *You Owe Yourself a Drunk: An Ethnography of Urban Nomads*. Boston: Little Brown; Holmstrom. L.L., Burgess. A.W. (1983) *The Victim of Rape: Institutional Reactions*. New Brunswick: Transaction Books. Such attitudes have also been found in prosecutors, Swigert. V. L., Farrell. R. A. (1976) *Murder, Inequality and the Law*. Lexington Mass: D C Heath; Mather. L. M. (1979) *Plea Bargaining or Trial? The Process of Criminal Case Disposition*. Lexington Mass: D C Heath; Myers. M. A., Hagan. J. (1979) 'Private and Public Trouble: Prosecutors and the Allocation of Court Resources.' *Social Problems* 26: 439-51

<sup>96</sup> Holmstrom. L.L., Burgess. A.W. (1983) *The Victim of Rape: Institutional Reactions*. New Brunswick: Transaction Books. p 43.

process of creating a case on paper and, with it, the task of preparing for disclosure begins.

## **11. Stage 2: file preparation & submission**

### **11.1. disclosure and case construction**

Having identified some of the aspects of the investigative process which acted to the detriment of effective disclosure within the police forces studied, it is necessary to consider what happens when the information generated by the enquiry leaves the OIC and passes to others within the criminal justice system. It is here, during the processes of case construction, file preparation and submission, that the real dilemmas of disclosure begin to appear, as it is at this point that the actions of the OIC must be translated into the paper version of events that will form the basis for the remainder of the prosecution process.

As has already been indicated, the overwhelming majority of investigations do not follow the apparent wording of CPIA, by involving a separate OIC and disclosure officer, but instead combine the roles, leaving the OIC to conduct his/her own assessment of the status and relevance of the material generated during the investigation. This was certainly the case in both of the forces which formed the basis for this work. It is, therefore, only at the file submission stage that the initial judgement of the OIC in relation to unused material is first subjected to scrutiny and it is here that the ASU becomes pivotal in determining not only whether or not the case ultimately proceeds to court but also in ensuring the integrity of the file content, including the unused material. As will be seen, the ASU occupy a crucial position as the interface between the OIC and the CPS, acting as the channel of communication between these two groups which, ostensibly, work towards a common goal but frequently from conflicting perspectives. The way in which this operates in practice reveals not only a number of the fundamental flaws in the current disclosure regime but also more far reaching tensions within the criminal justice system in general.

## 11.2. the chore of file preparation

The significance of the file preparation process cannot be over emphasised for, as Cook<sup>1</sup> concluded, the 'positional advantage' of the police is that every other limb of the criminal justice system is dependent on their version of 'criminal' events as it is this which is taken as the official version for all subsequent stages of the prosecution process. Equally, those cases which the police do not define as 'criminal' do not come to the attention of the other agencies in the first place. The result is an increasingly administrative process of prosecution. For this reason, it might be thought that officers would see the compilation of the case file as a central aspect of their work. The reality, however, is that although officers are more than aware of the importance of the file, their enthusiasm for the task is minimal.<sup>2</sup> As one ASU officer noted:

'I think police officers have always hated paperwork - full stop. Whether they are good at it or not they have always hated it. But you knew you had to do it and you knew you had to present the case, because if you didn't present the case then you wouldn't get a conviction so it was your responsibility'<sup>3</sup>

During the interviews with officers of all levels, this concept of paperwork as a 'necessary evil' was frequently apparent and manifested itself in various ways. Almost all of the officers interviewed commented on the increasing pressures of the job, with developments such as HRA and RIPA generating very real frustrations, yet it was always paperwork, rather than actual operational policing, which attracted the greatest criticism.

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<sup>1</sup> Cook. K. (1977) 'Exchange and Power in Networks of Interorganizational Relations.' *The Sociological Quarterly* 18: 62-82.

<sup>2</sup> Hobbs, in his study of East end detectives noted that, 'paperwork is generally regarded as an organisational restraint upon the otherwise autonomous actions of detectives and these restraints can be either bypassed, or resisted via collaborative trade-offs with colleagues.' Hobbs. R. (1989) 'Policing in the Vernacular', in Downes. D. (ed) *Crime and the City: Essays in Memory of John Barron Mays*. Basingstoke: Macmillan. p 177.

<sup>3</sup> ASU 6/57.

'The number of times you hear about a new form being brought in and people say, "Look, we understand you already have a lot of paperwork but we are only talking about one more form, or 30 more seconds of your time". How many of these do you have before you say, "I am sorry but no more" and what happens if the record you need to save your skin is the one you forgot to fill in? Then it looks as if you are deliberately trying to hide something.'<sup>4</sup>

There may be a number of reasons for the resentment which officers have for administrative work but, when questioned, responses invariably centred on a straightforward trade-off – time spent in the office is time which could be better used on the street,<sup>5</sup> but there are also ideological reasons why officers recoil from the requirement to document every aspect of their work in ever greater detail.

Whether individual officers choose to recognise the fact or not, the principal impetus for the tightening of administrative controls on the police has been a declining public confidence in their ability to act simultaneously with autonomy and probity. The word of the police officer is no longer accepted without challenge and, for many of the older officers, this has been a difficult transition.

'The criminal justice system itself has changed so much over the last ten years, what used to be acceptable ten years ago is no longer acceptable now and, whereas in the past you could put the bare basics down and it would work with the bare basics, now they're not willing to accept it with just the bare basics, they want everything.'<sup>6</sup>

Perhaps it is this regret at the loss of public esteem and trust which lies at the root of the loathing of paperwork. The fact that the officer's discretion and experience are no longer sufficient to sway the court.

### **11.3. the concept of 'real' policework**

Whether the difficulty experienced by many officers in relation to file preparation stem merely from disinterest, or from a more fundamental lack of

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<sup>4</sup> CID 5/101.

<sup>5</sup> 'Where does the time come from to fill in that document that you didn't have time to fill in last week? You are going to have to make the time and the time you make to do that is to the detriment of somebody's crime that you are investigating.' [CID 5/89].

<sup>6</sup> UNI 2/20.

understanding, it is clear that it lies at the root of many of the shortcomings of the disclosure regime. It follows, therefore, that in order for this to perpetuate within the police service there must be some form of cultural justification which the rank and file can put forward (either implicitly or explicitly) to explain their failure to engage adequately with the administrative elements of case preparation but which, crucially, does not overtly diminish their status as professionals in the eyes of colleagues and supervision. The way in which this is achieved is by reference to the concept of 'real' policework. Duties which are so defined attract elevated status and their competent performance are seen as essential to the reputation of the 'good' officer, those which fall outside of the definition are denigrated and their competent performance is seen, at best, as largely irrelevant and, at worst, as the antithesis of the ideal police officer.<sup>7</sup>

In this way, officers are able to rationalise and legitimise their conduct by reference to the common perception of what constitutes 'real' policework, and what does not.

'If a fight goes off in the street, you will get everybody there. Every man jack will be there and they will assist in the arrest, cart them off, put them before the custody officer, search them and put them in the cells. Then you will say to them, "Whose case is it?" and they don't want to know - all of a sudden they lose interest. You see that happen so often and CPIA is one of the first things they lose interest in. It's not what they joined for. They didn't join the police to write disclosure forms. They joined to drive around in big fast cars, to stop villains, to lock them up, to get into a bit of a punch-up.'<sup>8</sup>

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<sup>7</sup> One detective concluded, 'I could write you a list of criminals that I would take off the streets and stop the majority of crime, and I could also write you a list of policemen that I know who shouldn't be in the job, either because they've never been good enough or they avoid work or, you know, they'll take the easy option out and basically do nothing...they either fall into the category where they get up and get on with it, or they fall into the category where they'll hide or look for a job which is non-frontline...they'll look for an administration job or they'll look for a communications job or they'll look for a job at Headquarters and avoid it, that's the "lame duck syndrome" - sad times but there you go!' [CID 1/133].

<sup>8</sup> ASU 12/32. One detective explained how this desire to return to 'real policework' can impact on the quality of file submission, 'You might have the situation where the 3 of us have been investigating a job and then 2 of us might get taken off to do something else and then you have one person trying to do the work of 3 and get the file together in 24 hours for submission to the CPS. Then mistakes are made and things are omitted. But the intention is to get things right.' [CID 11/78].

Initially, it is tempting to explain this in terms of machismo, and this is clearly a factor, but the reality is somewhat more complex and is intertwined with officers' own perceptions of their role and their self-worth, within a community which is increasingly critical of their efforts. An officer who is seen to undertake 'real' policework is performing the function which (s)he believes will enhance their status in the eyes of the general public.<sup>9</sup> Administration is seen as a diversion from that objective.

'What do I need to achieve for the people of this town? That's what you should be thinking all the way along the line. That's what you've got to keep in mind...if you're Jo Bloggs sat in your house, you really couldn't give a toss if I detect 40% of crime, what you want to know is that there have been no burglaries in your street...that your daughter can walk home safely from the disco without getting attacked or accosted. That's what you want to know. You don't really want to know that we've achieved a lot of targets.'<sup>10</sup>

The importance of this concept of what does and does not constitute the true performance of the police officer's role is that it provides a cultural justification for downplaying the importance of file preparation and for excusing the administrative weakness of some officers. In fact, such is the strength of this self image that there exist numerous accounts of officers who are highly effective, but whose paperwork is poor, accompanied by the suggestion that their prowess in the field renders their administrative weakness largely superfluous.

'You get some good policemen, very good police officers, very good investigators, with a very good, let's say "nose" for it, but they can't put pen to paper. Very good interviewers but, if you ask them to describe what happened in that interview, they can't do it. They can handle that interview and get the right result but they can't put it down on paper.'<sup>11</sup>

This sympathetic treatment by colleagues serves to reinforce the perception of

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<sup>9</sup> 'I enjoy putting them in prison - that's what I'm here for. I don't take any pride in saying that but that's how it is, it's "us and them" and I'm sure the criminals see it the same way.' [CID 3/110].

<sup>10</sup> CID 1/79.

<sup>11</sup> ASU 2/62. Another ASU officer commented, 'There is a proportion of officers who don't put a lot of work in anyway, but that isn't the same as saying they are bad police officers. For example, there are those officers who will always be "assisting". They will always be there, say at the brawl outside the pub on a Saturday night, that sort of thing, but "I'll leave the paperwork to the young sprog officer".' [ASU 6/99].

what constitutes the 'good' police officer. The officer who can apprehend the suspect and conduct the interview, but who may lack the skills needed to transfer that information to paper in order to construct a case, is still very much seen as a 'good' officer for, in balancing practical ability against administrative weakness, there is clearly little contest, despite the fact that the defects within the file may ultimately lead to the failure of the prosecution.

On the other hand, an officer whose strengths lie in case construction, perhaps at the expense of their investigative skills is highly unlikely to be perceived as a 'good' officer by their peers, because their abilities lie outside of those which are seen as fundamental to 'real' policework. This is significant for a number of reasons: firstly, it underlies many of the issues of credibility which affect the relationship between the CID and the ASU,<sup>12</sup> making the distinction between deskbound and operational officers, secondly, it provides a cultural justification for those officers who can't, or won't, create effective files. The image of the highly competent officer who is poor at paperwork clearly has a certain attraction from the officers' point of view as, not only does it provide a justification for errors that they might make in the process of file preparation but, in doing so, it reinforces the image of that officer as a 'real' policeman, who may fail in the task of file preparation but who is skilful where it really matters – on the ground.

This raises the question of how much supposed inability in file creation is, in fact, the result of laziness or lack of interest and there is little doubt that, within the force itself, certain officers are perceived in this way.

'It's laziness - it's as simple as that – laziness. It's not a lack of knowledge, because I don't think I've come across a police officer yet where intelligence has actually been an issue, you know? I think that everyone has the nounce to know what's required and how to do it, it's all down to "can I be bothered?".'<sup>13</sup>

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<sup>12</sup> See Chapter 12.

<sup>13</sup> UNI 2/130. As one CID officer explained, 'There are lads who will avoid putting paperwork in - they're quite happy to pick somebody up and put them in the cells and then, hopefully, somebody else will take it over and do it.' [CID 4/59]

It might be thought that, particularly within the CID, there would be limited opportunities for such task avoidance, even if such conduct were to be condoned by fellow officers due to their ability as 'thieftakers', but the way in which disclosure operates in practice illustrates that the procedures provide as much assistance for the lazy officer as for the officer in genuine difficulty. Just as with the investigative stages, it is possible to examine the elements of operational practice which militate against effective disclosure.

#### **11.4. disclosure as an afterthought**

If officers resent the time they are forced to spend on preparing the evidence within the file, their irritation is even greater when it comes to the preparation of unused material.<sup>14</sup> In part this stems from officers' resentment of CPIA in general and, in particular, this is due to the time which is required. For many of the officers interviewed, this represented a significant cause for resentment.

'There is a lot of bitterness because they have to spend a lot of time and a lot of effort and do a lot of work on disclosure and there is no way around it. They are doing it but it has increased their work quite significantly and we are not talking about a couple of minutes, it is a MAJOR part of the file...I don't think anyone takes much pride in assembling an unused material schedule because it is a necessary evil. They know they have to do it and they know they might lose the case if they don't do it, so they do take it seriously, but it is an effort.'<sup>15</sup>

For many officers the dilemma is straightforward - any time which is devoted to the consideration of unused material is at the expense of detection and, for many officers, this has resulted in an essentially pragmatic approach to the collection and assessment of unused material. Officers recognise that, at the very least, they must give the appearance of having fulfilled their obligations under CPIA but, in doing so, the potential for wasted effort and interference in the task of

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<sup>14</sup> This echoes the conclusions of the DPP, David Calvert-Smith, that 'unused material is a bore and much less fun than the preparation and presentation of the case. There is therefore an instinctive and understandable desire to get through it as quickly as possible.' Calvert Smith, D. (1999) 'The Prosecuting Authority's Role: Making the Criminal Procedure and Investigations Act work to Facilitate Fair Trials and Just Verdicts', in *Disclosure under the Criminal Procedure and Investigations Act 1996*, conference papers. London: British Academy of Forensic Sciences (BAFS). Although it might be wondered whether most officers would describe even the preparation and presentation of the case itself in terms of 'fun'.

<sup>15</sup> ASU 13/12.

'real' policing must be kept to a minimum. The most straightforward strategy employed is to ignore the issue of unused material completely until the final file is prepared although, under CPIA, the consideration of unused material generated through the course of the enquiry is an ongoing duty on the OIC. It is clear, however, that for the majority of officers, there is little consideration of unused material during the investigation itself and it is only at file preparation stage that there is an assessment in order to compile the schedules. In this way time and resources are devoted to collecting the evidence to charge.

'I don't think it is actually practical to keep doing it as an ongoing proces. The way you think is "I need some time to look at this job. At some stage I am going to have a bit of time". Hopefully you might get 2 or 3 hours to do that but, in that time, you ought to be carrying on your investigation, rather than thinking about the unused because you think, "Well the unused can wait and I can sort that out later. What I MUST do is to take a statement from so-and-so or take this tape to the CCTV office, or whatever." That is the way you tend to work.'<sup>16</sup>

There is an obvious logic behind this tactic, as it frees the OIC to conduct the actual enquiry, rather than devoting time to an essentially administrative exercise, as there is clearly no need to draft actual schedules of unused material until the file preparation stage. The way in which this is implemented, however, can have a significant impact on the ultimate standard of disclosure. What is critical is whether the unused material generated during the course of the enquiry is actively retained until the conclusion of the investigation and is managed adequately to permit an assessment of any issues of relevance which may emerge. Some investigators accomplish this with minimum disruption by retaining any material as it arises but without any assessment of its relevance and disclosure status until the end of the investigation.

'I am on with a job at the moment. I am rapidly gathering paperwork and I am not making any effort to record that. It is just all in a box. Now, at the end of the day, if we get an arrest and someone is charged, then I will sift through that paperwork and start to go through and put in index form what is pertinent to the case.'<sup>17</sup>

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<sup>16</sup> CID 5/43.

<sup>17</sup> CID 11/264.

The difficulty is with those officers who lack the foresight to methodically retain material in this way and, for them, addressing the question of unused material may not always be a simple task.

'Then you have people who, in the end, still charge people but then, "Fuck, I've got a really big problem here" retracing their steps. That's when things get missed, that's where they get it wrong, that's where they get confused. "Is this disclosable, is it not?" or is there something like that on the backtrack, the organised officer doesn't have a problem but some people just aren't naturally organised.'<sup>18</sup>

Another factor which influences officers' approach to the treatment of unused material is their perception as to the likely outcome of the case. In a case where there has been (or is likely to be) an arrest, there exists from the outset an incentive to manage information efficiently. By contrast, in those cases where there is no obvious suspect and, as a consequence, the ultimate outcome may be more uncertain, the temptation is to devote time and effort elsewhere and to adopt a far more robust approach to the unused material generated. As one CID officer explained.

'In some of the investigations, where you begin without any clear idea or any light at the end of the tunnel, you might well think "This could be 6 months hard work for nothing" and it is just that you collect so much rubbish that it is impractical or you don't feel its relevant to record it all.'<sup>19</sup>

This is a very pragmatic approach to the problem but also demonstrates the hazards of such a strategy, for it is difficult to see how a case which is so uncertain can produce such a confident assessment of the relevance of the material generated, bearing in mind that the issue is not whether material is ultimately disclosed but whether it is recorded at all. There is the additional hazard that the case may be re-opened at a later date under the supervision of a

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<sup>18</sup> CID 1/118.

<sup>19</sup> CID 11/305.

different OIC who will be unaware of what may or may not have been discarded by the original investigator as 'not relevant'.<sup>20</sup>

Similar problems arise in serious cases where the investigation is conducted by a team of officers and where the OIC assumes responsibility not only for their own unused material but for that of the other investigators. As one detective explained, such responsibilities can often be allocated late in the investigation.

'If a robbery came in now, we would all go and deal with that robbery and towards the end of that investigation, the DS would turn to someone and say, "I want you to be OIC" and it is at that point that the person would say "Right, it is my responsibility and so I will collect all the unused material and make sure it is correct", so then you have ownership of the job. Now that is fine if it happens in the first few days but what can happen is that the decision might not be made until 2 or 3 weeks into the investigation and, to be told at that point that you are OIC, when there might have been 20 officers who have played some part in the investigation up to that point and who all possess material which is "unused", you tend to find that you are scouting about to try to find out what you have got and trying to play catch-up really. Sometimes the emphasis is on looking after the unused rather than looking after the investigation.'<sup>21</sup>

It is difficult to see how there can ever be more than an attempt at effective disclosure under such circumstances, as the OIC is dependent on all of the other investigators to bring any unused material to his/her attention. This requires a level of cooperation which may not always be forthcoming.

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<sup>20</sup> A similar situation may arise when CID take over an enquiry from uniformed officers as one detective explained. 'If we have a domestic burglary reported, the uniformed lads are usually the first to turn up. If it is a confirmed burglary, then a CID officer is tasked to deal with that but he doesn't necessarily have to go to the scene - that is a judgment for him. But what happens then is the CID officer will say to the uniformed lads, "Have you done house-to-house enquiries?" and he might be told, "Yes, we knocked on 18 doors and no-one saw anything". But that is a disclosure issue because we should be saying to the defence "We knocked on 18 doors and no-one saw your client".' [CID 11/369]. An example of this was an assault case containing a statement that "House to house enquiries were later made in the area of XXX for independent witnesses. Although some residents say they heard noise, none can provide any evidence". The file was comprehensive in other regards and there was copious unused material including rough notes, etc. but there was no mention of these statements nor any list of the houses visited on the MG6C. [NCI/141].

<sup>21</sup> CID 9/10.

'We are busy, but some people purport to be busier than others and I think 30-40% take the point of view that, "If it is not my job and I am not disclosure officer then I will wait for them to approach me to see what I have got". There is another 50% who would think, "I am taking a statement, I took notes on the statement so I will label them "unused", I will decide whether they are sensitive and then I will hand them to the disclosure officer to save him work because I have done it, whereas he would have to read through it to decide for himself". Then there is the remaining 20% who probably haven't a clue anyway and so just do as they are told.'<sup>22</sup>

This demonstrates how, potentially, vital material may never enter the disclosure process due to a reluctance on the part of some officers to venture more than the bare minimum in terms of effort, not from ideological opposition to the concept of disclosure but from a more basic desire to avoid additional work, particularly when the cause is unused material, which is viewed as less important even than file preparation.<sup>23</sup> Again this indicates the low opinion officers have of paperwork in general for, when time is limited, 'real' policework comes first. File preparation itself is a sufficiently onerous task without the added burden of consideration of unused material and the extra time that it demands.

'To the OICs, unused material is just seen as form filling which the CPS insists on. A form filled with standard rubbish - just one of those things they have to do. That is the significance that they attach to it and their general mentality.'<sup>24</sup>

### **11.5. doing 'enough'**

The necessity to impose some sort of limit on the scope of the investigation, together with the effect this has on the unused material generated, has already been considered and it has been shown that, despite efforts to adopt a more even-handed approach to the investigative process, the instinct of many officers remains to secure evidence which supports the allegation and that this militates

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<sup>22</sup> CID 9/12.

<sup>23</sup> 'They are run off their feet and, of course, the last thing they want to do is gather the unused material so, if they can cut a corner in the preparation of the schedules, then they will do it. Now some officers are very good at it...but there are a number of officers who are either lazy or they are trying to cut corners in not being specific enough because the next 3 jobs are already piling up.' [ASU 14/10].

<sup>24</sup> CPS 4/170.

against the recording and retention of potentially undermining material.

This conflict, arising from the understandable desire on the part of the OIC to secure a conviction, does not end with the conclusion of the investigation, in the form of the charging of the suspect. It must also impact on the process of file construction and the extent to which the existence of potentially undermining material is acknowledged within the case file, by means of the unused material schedules. This raises some of the most contentious aspects of the police handling of unused material, for it is at this point that the police version of what material has been generated during the enquiry is passed, via the ASU, to the CPS and the range of factors which combine to impede full disclosure must be considered.

One theme which emerged from this work was the incentive for investigators to present as clear a case as possible to the CPS, particularly as officers are constantly aware of the threat of discontinuance, and this creates an obvious conflict when it comes to listing information which might, conceivably, assist the defence. The assessment by the CPS of the merits of the individual case is made on the basis of information provided by the police and so it is hardly surprising that cases put forward for prosecution are presented as being 'prosecutable', with the evidence arranged accordingly. Previous work has shown that the police are able to present the CPS with case summaries which are selective in the extreme<sup>25</sup> and that, in seeking advice from prosecutors, the police are able to influence the advice they obtain by careful selection of the information which they present.<sup>26</sup>

Even in forces where an ASU officer acts as the disclosure officer, rather than the OIC, the initial discretion as to what material to list on the schedules remains with the investigator and so it is open to officers to omit material which they feel 'muddies the waters'. Where this occurs it is, more often than not, less the

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<sup>25</sup> Gelsthorpe. L., Giller. H. 'More Justice for Juveniles: Does More Mean Better?' [1990] Crim LR 153; Duff. 'Diversion From Prosecution into Psychiatric Care'. (1997) 33 Br J Criminol 481.

<sup>26</sup> Sanders. A., Creaton. J., Bird. S., Weber. L. (1997) 'Victims with Learning Disabilities: Negotiating the Criminal Justice System.' Occasional Paper No. 17. Oxford: Centre for Criminological Research.,

product of a desire to deceive, but rather a wish to eliminate loose ends which are seen as irrelevant to the investigation. The risks, however, remain significant.

'The material itself is nonsense really and just gives the defence straws to clutch at. You might have another burglar arrested a few weeks previously for burglaries committed in the area. The crimes might be different. The MO is different but, obviously, no matter how different the offences are, a good defence lawyer is going to try to link them together and some people might decide not to disclose that information because of that.'<sup>27</sup>

Such an conclusion is laden with preconceptions and the danger is that, in deciding what information to include, the OIC may allow his/her own assessment of the value of the material to usurp the discretion of the prosecutor and deny the defence access to possibly beneficial material. Any action which eliminates evidence of even the existence of potentially undermining information undermines the basis of CPIA disclosure and yet it is clear that such, largely arbitrary, decisions are made by operational officers on a day to day basis.

Why then are officers prepared to risk not listing potentially undermining material? A key factor may be their limited confidence in the disclosure procedures, based on the assumption that almost anything can be accommodated due to the absence of any consistency of approach.

'We tend to give the CPS full disclosure lists but, inevitably, they don't contain everything and I still don't think the procedures are formalised enough. I mean, I keep a diary and a pnb, and on my schedules I will put that I have both of those things and I will put that they are in my possession. But I know that a lot of other officers will only list the pnb and no-one has ever come to us and said, 'You must list your diaries' or the pnbs, or both, or neither. CPS must see those and think "DC X puts pocket book, DC Y puts pocket book and diary" but no-one ever asks why we put different things.'<sup>28</sup>

Of course it is possible that any enquiries from the CPS are directed to the ASU and answered without the OIC ever being made aware of the discussion but, inevitably, many officers have the suspicion that much of what they submit is never really scrutinised. Whether or not this is the reality, the result is that many

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<sup>27</sup> CID 13/90.

<sup>28</sup> CID 11/343.

officers are prepared to be economical with the information they disclose in the expectation that they are unlikely to be caught out.

'I am sure that, on occasion, we have sent files to the Crown Court which, if the defence had been a bit more rigorous, they would have found problems. I mean, sometimes we lose exhibits but what you do is put a statement in that it is in the POFP store and they will never ask to see that - they just accept it.'<sup>29</sup>

Operational pressures and financial constraints also act as impediments to effective disclosure, with some evidence of a desire to restrict investigations, as a matter of practical expediency, in ways which could have a detrimental effect on disclosure. In cases where the existing evidence is felt to be compelling, there are indications that there is often a reluctance to undertake additional enquiries, such as ID parades and forensic evidence.<sup>30</sup> This is not based on a fear of what will be revealed but, instead, stems from a conviction that the case is sufficiently persuasive to make the extra work and expenditure unnecessary, however, as with other aspects of 'selective' investigation and disclosure, the motive need not be underhand to produce harmful consequences.<sup>31</sup> An example of this relates to the treatment of fingerprints found at the scene of the offence and the questionable status of non-matching lifts. Clearly the presence of the fingerprints of someone other than the suspect may serve to undermine the prosecution case but not all investigators consider this information worthy of disclosure.

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<sup>29</sup> CID 11/361.

<sup>30</sup> As one CPS lawyer explained, 'The police will often say "We don't need an ID parade - it's too complicated". But you have to point out to them that there is caselaw to the effect that, if you don't hold an ID parade when you should have done, then you are depriving the accused of an opportunity not to be picked out. If he isn't picked out then that might undermine your case but that is his right and, if you don't conduct the ID parade, then that might say something about the purported strength of our recognition evidence.' [CPS 4/30].

<sup>31</sup> Another CPS lawyer recounted the example of a criminal damage charge in which the MG6E stated that, although the accused's clothing had been seized, it had not been sent for forensic examination. On the lawyer's insistence this was done and the results revealed that the accused was not responsible. He was of the opinion that a significant proportion of cases had such forensic evidence which was not sent for analysis by the police in a conscious attempt to limit costs. [MCPS 5/5].

'You might have 3 or 4 sets of fingerprints at the crime scene, one of which matches the defendant. Someone should be saying 'but what about the other 3 sets? Who do they belong to?' but they never do, and we never tell them.'<sup>32</sup>

In this instance, the desire to present the straightforward case file leads the OIC to conclude that the existence of the contradictory fingerprints is not relevant for the purposes of disclosure, based on the argument that, as one set of prints found at the scene does match the suspect, then the presence of the unidentified prints does not affect the strength of the prosecution case. The fact that such material clearly falls under the ongoing duty of disclosure<sup>33</sup> does not appear to unduly influence this decision and this is in keeping with many of the day to day decisions as to what to include, and what to omit, from the schedules.

Another example of information which is commonly discarded at this stage is CCTV which, as with the fingerprints, may be seen as irrelevant if it does not support the prosecution case. This is particularly true of 3<sup>rd</sup> party video, such as shop CCTV.

'We sometimes contact people and say, "We had a job in town overnight, will you disclose the CCTV to us to review it?" and they might say "There is nothing on it". We never disclose that. The enquiry has been made and, because it didn't produce a positive outcome, we don't disclose it.'<sup>34</sup>

The potential hazards of such a narrow interpretation of 'relevance' in relation to video evidence have already been discussed but the critical point here is that this potentially undermining material is not perceived as relevant by the OIC. Once that conclusion has been reached, it is relatively easy for the OIC to omit this information from the schedules as, in the vast majority of cases, the OIC will be

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<sup>32</sup> CID 11/560.

<sup>33</sup> Para 2.1 of the CPIA Codes of Practice defines material as relevant to the investigation, 'If it appears to an investigator, or to the OIC, or to the disclosure officer, that it has some bearing on any offence under investigation or any person being investigated, or to the surrounding circumstances of the case, unless it is incapable of having any impact on the case.'

<sup>34</sup> CID 11/369.

acting alone.<sup>35</sup> From this moment onwards, the fact that the CCTV ever existed will be lost.

Whatever the motivation, there is little doubt that the obligation to disclose creates an implicit disincentive to investigate further, for fear of potentially awkward disclosure, a fact which has been recognised by officers and which appears to be an active consideration for many.

'By not asking the question, you don't get the answer that you don't want sometimes. You can sit at your desk and think, "There is a question I should ask but I don't want to ask". The Act probably says that you should write down the fact that you have thought of the question and decided not to ask it - but who is going to know? Yeah, there is no doubt, the more that you put in the file, the more will come back at you.'<sup>36</sup>

### **11.6. the creation of a case on paper**

'Mastery of paperwork and the ability to manipulate the "paper reality" are core police skills...The ability of the police to create a convincing paper record is a necessary part of successful case construction. Cases against individuals... are cases made out on paper, subject to assessment on paper and, for the most part, decided upon paper.'<sup>37</sup>

It has long been suspected that case files are constructed in a largely unidirectional way in order to reflect the certainty of the investigating team and reinforce their impression of the guilt of the defendant.<sup>38</sup> One of the principal mechanisms for this is stereotyping. This is usually discussed in the context of preconceptions of the offender him/herself but, in the context of file preparation, the process is equally applicable to the events surrounding the case, as contained

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<sup>35</sup> 'If you wanted to hide something you could - easily. You wouldn't have any problem in hiding it unless you speak to someone else and you know that they know. Then you are going to have to put something down. On other occasions where, say, you have a witness at the scene who doesn't correspond with what you know then, yes, you could lose that.' [CID 7/38].

<sup>36</sup> CID 5/63. One ASU officer saw the process in the following terms, 'I think that some officers can be blinkered in what they look at because they don't want to create too much unused material, so they will target one particular area to pull all the evidence together and then say, "I'm not interested in that and I'm not interested in that, so I won't generate too much unused material".'  
[ASU 5/16].

<sup>37</sup> McConville. M., Leng. R. (1991) *The Case for the Prosecution; Police Suspects and the Construction of Criminality*. London: Routledge.

<sup>38</sup> See, for example, Moody. S. & Tombs. J. (1982) *Prosecution in the Public Interest*. Edinburgh: Scottish Academic Press.

in the statements and other documentation which make up the case file. By using the stock expressions associated with that particular type of offence, a 'legitimate history'<sup>39</sup> of the events in question can be produced, which serves to characterise the actions of the defendant as 'normal' for the charge in question.<sup>40</sup> This is particularly significant given that the police in any division regularly deal with similar offences, such as burglary or car crime, often committed by a small number of offenders. Under these conditions a case which fits the regular pattern will, of itself, appear credible as *'Events, incidents and encounters are shaped, ordered and transcribed through this paperwork into recognisable typical cases.'*<sup>41</sup>

Examples of *'the editorial filter of the police officer's pen'*<sup>42</sup> were evident in a number of files studied, with witness statements re-worded by the police into their own language.<sup>43</sup> Some examples were merely illustrative of a desire to transform what a witness had said into terminology more suited to the process of

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<sup>39</sup> Garfinkel. H. (1968) *Studies in Ethnomethodology*. Englewood Cliffs, NJ: Prentice Hall.

<sup>40</sup> Sudnow. D. 'Normal Crimes.' (1965) 12 *Social Problems*. 255.

<sup>41</sup> Chatterton. M. (1989) 'Managing Paperwork', in Weatheritt. M. (ed) *Police Research*. Aldershot: Avebury. This view was echoed by Meehan, who concluded that, 'To prove guilt in court requires the reconstruction and transformation of what happened into "facts" that will appear to conform with proper legal procedure.' Meehan. A.J. (1997) 'Record-Keeping Practices in the Policing of Juveniles', in Travers. M., Manzo. J. F. (eds) *Ethnomethodological and Conversation Analytic Approaches to Law*. Aldershot: Ashgate. p 189.

<sup>42</sup> Heaton-Armstrong. A. (Editorial) 'Disclosure, Hearsay and Previous Misconduct: Progress in the Criminal Law?' (1997) *Med. Sci. Law* Vol. 37. No 2. 49. Similar concerns followed the introduction of taped interviews, with fears that the transcript had replaced the tape itself as the official version of events. - See Baldwin. J., Bedward. J. 'Summarising Tape Recordings of Police Interviews'. [1991] *Crim LR* 671. For stark examples of the manipulation of interviews and the difference between official and unofficial interviews see McConville. M. 'Videotaping Interrogations: Police Behaviour on and off Camera'. [1992] *Crim LR* 532. and an example of such selective transcription in this study was found in relation to a charge of affray following allegations that a woman had been held in her home against her will for a number of hours. A letter in the file from the defence solicitors questioned the accuracy of the interview summary and a number of points were conceded by the police in reply. In particular equivocation such as 'probably' had been omitted from the transcript (in order to convey a more emphatic confession than suggested by the original interview) and, more seriously, a paragraph was omitted which stated that the two talked for a number of hours in the house and so supporting the defence version of events, which was that the IP could have left at any time during the alleged imprisonment. [PCI/70]. For numerous other examples of such 'gilding the lilly' (albeit pre-PACE) see Smith. D. J., Gray. J. (1983) *Police and People in London IV: The Police in Action*. London: Policy Studies Institute.

<sup>43</sup> See, for example, Ainsworth. P.B. (1995) *Psychology and Policing in a Changing World*. Chichester: Wiley; Loftus. E.F., Palmer. J.C. (1974) 'Reconstructing of Automobile Destruction: An Example of the Interaction Between Language and Thought.' *Journal of Verbal Learning and Verbal Behaviour*. 13, 585.

prosecution, such as the following statement, purportedly from an elderly woman who had been the victim of a burglary:

'At approximately 6.15pm I had occasion to make a physical check of my home prior to leaving same in order to attend a nearby relatives home...at this particular time my home was both fully secure and in order in an undamaged condition, as were the contents therein.'<sup>44</sup>

Similarly, a CPS memo on one file advised the OIC to reword his statement to include stock expressions such as '*witnessed suspicious acts*' and '*I was on duty in a unmarked police vehicle*.'<sup>45</sup> The same memo, however, indicated a more explicit desire to minimise the possibility for future challenge by requesting that the wording of the statement be changed to render the reasons for conducting a traffic stop search more in line with PACE in order to '*correct this sentence*.'<sup>46</sup> Such skilful file preparation minimises the opportunity for criticism from superiors by controlling how investigations are recorded and constructing, as far as possible, a version of events which justifies officers' actions.<sup>47</sup> In this way,

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<sup>44</sup> PCI/79. Also, during one visit to an ASU office, a traffic warden who had made a complaint of abuse from a motorist (which was being considered for charge under s5 POA) was coached over the phone to amend his statement to specifically include the phrase 'harassed, alarmed or distressed'. [YASU 1/1].

<sup>45</sup> PCI/30.

<sup>46</sup> PCI/30.

<sup>47</sup> In a study of record keeping in juvenile cases, Meehan found reports compiled, 'In ways that portray the actions taken by the police as standing in a "correct" or sanctionable relation with court honored standards of law enforcement.' Meehan, A.J. (1997) 'Record-Keeping Practices in the Policing of Juveniles', in Travers, M., Manzo, J.F. (eds) *Ethnomethodological and Conversation Analytic Approaches to Law*. Aldershot: Ashgate. p 187. A high degree of selectivity in the production of documents certain or likely to be made available to outsiders is not unique to the police service and similar practices were noted by Garfinkel and Bittner who noted, in relation to the preparation of medical records, 'The contents of clinic folders are assembled with regard for the possibility that the relationship may have to be portrayed as having been in accord with expectations of sanctionable performances by clinicians and patients.' Garfinkel, H., Bittner, E. (1967) 'Good Organisational Reasons for 'Bad' Clinic Records', in Garfinkel, H. (ed) *Studies in Ethnomethodology*. Englewood Cliffs NJ: Prentice Hall. p 199. Similarly, Chatterton noted that questions would be asked about files which 'left too much in the air', Chatterton, M. (1975) 'Organisational Relationships and Processes in Police Work.' Unpublished Ph.D. Thesis. University of Manchester, and this concern with how senior officers will view the cases prepared provides yet another incentive to create credible and convincing files. 'It is through paperwork (or its absence) that they are able to provide a controlled and selective presentation of their activities for external scrutiny', McConville M., Sanders A., & Leng R. (1991) *The Case for the Prosecution: Police Suspects and the Construction of Criminality*, London: Routledge. p 80. In this study, one ASU officer noted a similar approach in relation to the files he saw, 'I am not saying that people are deceitful but bobbies have a habit of telling you what they want you to hear, not necessarily all of the facts.' [ASU 12/38].

handling one situation can create a pro-forma to be applied to similar incidents.<sup>48</sup> As Meehan concluded.

'When faced with a formal written account, officers will invoke their mental dossiers and the running record to interpret the significance of the written record for their policing. In effect, officers "read between the lines", treating the record as the product of a set of known decision-making and record-producing practices.'<sup>49</sup>

This has profound implications for the handling of unused material.

### **11.7. making it 'look right'**

With the creation of the case file and its transfer to the ASU the 'hands on' investigation gives way to the increasingly administrative prosecution process and this requires the OIC to produce a file which will pass successfully through the various stages of the criminal justice system. In this way, having produced a documentary account which supports the preconception of a 'typical' case, it is also necessary to undertake a similar exercise in relation to any unused material to reduce the risk of the file being rejected by the ASU or CPS at a later stage and the way in which officers perform this task reveals much about the operational perspective on disclosure in general. In particular, it is clear that, in a significant proportion of cases, the OIC approaches the task of schedule compilation with motives far removed from those embodied within CPIA.

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<sup>48</sup> See, for example, in relation to the policing of domestic disputes. McConville. M., Shepherd. D. (1992) *Watching Police, Watching Communities*. London: Routledge. p 159.

<sup>49</sup> Meehan. A.J. (1997) 'Record-Keeping Practices in the Policing of Juveniles', in Travers. M., Manzo. J.F. (eds) *Ethnomethodological and Conversation Analytic Approaches to Law*. Aldershot: Ashgate. p 186. The way in which the case is handled by the police can be depicted as having complied with the rules after the event by means of a process which Skolnick termed 'post-hoc construction of legal compliance' which he defined as, '...when he sees the law as a hindrance to his primary task of apprehending criminals, [the officer] usually attempts to construct the appearance of compliance, rather than allow the offender to escape apprehension.' Skolnick. J. (1994) *Justice Without Trial*. New York: Wiley. p 214.

There is considerable evidence that, for many officers, the preparation of the schedules is a largely mechanical task,<sup>50</sup> and this raises questions over the extent to which some officers actually appreciate the significance of the content. The effect of this, in some instances, is to present a misleading impression of the way in which the case has been investigated.

'On the back of the MG6, there are boxes to list the IO, OIC and disclosure officer and, initially, a lot of people were putting themselves as IO and the DCI as the OIC. Then the DCI said, "Hang on, I don't know anything about these cases" and that stopped. But you could see it was a get out clause for the officers.'<sup>51</sup>

There are two possible interpretations of this: Firstly, that the form was completed to suggest a greater degree of supervision than actually existed or; secondly, that the officers involved simply saw the form as listing a chain of command and assumed that the DCI should be at the end of this chain, regardless of the fact that (s)he could not have fulfilled the function which the form alleged. Neither engenders great confidence.

It will be remembered that the purpose of the MG6C is to alert the reviewing lawyer (and later the defence) to the existence of any relevant non-sensitive material yet, for many officers, this objective is replaced by a simple desire to produce a schedule which appears to be credible for the type of case in question in order to satisfy the ASU and CPS, and so successfully negotiate the potential barriers to prosecution which they represent. Unsurprisingly, detectives themselves were reluctant to admit to such tokenism in relation to the compilation of the schedules,<sup>52</sup> but there was general consensus among ASU officers that this approach was commonplace.

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<sup>50</sup> In their own review of the operation of CPIA disclosure the CPS also recognised the approach of officers towards this part of their work. 'We were told on many occasions, both by CPS staff and external interviewees, that the listing of unused material was regarded as a mechanical task.' Crown Prosecution Service Inspectorate. *Report on the Thematic Review of the Disclosure of Unused Material*. 2/2000 (March 2000). [4.11].

<sup>51</sup> CID 13/378.

<sup>52</sup> Although one officer did concede that, 'There are ways of getting round it [laughs] – "Oh, he's pleading guilty, I'll put this in, I'll put that in, that'll keep them happy".' [CID 2/238].

'There's no doubt that there are certain people who are just getting the form and rushing through it, crossing out ones that they think aren't applicable and putting the odd reference number in here and there, and then they're putting it on the file. I think there's a certain element of, "Well if the form's sort of partly filled in and it's on the file, then I've done one anyway".'<sup>53</sup>

The fact that officers are prepared to engage in such perfunctory disclosure, by means of schedules drafted to appear 'appropriate' for the case in question, illustrates the ease with which officers can restrict the flow of information from the outset. In part this dismissive attitude towards the scheduling of unused material can be explained by officers' scepticism towards disclosure in general but, in addition, there are well founded suspicions that a schedule which appears unremarkable and which does not attract the attention of the ASU or the reviewing lawyer is unlikely to return. As one ASU Sergeant admitted.

'If there was something glaring. If it came in totally blank, for example, then I would be saying, "Well surely there must be something. What about the general incident? Surely there is a RTA report". But, if there isn't a glaring error, then it will go through.'<sup>54</sup>

It is this element of calculated risk on the part of some OICs which is most alarming. The strategy of submitting a, possibly incomplete, file in the hope that it will be accepted. The result of this 'have a go' mentality is that any file which does not return for amendment is regarded as a 'success' and, subsequently, a conscious or unconscious template for future cases of a similar type.

'I think a lot of people don't really give it a lot of thought a lot of the time. It's, "Oh yeah, I'd best write something down on the schedule". So they write a few things down and, in the main, they have got away with doing that for years and so think "Well I have never had a problem with that in the past so I am obviously doing it right" and that is self-perpetuating.'<sup>55</sup>

This has a pernicious effect on the operation of the entire disclosure regime as it draws together a number of the key factors which serve to undermine the aims of CPIA. Any ideological resistance to the underlying ethos of the Act is reinforced by the apparent laxity of those charged with supervising the OIC's assessment of

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<sup>53</sup> ASU 4/11.

<sup>54</sup> ASU 12/18.

<sup>55</sup> CID 5/47.

the unused material. Similarly, officers who remain uncertain about the precise scope of their duties may conclude that the most expedient solution is not to seek additional training or clarification but, instead, simply to produce a token schedule in the hope and expectation that it will not be revealed as such.

'They think, "That form went through alright and there was no comeback, so I'll just put the same down.' They will have a set list in their minds of things that they are going to put on and providing they have a form in front of them with half a dozen things on they're probably quite content with that and think, "That's OK - that'll do".'<sup>56</sup>

The reasons why this superficial disclosure is not challenged more regularly by the ASU and the CPS will be explored further, but the critical point is that there exists an expectation on the part of many investigators that, providing sufficient is included to give the schedule an appearance of credibility, it is unlikely to return. Inevitably this leads some of the more diligent officers to question whether their efforts are worthwhile and the result is an increased temptation to adopt a less rigorous approach to disclosure.

'I think most people work on the premise, "If I can do it well enough to keep out of the mire - then that is what I am going to do" and, whether they like it or not, they will do it and to the standard which they feel is adequate to keep them out of trouble, until they get tripped up. That hasn't happened to the extent that I thought it would and the fact that that hasn't happened makes me wonder sometimes if I am going too far, because people who put in a lot less effort in relation to unused material aren't getting caught out, so why should I? If I mention something on a schedule I might get asked questions about it but, if I don't mention it on the schedule...'<sup>57</sup>

This suggests a conscious process of selectivity in preparing the schedules but, equally, problems can arise from a overly inclusive approach when this is not supported by adequate examination of the material concerned. In a number of cases it was found that the OIC had created a schedule of unused material based on those documents which *should* have been created as part of the investigation,

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<sup>56</sup> ASU 3/132. A CPS caseworker echoed this conclusion. 'We get amended MG6Cs all the time when nothing has changed in the case, for instance between committal and trial, so where has this additional material come from? CPIA is supposed to be about disclosure as soon as possible so why are we getting things 6 weeks later? I think their approach is "That's sufficient - it will do" and then they send it off.' [CPS 5/95].

<sup>57</sup> CID 5/60.

rather than on those which *actually* exist. The resulting schedules contained a plausible list of the forms and documents produced during the inquiry, and this was frequently sufficient to allow the file to progress through the prosecution, but such schedules were based on an assumption of what was held by the police, rather than on a physical examination of the material to determine its actual relevance.

The principal motivation for this appears to be an attempt to save time rather than a desire to actively conceal material but, once again, this reveals a great deal about the psychology of file preparation and the relatively low status of unused material. For an OIC who has formed a view as to the likely guilt of the suspect and has constructed the case file accordingly, the unused material is of little interest and, whereas there is an administrative requirement that it be listed, there is little or no incentive to actually examine it as it is likely to be neither needed nor asked for.

'They haven't checked, physically checked it themselves. They have presumed that it exists - or presumed that it doesn't exist, whatever the case may be. So presumptions have been made about the unused material - "Oh, there will be one of them" or "there won't be one of them".'<sup>58</sup>

The most common examples relate to officers' pocket note books and there were number of instances of schedules being compiled on the erroneous assumption that pnb entries existed. In one typical case, the MG6C listed 'officers' pocket book entries' but the file also contained the response to a defence request for the pnb of a specific officer. The e-mail from that officer apologised and stated that she did not make an entry in her pnb after the incident in question.<sup>59</sup> This clearly means that the MG6C had been compiled without sight of the pnbs, with an entry simply being listed for each of the officers in attendance<sup>60</sup> and the result is a

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<sup>58</sup> ASU 4/31.

<sup>59</sup> NCI 97.

<sup>60</sup> An ASU officer recounted a similar example. 'The officer had completed the unused material schedule and put the usual bits and pieces down, including the pnb entries of officers. He's signed the MG6E to say that he's looked through all this material and said that it doesn't undermine the prosecution case. We've asked for a copy of one of the pnb entries and it doesn't exist. He assumes that, because an officer attends, he will make a pnb entry and he's signed a form to say that he has checked it. Now that brings everything else that he has done into disrepute.' [ASU 7/5]. Similar problems were found in relation to initial messages.

schedule which presents an appearance of disclosure but which is fundamentally flawed as it is not based on an actual assessment of the material.<sup>61</sup>

### **11.8. coping with uncertainty**

The rapid pace of change within the police service has already been recognised and this places considerable strain on officers in attempting to keep abreast of developments which frequently impact directly on their work. The inadequacy of much of their training formed a recurring theme in the discussions with officers and this leads to a high degree of reliance on pooled knowledge and experience as an aid to the interpretation and performance of their duties. As with other aspects of the disclosure procedures, there are underlying cultural influences which combine to facilitate operational police work but often to the detriment of effective disclosure.

### **11.9. pooled knowledge**

In the absence of effective training officers have a range of options available to resolve issues of unused material. Notionally, both ASU and CPS are available to guide officers in exercising their responsibilities under CPIA, however the attitudes of many CID officers towards both of these bodies mean that, even where officers have the opportunity to consult with prosecutors during the file preparation stage, they often choose to reject it.<sup>62</sup> As will be seen, such avenues of communication are often used selectively and with a clear strategy as to the desired outcome. For this reason, the average CID officer looks to his/her colleagues for assistance with the uncertainties surrounding unused material and, just as the conduct of the investigation itself may be influenced by those with

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<sup>61</sup> Similar problems exist with the interview tapes of co-accused, 'The tapes are never transcribed and no-one ever listens to them so we don't know if they are relevant or not. All we ever get is the tape reference number.' [CPS 1/378].

<sup>62</sup> Research into the introduction of the LAPS scheme recorded only 1.8% of case where pre-charge advice was sought from CPS. The LAPS researchers concluded that it was the officers most in need of advice were least likely to seek it. Many lacked the necessary training or legal knowledge to appreciate cases where they needed help. Baldwin. J., Hunt. A. 'Prosecutors Advising in the Police Station.' [1998] Crim LR 521.

greater experience within the office, decisions related to disclosure are frequently the product of discussion between detectives, as one officer explained.

'Yes, there is a debate within the office, "I have got this what do you think?" and, really, we are all doing our own tests on material, based on what we have learned, and we are all applying our own tests as to what is relevant or what is sensitive.'<sup>63</sup>

The importance of this is twofold: firstly, it allows for the mutual reinforcement of both cultural attitudes towards disclosure and the practical strategies which emerge from them; secondly, this process occurs outside of the influence of either ASU or CPS. The CID arrive at their own common approach to everyday disclosure issues before involving those whose task it is to assess their effectiveness by means of an essentially insular process.

'I think if you can work it out for yourself then why go to them, because there is no need to go to them, more often than not we can work things out without having to go to them. I'll say to the lad across the desk from me, "He's done this, he's said this, he's said that - what do you think?" So where the CPS are asking us to go up there and ask them, we can work it out for ourselves - picking a law book up or talking to our DS, just by discussing it with him - but I definitely don't, and the other lads in the office don't go down to the CPS a lot - I don't know what CPS would say.'<sup>64</sup>

The result is a communal reservoir of knowledge and experience<sup>65</sup> which forms the first resource for the uncertain officer<sup>66</sup> and, although it is highly functional, there are potential hazards. It leaves officers whose understanding of CPIA may be defective to seek guidance from colleagues who are frequently in the same position,<sup>67</sup> and so creates a situation where decisions may be made on the basis of operational expediency rather than an intention to strictly comply with the

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<sup>63</sup> CID 8/106.

<sup>64</sup> CID 2/175.

<sup>65</sup> One ASU officer offered his assessment of the origins of this knowledge. 'It will be picked up from whatever training they get, from whatever is written or published in relation to that, from me and my colleagues in this job who check the files, possibly from CPS and the advices that come back, and experience - hit or miss!' [ASU 10/91].

<sup>66</sup> One detective was clear on the value of this process. 'That is how policy is made in this force, on the basis of people who have experience.' [CID 11/215].

<sup>67</sup> One ASU officer concluded, 'They ask each other and they ask someone else who doesn't really know and so the disease spreads. They will go to the bobby who has 20 years in, who wasn't interested in unused material before, and ask him. The answer is, "Oh I wouldn't bother doing that" and so they get the wrong answer.' [ASU 7/91].

duties.<sup>68</sup> In this way, genuine errors may be legitimated and supported by a shared, but flawed, body of experience and the very commonality of this experience means that there is little likelihood that there will be challenges from within the CID office.<sup>69</sup> Furthermore, even where there exists a genuine desire to fully satisfy the disclosure requirements, there is no guarantee that the knowledge of the provisions which has accumulated within the office is accurate. For example, as part of this process of consultation, officers may encounter potentially contradictory interpretations within this shared knowledge and so be forced to choose which to follow in order to achieve the desired outcome.<sup>70</sup>

‘There are one of two people who have dealt as disclosure officer on major cases and you would go to them and seek their advice, tell them what you think, listen to what they have to say, and then strike a balance between them.’<sup>71</sup>

This response to uncertainty within the communal body of knowledge is indicative of the approach officers adopt towards disclosure in general in that, where competing interpretations of the correct course of action exist, the response is not necessarily to seek advice from ASU or CPS, but to keep the process within the CID office and *strike a balance* between them. Clearly this does not occur in every case, and some officers may seek clarification from outside, but the fact that officers are prepared to weigh up conflicting advice from colleagues in this way, when the logical conclusion is that at least one of the opinions offered is incorrect, illustrates that the first instinct is to deal with

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<sup>68</sup> A process which one ASU officer characterised as ‘Ask each other, hope for the best and wing it.’ [ASU 12/102].

<sup>69</sup> To some extent this mirrors the work of Berger and Luckman which pointed to the importance of ‘significant others’ who are key in reinforcing subjective reality for the individual. Berger. P., Luckmann. T. (1966) *The Social Construction of Reality*. London: Penguin. p 169.

<sup>70</sup> This discretion over which advice to follow operates even where the OICs consult with ASU staff, ‘My first question is always, “Well who have you spoken to about this?” and, again, I have had my fingers burned over that because officers will tend to go in search of the solution that best suits them and go with that one.’ [ASU 14/40].

<sup>71</sup> CID 8/72.

the matter internally,<sup>72</sup> as part of a process which operates with the tacit approval of the remainder of the office.

There are a number of possible reasons for this insularity. Firstly, there is a well-recognised reluctance on the part of many officers to ask questions on any area of law for, to do so, demonstrates a lack of knowledge on their part which they fear will undermine their status or leave them open to ridicule. As one detective explained.

'As police officers we all like to say, "If I don't know I will put my hand up and ask", but police officers don't like admitting that they don't know something. I will ask and I will think "well what have I done wrong here?" and hopefully I won't make the same mistake twice. But some people will try to cover up a mistake and will repeatedly make it. It is part of the culture of police officers.'<sup>73</sup>

The reasons for this can be found not only in the relationship between the police and the wider community but also in the way officers relate to each other within the police service itself. To the general public, the police represent a symbol of authority and certainty and to maintain this, the officer must appear decisive and knowledgeable as to suggest otherwise may serve to undermine public confidence. One difficulty with this is that the ordinary member of the public makes no distinction between the experienced and the inexperienced officer in terms of expectation.<sup>74</sup>

More importantly, this premium on decisiveness of action also impacts on the way in which the officer is perceived by his/her peers, within a working environment which places enormous emphasis on issues of status and reputation.

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<sup>72</sup> Further evidence of this comes from the fact that, when ASU officers have the chance to give some input into CID practice it is possible to detect a change in approach. 'Once you have told them how to do it, once they go back to their units, they can pass that knowledge on. We can see that. A person will go back to a station and the other officers in that station will start to do things the way that he has been shown. But it is a bit like closing the stable door after the horse has bolted.' [ASU 11/23].

<sup>73</sup> CID 6/36. An ASU officer concurred, 'I think that's an inherent thing. If you're not quite sure about something then professional pride, irrespective of what it is, says "Well I'd better not ask or I will be made to look a bit of a fool", so they tend not to.' [ASU 5/12].

<sup>74</sup> 'You could be a brand new police officer, with 2 weeks in, walk round a corner and be faced with a multi-fatality accident where everyone thinks "Thank god the police are here" and, from then on, you have to think "Right, I've got to know what I am doing".'<sup>74</sup> [ASU 12/30].

'There is status all the time. It's status, status, status, you know. Everybody's guilty of it. If you look at a shift on a duty sheet and there's ten people on there, you go "He's a prat, he hasn't got a clue", or "He's the best lad on that shift. He knows exactly what he's doing".'<sup>75</sup>

Nowhere is this more prevalent than within the CID and, in considering how officers address uncertainty over the disclosure provisions, it is important to recognise that the understandable pride in membership of the CID can also act as an impediment, if it is accompanied by a reluctance to seek clarification for fear of drawing attention to a lack of knowledge.<sup>76</sup> Officers are highly critical of those whom they perceive to be falling below their own standards and are wary of working too closely with them for fear of being let down, or worse.<sup>77</sup> Consequently, there is little sympathy for those who appear to be anything less than wholly confident. This can create particular problems for those who find themselves returned to operational duties after prolonged periods in other roles for the training needed to bring them up to date with developments in legislation and procedure is rarely given. The result is officers whose length of service suggests a level of competence which may not be present and this brings its own crisis of self-confidence.

'They haven't been doing it for 10 years and it is a huge change and they can be lost, but they feel, "I have 20 years service in and I should be able to do this. I can't ask any questions even though I don't know what I am doing". That can happen.'<sup>78</sup>

The temptation is to compile what appears to be a credible schedule, based on experience, and the limited expectation of challenge by the ASU and CPS. This produce a situation where the OIC exercises a high degree of control over the content of the schedules.

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<sup>75</sup> ASU 4/111.

<sup>76</sup> As an ASU officer explained, in relation to training, 'Even for a simple video teach or something like that, you would expect less of a takeup from the CID than you would generally from the uniformed officers...you have people who have been a CID officer for years and for whom it is a self-fulfilling qualification - because they are doing it they must be good!'<sup>76</sup>

<sup>77</sup> It would be erroneous, however, to see such concerns as the exclusive province of CID, as one uniformed officer commented in relation to his own work, 'Certain individuals you will shy away from because you know that they are renowned for doing a sloppy job and there will be things that are missed out and lines of enquiry that are blatantly ignored and you don't want to be a party to that, especially now that disclosure has come in and somebody signs the dotted line and puts their job on the line.' [UNI 2.128].

<sup>78</sup> ASU 10/114.

### 11.10. getting it off the desk

In 1992, Runciman recognised that police work is conducted under a constant pressure<sup>79</sup> and, in discussing the mechanics of file preparation with CID officers, there was an obvious desire to spend as little time as possible on the process and to move the file on as quickly as practicable. In part this can be attributed to the emphasis on 'real' police work<sup>80</sup> and the corresponding low regard for paperwork in general, but uncertainty over disclosure provides an additional incentive to move the file on to someone else. In this way the goal of getting the file 'off the desk' emerged as a recurring theme which served to compound some of the disclosure related errors made by officers and to exacerbate already strained relations between some investigators, their ASU and the CPS.

Inevitably, for many officers, the physical removal of the file signifies the end of their responsibility and the perception that all the various elements of the criminal justice system function under the same level of pressure acts as justification for passing the burden on to others.<sup>81</sup> The resentment which this generates at the later stages of the prosecution process are evident from the comments of one CPS lawyer:

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<sup>79</sup> [Officers were under pressure] 'to expedite matters quickly and to move on to the next task.' Maguire. M., Norris. C. (1992) 'The Conduct and Supervision of Criminal Investigations.' Royal Commission on Criminal Justice Research Study No 5. London: HMSO. p 33. A former Chief HMI also observed that, 'From the very beginning of a police officer's career, he or she finds that the demands of the tasks in front of him or her tend to overwhelm the procedures laid down to deal with them. There is a constant sense of urgency in the police world, which often leads to corner-cutting...the working culture of the police service is shot through with corner-cutting and with expediency.' Woodcock. J. (1992) 'Why We Need a Revolution.' Police Review. 16<sup>th</sup> October. 1929-32.

<sup>80</sup> Although one CPS lawyer offered the following scathing assessment of what 'real police work' involved, 'Basically lots of macho hiding in bushes with video recorders and radios. "Let's get them arrested and then move on to the next case"...the minute the case comes up and there is a file to be prepared they don't want to know. Nothing that happens after the person has been charged is of interest to them, it just isn't sexy. That includes unused material which causes problems and sometimes it causes cases to be lost.' [CPS 4/114].

<sup>81</sup> 'The police, CPS and defence - all of them have more work than they can cope with. So, if you can get rid of it to someone else, then it's not an issue.' [CID 9/104].

'It all depends on the officer, some will make the effort and some won't and then the attitude is "Well if there is something wrong the ASU will look at it or the CPS will look at it so what is the point in me doing it now? I might as well just send it up". Sometimes you will write back to them with a problem and the response is "Yeah, I thought you would say that". The worst is when you get to court and the OIC comes up to you and says "I am surprised it has got this far" [laughs]. One way of looking at it is, they are supposed to knit us a jumper and we are supposed to check the quality - well sometimes all we get is a sheep! They give us so much and say "There you are, see if you can make a case of that" and they are quite happy to do that.'<sup>82</sup>

But, for investigators, this represents the pragmatic option. The fact that a suspect has been charged labels the case a 'success', in the medium term at least, and handing the case over to the CPS makes its ultimate outcome a matter for them, rather than the OIC. The file is completed and submitted, with luck there will be no outstanding issues to address<sup>83</sup> and the officer can concentrate on the next task.

'I think it comes down to time. They get focused with the evidence required to charge. Target that and get that. Then they charge and put the file in and think, "Let's deal with these other side issues as and when they crop up".'<sup>84</sup>

In terms of how officers approach their disclosure obligations this means that the time needed to address more wide reaching issues is viewed as better spent elsewhere.

### **11.11. the fallacy of ongoing review**

One casualty of this pressure to move the file on to the next stage of the prosecution process is the continuing duty imposed by CPIA to keep under review any additional material which comes to light and which may assist the

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<sup>82</sup> CPS 4/237. One uniformed officer added 'Well I'm very simplistic in my perceptions and I do believe that it all comes down to being bone idle. They think, "Somebody else will do that - why should I do it when somebody else will do it".' [UNI 2/166].

<sup>83</sup> As one ASU officer said of the response he had received to a query, 'It says 'please clarify which photographs you are talking about' but it really means, "It is out of my tray and I don't need to worry about it anymore".' [ASU 12/86]. This view was echoed by a CPS lawyer, 'I just think they just don't see it as a problem. "I have filled in the form and that is all I have to do - what does it matter?" As long as it doesn't come back and, even if it does, it will probably go back to the ASU rather than to the OIC.' [CPS 4/218].

<sup>84</sup> ASU 5/132.

defence.<sup>85</sup> In theory, this duty extends throughout the prosecution of the case<sup>86</sup> but, in practice, operational imperatives dictate that it is largely ignored.<sup>87</sup>

'Because stuff comes in so quickly, you are moving on to the next thing. Unless anything comes back from CPS saying "additional work required" you tend to forget about that and deal with what is on your desk at that particular moment in time.'<sup>88</sup>

Once again, the effect is to render ineffective one of the apparent safeguards under the legislation, not through any deliberate attempt to undermine the provisions, but because the Act simply does not recognise the realities of investigation and the fact that detectives rarely have the time to revisit cases which have moved on. The result is that anything which emerges following submission of the case file, and which is not seismic in its consequences, stands little chance of making it into the file and, in many instances, there is tacit acceptance of this by the staff of the ASU.

'Yes there is a conflict because there is pressure - time pressure to get the job done...effort is poured into a particular job and it will be worked on until the officer sees it as being "done". He completes the file and then it goes...if anything else comes up after the submission of the file which is relevant to it, they should put new schedules in, although that is rarely done. But, then again, it is rare that anything else comes up and, to be honest, that is because the officer is on to the next job.'<sup>89</sup>

Obviously the fact that this has occurred is not apparent from the file and, as any potential information lies with the OIC, any amendment to the submitted schedule would require them to, effectively, re-open discussions with the ASU or CPS on the case. In this way, even if the OIC recognises fresh material as potentially significant, there is little incentive to return to what is regarded as a completed case to add what will usually be regarded as superfluous information.

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<sup>85</sup> CPIA s 9. and s 9 (5).

<sup>86</sup> s 9 (1)(b) provides that the duty exists 'at all times...before the accused is acquitted or convicted or the prosecutor decides not to proceed with the case concerned.'

<sup>87</sup> 'At more than one site, prosecutors expressed concern that they are not always informed of unused material that comes into existence after the initial primary disclosure stage has passed.' Crown Prosecution Service Inspectorate. *Report on the Thematic Review of the Disclosure of Unused Material*. 2/2000 (March 2000). [7.4]

<sup>88</sup> CID 8/78.

<sup>89</sup> ASU 10/155.

It would be erroneous, however, to see such omissions as exclusively the responsibility of the OIC as, frequently, the system itself makes it less likely that material will be linked to the file which has already passed to the ASU or CPS. This is particularly true of forensic evidence<sup>90</sup> where the drive to deal with cases more quickly within the criminal justice system means that, on occasion, information arrives after the case is concluded and, here, there is little that can be done.

'You might arrest someone, charge them and send off fingerprint lifts, but it may be months before the results come in. You may have been to court and the case will have been dealt with before the results come back and, when they do, they might say, "These prints do not match the defendant". But by then the case has been weighed off and forgotten about – so what do you do then?'<sup>91</sup>

On a strict analysis, it could be argued that such results do not fall foul of the continuing obligation under s 9, as the material has not been identifying as potentially undermining until after the case has been concluded, but this may be a dangerous precedent. As has been suggested, there is anecdotal evidence of pressure to limit the extent of forensic testing and, if this can be used to evade the duty to disclose, then this must be cause for concern.

### **11.12. mistrust (of ASU and CPS)**

Problems with file preparation and submission are exacerbated by the uneasy relationship between the police (the CID in particular) and the CPS which began when the prosecuting role was removed from the police in 1986 and discussions

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<sup>90</sup> 'Even after PDH there might still be information coming in, it could be from forensic, blood can take a long time, DNA can take an awful long time to get through. So it might still be coming in. What you don't expect is the officer saying, "Well there's nothing on that" and just ripping that statement up, which there's a tendency to do.' [ASU 2/47]. In some cases even the forms used may assist in making the case appear more straightforward. For example, in relation to forensic evidence, the HOLAB 3 form has been replaced with the MG FSS form. The crucial difference between the two being that the new form requires only the items submitted for analysis to be listed whereas its predecessor required the police to list all appropriate items collected or seized (not just those submitted for analysis) and, further, to provide reasons why the other items were not submitted for analysis.

<sup>91</sup> CID 13/43.

with either body reveals that the underlying tension between the two is still apparent.<sup>92</sup>

'The police still see us as the "Criminal Protection Society", but we are here to make sure that the guilty are properly convicted - not to get convictions at all cost. Ultimately, if the evidence is not there then it's not there and if there is material which undermines then it undermines. You can't hide it so you have to do something with it and that can be difficult for them.'<sup>93</sup>

In both of the police forces which participated in this study there was evidence of a genuine and positive working relationship between the police and CPS. This was most apparent at ASU level and the critical role of the ASUs, in negotiating between investigators and CPS but elsewhere, attitudes are frequently more polarised, with CID perceiving the CPS as weak and averse to pursuing cases.<sup>94</sup>

'It hasn't changed, they are for an easy get out. There was a programme on the television not so long ago where a CPS solicitor was receiving his yearly report from his boss, and the earlier he dropped a case...the better it was in his report, because he was saving the taxpayer money.'<sup>95</sup>

Similarly, the CPS see themselves as easy scapegoats for poor investigation, unrealistic expectation and inadequate case preparation.

'As long as the crime is detected, then that is it for them. If there is a prosecution then that is a bonus and, at that stage, they can always say, "Well we caught them and the CPS made a mess of it". Over the passage of time we hear every excuse given but some of them really don't grasp even the basics of the evidence and they still think that their case is wonderful.'<sup>96</sup>

For officers, one of the principal frustrations is that, as the public face of the criminal justice system, it is they, rather than the CPS lawyer or caseworker, who is left to explain the collapse of the case to the victim. Within close-knit

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<sup>92</sup> For evidence of this, see the comments of Metropolitan Police Commissioner Sir John Stevens in Feb 2002 reported in 'Bandit Country UK: Why Criminals Win.' Sunday Times. March 10<sup>th</sup> 2002.

<sup>93</sup> CPS 4/268.

<sup>94</sup> One ASU Sergeant offered the following assessment. 'I think a lot of officers never come into contact with them and, because of that, if their case gets ditched, CPS are a bunch of tossers.' [ASU 7/199].

<sup>95</sup> CID 2/139.

<sup>96</sup> CPS 5/121.

communities this can generate tensions which erode confidence in the police and which make the everyday task of policing much more difficult.

'You can guarantee that if you work here for ten years, you will bump into the IP or their friends and they will say, "That was crap" and you think, "Oh, I don't need this" but you have to sit there and take it and CPS don't get that, because the victims don't go up to the CPS. They might write a letter and tell them that they're fucked off, but with us it's face-to-face, they see us in the street, they see us in the pub.'<sup>97</sup>

This resentment influences the attitudes and conduct of officers in a number of ways as it encourages officers to see the CPS, not as colleagues working towards a common objective, but rather as just another part of a dysfunctional criminal justice system, which operates largely in favour of the defendant and which is stacked against the police. Within this model the CPS, as lawyers, have more in common with the defence than with the police and the result is a layered approach to disclosure within the prosecution itself, which can be seen to operate on three, increasingly damaging, levels, particularly in relation to the treatment of sensitive material.

At its simplest, it has already been shown that there is a tendency for officers to construct files which fit the preconceived patterns of previous cases (as, for example, a 'typical' burglary) in an attempt to enhance the credibility of the charge and so reduce the possibility of discontinuance. This might be seen merely to represent a desire to place the offence within a category which will be recognised by others within the criminal justice system on the basis of shared knowledge and experience.

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<sup>97</sup> CID 2/163. One CPS lawyer saw the situation somewhat differently. 'I think that more and more officers are bringing along their "dodgy" cases and, if we advise against proceeding, they can always go back to the IP and say, "The CPS wouldn't do it", but it is not uncommon for them to have already identified that case as "dodgy" before they even bring it to us and almost seeking confirmation that it won't be good enough. There is a feeling that they know that they should say "no", but that they come to us to do the dirty work - we are used as a bit of a filter for cases which they are not too sure about themselves.' [CPS 6/210].

A more serious situation arises where the OIC still regards the CPS as allies, but has little faith in their ability to deal properly with sensitive material,<sup>98</sup> or to maintain the necessary confidentiality. This may arise from a lack of confidence in the individual CPS lawyer<sup>99</sup> or from a broader mistrust, not of the CPS, but of the criminal justice system as a whole. If officers fear that the CPS themselves will be compelled to reveal material, then the safest option is not to tell them.<sup>100</sup>

'In those cases I have mentioned where the case folded on issues of sensitive material, the problem was that they just didn't think we should be told. It's not that they don't trust us with the information, it's just that they fear us telling them that they have to disclose it and, if they can't, then we will drop the case.'<sup>101</sup>

There are also concerns over security within CPS offices and questions of who might have an opportunity to read files. Cases of accidental disclosure by the CPS to the defence have done little to engender confidence on the part of some

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<sup>98</sup> To some extent such concerns were shared by the CPS itself in its own review of disclosure practice, 'Prosecutors told us that they take sensitive material very seriously. We found that they frequently examine it themselves. In striking contrast, the schedule was endorsed correctly by the prosecutor in only 59 out of the 144 relevant cases. In many cases there was no endorsement at all, not even the signature of the reviewing prosecutor. This means that we are unable to satisfy ourselves that in all cases sensitive material is being considered, or that the appropriate person is dealing with it.' Crown Prosecution Service Inspectorate. *Report on the Thematic Review of the Disclosure of Unused Material*. 2/2000 (March 2000). [6.21/6.22]

<sup>99</sup> 'If they trust you, they know you and they know that you can do your job, then they will tell you. Not every time but a lot of officers will tell you that there is an informant involved and run you through the evidential issues that it raises. But I am also sure that, if they don't know you and they aren't that confident that you will protect their sources, then I am sure that there are instances where they won't tell you that there is an informant involved. Having said that, if you know that the police raided a house at 6 am with a search warrant and kicked the door down, then you are going to be asking where that information came from and you know that, if there wasn't an informant, there was at least an anonymous call and, sometimes, they won't tell you outright, they just wait for you to ask.' [CPS 3/196].

<sup>100</sup> One 1996 study found that, in none of 31 cases where an informant had been paid by the police, had the involvement of an informant been brought to the attention of the CPS. Dunnighan. C., Norris. C. (1996) 'The Role of the Informer in the Criminal Justice System'. London: ESRC.

<sup>101</sup> CPS 4/284.

officers<sup>102</sup> and this was reflected in the South Wales Police Disclosure Survey, conducted shortly after the implementation of the Act, and which highlighted a mistrust of the CPS in relation to accidental disclosure '*especially where informants may be involved in the case.*'<sup>103</sup>

At worst, if the role of the CPS is perceived by investigators as more ambiguous, then the whole premise of disclosure based on the assessment of the OIC becomes seriously undermined. If the OIC is unwilling to pass on information to the CPS, because of a lack of faith in either the ability or the willingness of the prosecutor to keep that material from the defence, then this serves to legitimise a process of concealment which creates serious ethical dilemmas.

### **11.13. coping strategies**

Having illustrated some of the factors which emerge during the file preparation stage and which militate against the effective operation of CPIA disclosure, what remains is to consider the strategies which investigators employ to minimise the threat posed by the legislation.<sup>104</sup> For many officers, the easiest strategy is

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<sup>102</sup> In an early assessment of the operation of CPIA, ACPO noted that, '...there would appear to be anecdotal evidence that there is a fear of accidental disclosure by the CPS to the defence resulting for example in the identification of informants.' Association of Chief Police Officers. 'Disclosure and the CPIA: Implementation in Practice.' Police Staff College Seminar 12/5/98. There was at least one such example in the cases examined as part of this study where a CPS memo stated, '...at the court today the defence solicitor handed me the MG6, MG6C, MG6D and MG6E which had been given to him in the advance disclosure bundle left at the court office. He had read the same but at least had the decency to return the documents to me. This could have had extremely serious consequences if the confidential information forms had contained informant details, etc.' [NCI/53]. At least one CPS caseworker interviewed, recognised the dangers, 'Some of the lawyers can be a bit slapdash and just not note what is on the MG6D. I personally never send counsel a 'D' or an 'E' if there is anything on it, because you never know who else is in their chambers and things get left lying around...different caseworkers will include the 'D' and the 'E' in the brief but I wouldn't. Things get left in robing rooms and chambers and I just think it is too dangerous.' [CPS 7/139].

<sup>103</sup> South Wales Police (1998) *Disclosure Survey*.

<sup>104</sup> 'While outright fabrication of evidence is probably rare...departure from rules and procedure affecting evidence are far more common...There will be no fundamental change as long as many police officers believe that the job cannot be done effectively within the rules.' Smith. D.J., Gray. J. (1983) *Police and People in London IV: The Police in Action*. London: Policy Studies Institute. p 228-30. This would appear to be very much the norm when new restrictive procedures come into force. An example would be the 1988 survey by Sanders and Bridges which found a number of ploys used by officers to prevent suspects receiving legal advice. Sanders. A., Bridges. L. 'Access to Legal Advice and Police Malpractice' [1990] Crim LR 494.

simply to list everything, without any attempt to apply the tests for relevance.<sup>105</sup> This is on the basis that the defence are going to get the material eventually in any event and so to laboriously consider each item is simply a waste of time.

'I can hand on heart say that, for most people, "unused material" is simply what is there on your desk at the end of the file prep process...it must be "unused" because it does not form part of the MG file. But seldom do people go through it and pull out irrelevant bits or take anything out. There it is, it forms part of the file, it gets rid of that piece of paper, the job's over, thanks for that and let's move on to the next one. It's a nonsense really.'<sup>106</sup>

This is very much in accordance with the pragmatic approach outlined above as it enables officers keep to a minimum the time spent on considering material which they believe, in the main, to be inconsequential.<sup>107</sup> As a result, this approach has been adopted, not merely by individual investigators, but as the norm within certain CID offices, although this is not without difficulty. It might be thought that such extensive disclosure is wholly in keeping with the spirit of legislation intended to make available all unused material which may be of assistance to the defence, but this does require identification of that material which is relevant. A blanket policy of disclosure by officers circumvents this assessment of the value of the material to potentially undermine or assist and raises the question of whether the obligations imposed under CPIA have been fulfilled, a fact which is recognised by at least some investigators.<sup>108</sup>

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<sup>105</sup> 'If you were to compile a 10 question questionnaire asking "Which of these would you disclose?" the vast majority would just say "everything" I'm sure.' [CID 9/36].

<sup>106</sup> CID 9/68.

<sup>107</sup> 'In reality they are all probably irrelevant to me but you are back to are they irrelevant to them? Who knows? It is more of an arse-covering exercise, by putting your umbrella up and putting it all in, so you can say, "Look, I've nothing to hide, it's all there. That is what I gathered, that's what I used and that's what I didn't use".' [CID 9/70]. To some extent the ASUs encourage this approach by refusing to challenge unnecessary inclusion of material on the schedules, on the basis that this is far preferable to material being omitted, 'We get memos back from CPS saying, "That shouldn't be on". But I am not sending that back to the OIC to tell him to take things OFF the schedules - that sets a very bad precedent.' [ASU 12/118].

<sup>108</sup> 'My argument with just letting them have everything is you are still not pointing out what it is that undermines your case or assists them so, even if you let them see all of the unused material and give them a copy of it they are still within their rights to complain that the police and the CPS have failed to carry out their duties under CPIA and, had that information been made available to them, they would have been able to present a defence. If I were a defence solicitor and the police said to me, "You can see everything", then I would leave it until the very last moment and argue abuse of process on the day of the trial...and any judge worth his salt has got to agree that it is an abuse of process.' [CID 6/32].

There is also the question of whether this, supposedly open, approach is simply a mechanism for masking an ignorance of the disclosure provisions as a practice of 'total' disclosure allows officers present the appearance of having complied with the provisions yet, at the same time, avoiding difficult assessments of relevance. Evidence of this can be found in those cases where the officer completing the schedules, has shown a fundamental lack of understanding of the consequences.

'There are some who are probably so nervous of getting it wrong that they tend to be over cautious but, for instance that rejection memo, some officers will schedule that. They will put it on a schedule and you think, "Oh GOD! File rejection memo?" I mean, what is the average defence solicitor going to say to that? - "Music, music to my ears".'<sup>109</sup>

Another relatively simple ploy is to leave the schedules unsigned, which allows the file to progress through the system but, due to the sheer volume of cases, makes it difficult to trace the schedule back to an individual officer if problems arise. For the CPS the result is an degree of uncertainty.<sup>110</sup> Again, this is a logical strategy for the uncertain officer to minimise the scope for censure should the schedule prove to be deficient, and one which relies on the pressures and throughput of system itself for its success. As such it serves to illustrate not only the evident uncertainty which many officers still have about the operation of the disclosure procedures but also the opportunities which exist for officers, by virtue of their high degree of operational autonomy, to protect themselves by selective compliance, without going so far as to overtly flout the rules which govern their conduct.

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<sup>109</sup> ASU 14/69.

<sup>110</sup> 'We quite often get schedules through and they are typed but they are not signed by the disclosure officer and they go on the file and nobody is putting a signature to it so, if the wheel came off, then who would be accountable?' [CPS 7/62]. The CPS Thematic Review noted, in relation to the incorrect completion of MG6Es, that, in more than 50% of the sample, the disclosure officer had not indicated whether the form was submitted at primary or secondary disclosure stage - 'This may at first blush seem a pedantic point. But without careful adherence to and recording of the procedures at each stage, the risk of errors and oversights becomes significant.' Crown Prosecution Service Inspectorate. *Report on the Thematic Review of the Disclosure of Unused Material*. 2/2000 (March 2000). [5.44]. This also affected the mechanics of this study in that one of the original intentions had been to chart the disclosure decisions within cases by reference to the various drafts of the schedules kept within the file. this proved to be impossible in many cases, however, as the schedules, although completed, were frequently unsigned and undated, thereby obscuring not only who had written them but also the order in which they had been produced.

A similar approach can be seen in one of the other popular strategies. Where there are copious amounts of unused material, it is common for the police to offer the defence the opportunity to view, but at the police station. This is with the expectation that any initial enthusiasm for the task will quickly wane.

'Defence barristers will say, "Yes, I want a member of the legal team to examine the tapes" and so they come down and we put the tapes on for them, but after about 10 minutes they are virtually asleep and say, "Right I think we have seen enough". But at least that puts the onus on the defence by saying, "I haven't looked at the tapes but, if you want to, they are there".'<sup>111</sup>

This is especially useful in relation volume material, such as unused CCTV, where the logistics of multiple copying are often prohibitive. What is clear, however, is that alongside the understandable desire to avoid duplication time and costs, there is a recognition on the part of some officers that selective phrasing of the schedules can be used to deter unwanted inspection.

'The fact that we put on "This tape is a 4 camera, 24 hour tape, so if you want to come and view them you can" - that tends to put them off and, if you phrase things in certain ways on the schedules, you can avoid that.'<sup>112</sup>

It must be stressed that there was no evidence within the cases studied of this strategy being used to actively conceal from the defence material which the OIC actually knew to be detrimental to the prosecution case, but there were examples of cases where the OIC, having made an assessment of the relevance of certain segments of the CCTV, was keen to avoid the inconvenience of the defence requesting copies of the remaining tapes. If the schedules can be drafted in such a way as to discourage inspection, then the extra task is avoided without appearing to flout the procedures.<sup>113</sup>

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<sup>111</sup> CID 5/6.

<sup>112</sup> CID 7/53.

<sup>113</sup> The way in which material is made available to the defence can also be used to deter inspection, as one defence solicitor explained, 'When we are offered inspection at the police station we are often shown a box of material in the corner and told to "get on with it" but, in many cases, we are very much made aware that we are viewed as wasting their time by asking to see the material in the first place.' [DS 1/4].

This creative approach to the use of the schedules is also apparent in relation to sensitive material which the OIC is required to list on the MG6D. As this schedule is not disclosed to the defence, it allows material to be withheld without the risks inherent in the blatant suppression of material and some detectives have quickly learned to exploit this.

'What we tend to try to do now is to put more things on the sensitive schedule if we can and try to justify it later. That takes you out of the realms of perverting the course of justice by withholding stuff but you can put it on the sensitive schedule, and you can get around that to some extent by using PII.'<sup>114</sup>

This reaffirms that, for many officers, the objective remains to reveal as little as possible to the defence and, if material can be categorised as 'sensitive', then there is the possibility that it can be kept from the defence with minimal risk. As with the other strategies, this is an essentially pragmatic attempt to adapt the disclosure provisions, as far as possible, to accommodate operational objectives. In this way, although OICs will argue that certain material will always warrant its 'sensitive' status, they are prepared to ignore this where they believe it creates a tactical advantage.

'I think the system there of disclosure can be used in both ways, it can certainly be used to strengthen our case. Things like surveillance logs - there are times when we won't disclose them or will put them down as sensitive and there are times when we will disclose them because we want the defence to have a look...you wouldn't normally put the surveillance log down, it would go on sensitive material, because it's describing your tactics, but if you really want to show just how strong a case you have got you'll say 'Right, put it down, put the surveillance log down' and let them have it.'<sup>115</sup>

Here the OIC is exploiting to the full his role as initial arbiter in matters of unused material, by categorising documents in order to maximise the advantage of the prosecution. This can hardly be said to in the spirit of the legislation.

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<sup>114</sup> CID 7/40.

<sup>115</sup> CID 2/246.

## **12. Stage 3: the CID and ASU**

### **12.1. the ASU**

It is at this point that the file leaves the OIC and passes to the ASU, the role of which is pivotal in determining whether or not the provisions of CPIA are complied with fully. Positioned between the CID and the CPS, their relationship with both bodies not only exerts a powerful influence on the ultimate success of the case, but also serves to illustrate many of the interdepartmental tensions which exist within the criminal justice system. The interaction between the various elements of the system exacerbates one of the main weaknesses of CPIA, as it is here that information which may potentially undermine or assist can be lost. Examination of some of the factors influencing the decision making process at this stage demonstrate why CPIA has not succeeded as envisaged.

### **12.2. differing roles**

One of the most fundamental criticisms of CPIA disclosure is the absence of any national approach for how the procedures are to be implemented. Although there are national standards, in the form of the Attorney General's Guidelines, the Code for Crown Prosecutors and the JOPI, a great deal of the operational detail is left to the discretion of individual forces and nowhere is this more apparent than in defining the precise role of the ASU within the disclosure regime. This differs markedly between forces, with the central issue being who assumes the mantle of disclosure officer and, consequently, takes responsibility for the completion of the schedules. The two police forces studied illustrate the alternative approaches. In one, the OIC acts as the disclosure officer and signs his/her own schedules. In the other, the role of disclosure officer is performed by a member of the ASU, acting on the information provided by the OIC. The CPIA Codes of practice are sufficiently vague to allow for either interpretation,<sup>1</sup> but the choice of which model to adopt has far reaching implications.

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<sup>1</sup> 'The chief officer of police for each police force area is responsible for putting in place arrangements to ensure that in every investigation the identity of the officer in charge of an investigation and the disclosure officer is recorded.' [Codes of Practice para 3.2].

### **12.3. the ASU as administrators**

At its simplest, the ASU is what the name suggests, a unit which performs an administrative function to ensure that the file is ready to be sent to the CPS.<sup>2</sup> Here, their focus is on file content and whether the appropriate forms and statements have been included, with issues of evidence and unused material remaining the exclusive province of the OIC who signs the schedules. For the ASU officers in these forces there is little doubt that the responsibility must lie with the investigator.

'How can we sign it? We weren't there. We don't know what they have collected. That was our argument when it first came in because they said, "Right, the ASU Sergeant can sign the schedules as the disclosure officer". I'm not investigating and I have to rely on PC Bloggs to come along and say "that's the unused material". How can I sign a form to say that all the material is there?'<sup>3</sup>

In this way, in all but the most serious cases, the functions of OIC and disclosure officer are combined and performed by the same person. This means that there is no interface created between the two roles and, consequently, no potential for communication breakdown between them. The disadvantage is that an OIC with a defective knowledge of CPIA is not going to recognise or correct any errors simply by revisiting the unused material in the role of disclosure officer.

### **12.4. the ASU as disclosure officers**

In other forces the function of the ASU is expanded to encompass not only the mechanical compilation and checking of documentation but also the signing of the schedules. The functions of OIC and disclosure officer are separate and, on this model, the ASU adopts a more interventionist role in matters of disclosure. To a degree, this is more in keeping with the spirit of the legislation and the

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<sup>2</sup> 'ASU staff, certainly in this force, are clerical assistants. They are not there to make decisions.' [CID 5/71].

<sup>3</sup> ASU 7/47. Another ASU officer concluded, 'There's no way I could do it...I can't sign a disclosure report because I have not been involved in the investigation - for all I know there could be stuff there which undermines the case.' [ASU 4/161].

wording of the Codes of Practice,<sup>4</sup> in that both suggest that the disclosure officer will monitor the judgment of the OIC in matters of disclosure. The difficulty with this approach is that it could also be said to act as an impediment to effective disclosure by creating an interface between the investigator and the disclosure officer, with the risk that potentially valuable material will not be adequately communicated between the two and so will fail to be disclosed, as one CPS lawyer explained.

'Having had experience of places where the schedules are prepared by the ASU and places where it is done by the OIC, I would rather it was done by the OIC. I have seen cases at the magistrates court where you get to trial and the OIC is called and says, "Well we did that - don't you have that document?" and, quite often, that document assists us, but they just haven't reviewed it. The difficulty with the schedules being prepared by the ASU is that it absolves the OIC of responsibility after charge - "not my problem".'<sup>5</sup>

In reality, however, the situation is considerably more complex as, whether the force adopts the 'combined role' or 'separate role' model, the distinction between the two approaches is often blurred by decisions taken within the ASU, based on the nature of the problem, the reputation of the OIC, or a combination of both.

### **12.5. the power of signature**

It has already been seen that a number of factors at all stages of the investigative and file preparation stages combine to make officers reluctant to assume ultimate responsibility for paperwork in general and for disclosure in particular. Enduring uncertainty over the precise nature of their duties, together with ideological and practical resentment of the Act, creates the desire to pass the file on as quickly as possible, a view encouraged by the low status of paperwork when compared to 'real' policework. As a result, the question of who, ultimately, signs the

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<sup>4</sup> Para 3.1.

<sup>5</sup> CPS 4/164. A CPS caseworker also highlighted the dangers of schedules being compiled by the ASU, 'They will flag things up without any real idea, I think, of what they are. They will put "pocket books", and it could be something really relevant that should be made into a statement, and sometimes you ask them and they don't know what it is which makes it obvious that they have compiled the schedule without going back to the OIC.' [CPS 1/150].

schedules becomes central. Officers are wary of putting their name to the disclosure schedules and so a process which allows them to pass this responsibility to the ASU is welcome, and recognised by the ASU themselves.

'A lot of them, and they think "disclosure officer? - Oh he's the one that if he signs THAT then he can get into trouble" [laughs]. The mentality of some people in the police force is, "If I sign that I could get into trouble so I'm not signing. It can go upstairs and THEY can sign it".'<sup>6</sup>

This might be seen as simply a manifestation of the general reticence on the part of many officers to take ownership by means of signature, and it is important to recognise the influence which this can exert. Those duties which officers see as 'real' policework are conducted on the streets, usually under the immediate control of the officer and within an environment which officers view as their own. When the issue enters the arena of other criminal justice professionals, however, it leaves the natural environment of the police and enters the world of the judicial system, which is not governed by the crime control imperatives of the police. Consequently, the police no longer have control of the process and their judgment, which ordinarily provokes deference on the streets, is subject to intense scrutiny and challenge. For this reason, the link between the signature and accountability is a powerful one.

'A signature means liability should there be any comeback at a later stage..."If you sign that form then you're responsible, you are the disclosure officer so make sure that you do it properly", and so it's almost like you're trying to coerce people into doing it, you know, "You're going to be in bother if you don't".'<sup>7</sup>

This is particularly important in those forces where the role of disclosure officer is performed by a member of the ASU, rather than the OIC, for here the investigator can more easily attempt to abdicate responsibility for issues of disclosure to the officers at the next stage of the process. The question of whether it is tenable for the ASU to address matters of unused material at all remains to be considered, but there was a clear impression gained from the interviews conducted with detectives in the force areas studied that factors such

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<sup>6</sup> ASU 3/74.

<sup>7</sup> ASU 4/71.

as uncertainty, operational pressure and the concept of 'real' policework combined to produce a 'have a go' mentality in relation to unused material, where files were frequently submitted with token disclosure, based on the assumption that they were unlikely to be returned and were unlikely to be subjected to criticism. Inevitably, this creates a climate where the temptation for the OIC is to distance him/herself from disclosure decisions, to minimise the risk of any comeback on themselves and to leave any issue of accountability to the ASU.

In some areas, this has led to the introduction of other forms which, although not part of the file, attempt to instil in the OICs some sense of responsibility for the information which they have passed on.

'We have what's known as a "get out of jail free card", which is a form which you send out to the officer to remind them of the unused and to get an actual signature to say that that's all the unused that he has. Then, as the secondary disclosure officer, I can say that, "From this point your honour, to the point where the file came in, I've got nothing to disclose, if there is anything, it is nothing to do with me and there's my report [laughs and waves piece of paper] to say that it has nothing to do with me." It's an awful way to go on but basically that's what it's coming to.'<sup>8</sup>

This leaves the question of why there should be two approaches to the signing of the schedules, with the onus on the OIC in some forces and on the ASU in others. Both strategies have arisen from considerations of practical expediency but, in different ways, they both contribute to the appearance of disclosure which frequently masks a reality which is far less certain.

### **12.6. the uneasy role of the ASU**

There can be little doubt that the ASU is not regarded as a prestige posting within the police as, sedentary, administrative and working 9 to 5, it typifies all

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<sup>8</sup> ASU 2/43. Another ASU officer described a similar process in another division, 'I can say, "What's going on here? You are dealing with this. You are the disclosure officer. You are going to have to stand in court and explain this" and sometimes, although it's not a sanction in itself, that is a method by which you can get people to appreciate things. Well, by "appreciate" I mean "gain an appreciation" - there's not much by way of gratitude.' [ASU 5/56].

that is not viewed as 'real' policework.<sup>9</sup> To make matters worse, the role of the ASU is frequently to question the judgment and sometimes ability of operational officers, from a perspective which appears, to many officers, to be closer to that of the CPS than the police. These factors combine to exacerbate a number of the underlying tensions within the police service and place the ASU in an often invidious position.

### **12.7. credibility and resentment**

The reluctance of many CID officers to seek clarification on matters of disclosure from outside of their own office acts as a serious impediment to increasing their understanding of the provisions and leaves them reliant on the shared, but not necessarily accurate, knowledge of their colleagues. In this climate, the ASU, with the experience gained from processing large numbers of often complex cases, represent a resource which could be exploited by officers and yet there are reasons why, even when officers do choose to consult the ASU, this does not always work efficiently.

Much of this can be attributed to the common perception that the ASU is divorced from operational policing, with little or no understanding of the realities of practical police work. In a profession heavily influenced by issues of status, it is vital for the CID to believe that they are seeking advice from those for whom they have professional respect and the effect of this can be seen in the comments of one detective which were typical of those interviewed.

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<sup>9</sup> 'There's a definite resentment amongst the officers working out there on the shifts that we've got a cushy number. But it's interesting that, if vacancies arise, no-one applies for them.' [ASU 4/103].

'Formerly, the ASU Inspector here wasn't that experienced in relation to serious enquiries. The situation has changed somewhat in that the Inspector now is a former DS. So if an issue arose, I would have no hesitation in going to him, because I know I would get an experienced answer whereas, formerly, I would have gone straight to the CPS. Likewise the Sergeant who is here now, and has been here for a number of years now, and not to his discredit at all but I wouldn't go to him to ask his opinion on a job because I don't think he is experienced enough to give me a valid opinion. He could tell me that has to go into the file but if I was to say to him, "What about this aspect here?" He would just say, "Leave it with me," and he would ring the CPS, so I might as well do that myself.'<sup>10</sup>

This very clearly makes the distinction between the former CID officer and the former uniformed officer.<sup>11</sup> The former has operational credibility and, consequently, his opinion is sought and valued. The latter is regarded as inherently less knowledgeable (regardless of whatever experience he might have) and, therefore, more easily disregarded. Both work in the ASU and so are responsible for the processing of large numbers of cases and so it appears that the issue is not their knowledge of the disclosure provisions but, rather, their knowledge of what it is like to be an investigator and to share the norms and values associated with that role. If, as in the above example, the investigator turns to the CPS, then the damage is minimal. If, however, the response to perceived inexperience in the ASU is not to ask at all, then any defective disclosure decisions may remain undiscovered.

So, to what extent is this perception of the ASU as operationally inexperienced justified? Certainly in the case of some officers the credibility gap was apparent, as in the case of one officer whose duties included the signing the disclosure schedules as disclosure officer.

'Until I came in here, I was actually doing a job which was more community based, I didn't tend to make a lot of arrests and put a lot of files in, most of my work involved schools and meetings and things and getting involved in the community, that sort of thing.'<sup>12</sup>

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<sup>10</sup> CID 11/486.

<sup>11</sup> Another exchange further illustrates the point that it is CID experience which matters, 'There are 2 Sergeants up there who have never been on CID in their lives. One has been a traffic Sergeant and the other is an old patrol Sergeant and we laugh when they say, "Have you thought about this?" and we think, "Have you ever done a rape file?" - They have never done it themselves.' [CID 7/92].

<sup>12</sup> ASU 3/37.

Such officers are unlikely to command the respect of the CID, irrespective of the expertise which they have gained in their work. Their background is not in investigation, their experience of submitting more involved files is limited and their knowledge of the mechanics of 'real' police work is minimal. Consequently their status is diminished in the eyes of detectives and they are likely to be regarded simply as administrators. It must be said, however, that the majority of ASU staff interviewed did possess extensive operational experience prior to joining the unit and, for some, being dismissed as mere administrators by CID clearly rankled.

'There's a lot of resentment, and it's the culture in a way because there's resentment towards people with 9 to 5 jobs, there's resentment towards people who do office based jobs. It's, you know, the macho thing. But I did ten years on shifts on the outside and I'll be going back to it. I've done 5 times as much as they have and they are telling me that I'm in an office doing a cushy job.'<sup>13</sup>

This revealed a great deal about the dynamics between departments within forces studied. The denigration of office work is an essential element of the police self-concept and anyone who finds themselves in an administrative role finds themselves, to a degree, tainted by association, with their acceptance of an office role separating them from the world of 'real' policing and so diminishing their status in the eyes of operational officers.<sup>14</sup> This is significant as it enables OICs to distance themselves from the ASU and trivialise their role. As a result, any adverse decisions or criticisms which the OIC receives can be dealt with without diminishing the operational status of the investigator in the eyes of his/her peers, although such criticisms do act to reinforce the antagonism which some CID officers have for their ASU counterparts.<sup>15</sup>

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<sup>13</sup> ASU 4/95. As another ASU Sergeant remarked, 'We're not just "desk jockeys". We've been out there and we've fought with angry men in the street as well.' [ASU 6/85].

<sup>14</sup> Such professional sensitivities were evident in discussions with a number of OICs, 'Being an experienced detective with 18 years experience, I wouldn't expect to get a file back from the file preparation unit, from someone saying, "We don't think you have done this right" or "We think that this should be disclosed but you haven't listed it". That doesn't really happen.' [CID 11/458].

<sup>15</sup> Such inter-departmental antagonisms are common within the police service, as one ASU officer explained, 'The most notorious example is CID and traffic - they hate each other basically. CID think that traffic just ride about in cars all day and have a cushy number and the attitude from traffic is that CID officers are all bloody alcoholics who drink and drive. That isn't true - well there is an element of truth in it because that's why the resentment is there.' [ASU 4/99].

'The officer who, perhaps, resents you because you are sat behind a desk, working 8 til 4, five days a week, Saturday and Sunday off, while he has to work shifts. He might resent you, not personally, but your job, and his standard of files is poor so you have to reject them. In that way the animosity can grow.'<sup>16</sup>

The result can be low morale within the ASUs and this brings additional dangers. In visiting various divisions it became clear that the units contain some of the best disclosure specialists within the police and it was possible to identify individuals who had amassed considerable experience in the application of CPIA, making them a valuable resource to those officers who wished to consult them. This was particularly noticeable in relation to serious and protracted enquiries where the sheer quantity of material generated required a rigorous approach to disclosure. Yet it was frequently these officers who, precisely because of their appreciation of how the system should operate, expressed the greatest exasperation with the way in which disclosure was frequently addressed.

'It's nice to think that people regard me well enough to want me to stay on as some sort of disclosure specialist but that still doesn't answer the question of the overall responsibility of the force with regard to disclosure. All it means is that there is somebody on one enquiry who is doing the job right. It doesn't mean that we have training in place or that we have an adviser within force who can put policy right. So I could quite happily stay in post here and our cases would be OK but elsewhere it would still be the same old mess.'<sup>17</sup>

### **12.8. ASU as mediators and translators**

Positioned between the CID and CPS, a vital function of the ASU is to mediate between the two groups who, ostensibly, have the same objectives but, in reality, approach trial issues from markedly different perspectives.<sup>18</sup> With the long standing antagonism between investigators and prosecutors, it is in the interests of the ASU themselves, as well as the cases they process, to act as mediators.

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<sup>16</sup> ASU 6/91.

<sup>17</sup> CID 6/80.

<sup>18</sup> 'They do need the evidence and sometimes bobbies forget that.' [ASU 7/210].

'Yeah, we act as a buffer...the CPS would rather deal with us I think than have to go direct to an officer and have to say, "This is an absolute rubbish file". So, instead, it will come to us and we have to do something about it or else we will lose it. So, yes we are in the middle and we have to play both sides off and, at the end of the day, we are all after the same goal and it is a matter of, how can I put it, a different mentality.'<sup>19</sup>

This is an unenviable role, as both CID and CPS are apt to blame each other for the weaknesses in the cases they deal with and, to some extent, this is inevitable given the markedly differing perspectives of investigators and prosecutors. For the CID, the guilt of the suspect is an established fact by the time that the file is submitted. The evidence has been compiled, the suspect charged and the case itself has been replaced by fresh investigations. For the CPS there may be numerous other matters outstanding and, having never met suspect or victim, there is none of the immediacy which colours the investigator's view. As a consequence neither CID nor CPS can regard the ASU as entirely on their side and, for the ASU staff, the result is friction and sometimes divided loyalties.

How then do the ASU deal with the tensions generated by their role as part of the inevitable conflict between CID and CPS? Central to the ASU's role as mediator is the ability to soften the demands of either side to avoid antagonism and ASU officers have become adept at tailoring their approach to the target group, whether CID or CPS. That is not to say, however, that problems do not occur. When dealing with fellow officers, professional pride can make criticising the judgment of experienced investigators an awkward process.<sup>20</sup> Similarly, an ASU officer who does become knowledgeable in matters of disclosure may be resented if (s)he challenges the CPS and this study found at least one case where interdepartmental tensions had led to a virtual breakdown in communication.

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<sup>19</sup> ASU 6/43. Another ASU officer added, 'I mean, I can get a bit awkward with police officers and with CPS. I don't feel "piggy-in-the-middle-ish", but we are. You're the buffer zone, the neutral zone.' [ASU 7/169].

<sup>20</sup> This heightened sensitivity was evident in a number of the interviews with ASU staff, 'If it is wrong, we send it back with a rejection slip, although we don't call it a rejection slip because it hurts their feelings too much - it's a "memorandum". We can't call it a rejection slip anymore because the touchy people will go home and worry.' [ASU 7/143]. Similarly, confrontation and possible embarrassment for investigators can be avoided by ensuring that criticism comes from an officer of equal or higher rank, 'I would maybe ask my supervisor to approach their supervisor and maybe do it that way, rather than me picking up the phone to a DI and saying, "What about this? What about that?" because you wouldn't want that friction.' [ASU 5/78].

'With the CPS you become EXTREMELY unpopular with certain individuals because here you are, a policeman, telling them, law graduates, the law. It is professional sensibilities and, consequently, because you are just trying to get them to carry out their duties, they think that you are questioning their ability. You aren't, you are just asking them to carry out the duties which they should be. I have been banned from the CPS building and, if I telephone to speak to the person involved in dealing with this, I have to speak to them through someone else and pass the message on through them because I can't get them to sit down and go through the disclosure with me and I am not invited to case conferences. We are talking major cases here where the disclosure officer is not invited to the CPS case conferences because they don't want him saying anything which they regard as controversial.'<sup>21</sup>

It is difficult to see how such a situation could possibly contribute to effective disclosure in the case.

### **12.9. 'poachers' or 'gamekeepers'?**

It is understandably difficult for many OICs to look beyond the essentially short-term imperatives of the investigation to appreciate the wider requirements of the prosecution process<sup>22</sup> and issues which are easily dismissed as irrelevant by officers immersed in the investigation assume greater significance some months later in the altogether calmer atmosphere of the court. Suspicion of CPS, defence and the system in general, inevitably engenders resentment on the part of detectives and, if the ASU are not seen as assisting, then they are seen as impeding. This is crucial, as it influences the extent to which OIC's feel able to be totally honest with the ASU staff. If ASU officers are seen as 'one of us' then this might encourage the OIC to be open about defects in the investigation and the unused material. If, however, the ASU are aligned more with the CPS, then the OIC is more likely to regard information given to the ASU as automatically shared with the CPS and, as a result, exercise appropriate caution. In essence, this reflects police suspicion that the 'crime control' ethos of the investigator is less important to the ASU than the 'due process' concerns of the CPS.

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<sup>21</sup> CID 6/52.

<sup>22</sup> 'The weak points most frequently identified by the CPS lawyers in their recent cases were officers' over-reliance on their notebooks and consequent inflexibility, inadequacies in the investigation or insufficient preparation, and an unhelpful or overconfident manner. Some officers were described as arrogant, aggressive or emotional.' Police Research Group (1995) *The Presentation of Police Evidence in Court*. London: HMSO.

It has already been noted that there was a reluctance on the part of some of the officers interviewed to seek assistance but, even where this proves to be unavoidable, strategies differ. For some CID officers, the CPS will always remain an object of suspicion whereas, whatever the reservations about the ASU, they remain first and foremost policemen.<sup>23</sup> Others, however, view themselves as having more in common with the CPS lawyer, in terms of expertise, than with the ASU officer and so prefer to deal directly with their professional equal. This, coupled with the suspicion that queries will only be referred to the CPS anyway, leads many detectives to seek direct consultation with prosecutors and in some areas this is actively discouraged for fear of confusion.

'No-one is supposed to go to CPS directly. The ASU is meant to be the point of contact because we have found from experience that, if the CPS start talking to the OIC direct then they do one thing and we do another and then it comes back to us and we think, "What's going on here?" You end up with confusion and it is a recipe for disaster.'<sup>24</sup>

In such divisions, despite the logic of the argument, the insistence that communication go via the ASU is widely derided by CID officers as an attempt by the ASU to justify their existence and this is particularly true of those forces where the function of disclosure officer is performed by the OIC and where the role of the ASU is, consequently, purely administrative.<sup>25</sup> Equally, although the CPS may prefer to deal with the ASU, if for no other reason than they are normally available during office hours, they still regard them as police officers and so complicit in the culture of blaming the CPS.<sup>26</sup>

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<sup>23</sup> 'They're police officers and they are in the police force, whereas CPS are independent, independent of the police force, they are a whole different body and so they would view it maybe from a different angle, more often than not, because they have an end view - "Oh this is going to be a not guilty plea this one - it's going to be difficult, it's going to cost a lot of money".' [CID 2/187].

<sup>24</sup> ASU 10/97.

<sup>25</sup> 'What can happen is that I can receive a memo from a CPS lawyer, which is dated 10 days ago, asking for something, and I can call him to say he can have a verbal answer now and that I will follow that up in writing, only to learn that he has sent another one to ASU and, 4 days later that one turns up.' [CID 9/98].

<sup>26</sup> 'I think they probably do pass our comments down to the OIC but it is a whitewash job when it gets there. It becomes "Oh well, the CPS want this and that" or "The CPS have pulled the plug"- we are always the scapegoats.' [CPS 1/288].

There is no doubt that the CPS represent an easy scapegoat for the CID and any indication that the ASU have sided with the prosecutor is cause for resentment.<sup>27</sup> However, for some ASU officers, frustration in the inability or unwillingness of OICs to embrace the disclosure regime has led them to question prevailing culture of blaming the CPS.

'At my Sergeant's course I was with another ASU Sergeant who said on one occasion, "The majority of problems that we have with regard to files are nothing to do with CPS, it is the officers that don't do the job properly" and I remember the amount of stick he got over that. Here I am, 10 years on, in his shoes thinking he was spot on. It goes back to officers wanting to do things other than preparing files, which they see as a pain in the arse.'<sup>28</sup>

For these officers the conflict of interest is even more acute because they recognise the failings of their fellow officers and are compelled to act on them.

'You can't run with the hare and the hounds can you? So yes, you are piggy-in-the-middle but first and foremost we are police officers...you do get the odd one where you can see the CPS point of view and I feel unpopular sometimes because you're knocking bobbies when you should be supporting them but you've got to do that - it's the role'<sup>29</sup>

### **12.10. initial reception**

In assessing the strategies which ASU staff employ in processing the files from CID it is important to recognise that not all police stations have an ASU and it is not unusual for files to be dealt with centrally by ASU officers who may or may not know all of the OICs personally. The practical difficulties presented by shift patterns, rest days and the other idiosyncrasies of the police working environment may make it more difficult for the ASU staff to contact officers and the ever present time pressures necessitate speedy decision making in order to pass files on to CPS. This places great significance on the initial judgment of the ASU staff and how they react to gaps within the evidence or unused material

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<sup>27</sup> 'They sometimes don't like it if we agree with a CPS comment that they don't agree with. There is always that problem. They may not like the fact that a CPS lawyer is dropping a case and, if we say "We agree, you should have done this" then you can get the odd tantrum.' [ASU 7/159].

<sup>28</sup> ASU 12/106.

<sup>29</sup> ASU 7/161.

detailed within the file and almost all of the ASU officers interviewed stressed their ability to sense a file which was either deficient or where there was likely to be more that needed to be disclosed.

'Sometimes you know that things are going to go wrong, something hasn't been disclosed or you read the first PCs statement. That has a ring, a ring of confidence about it...it either rings nicely or it clangs and as an ASU worker gains more and more experience then, bang, you know immediately if things are not adding up. It starts to stand out and be obvious.'<sup>30</sup>

The issue for the ASU officers then becomes whether to return the file to the OIC or to attempt to remedy the defects themselves. If the ASU attempt to deal with such matters themselves, without reference to the OIC, then there exists little opportunity to rediscover material which might initially have been excluded on the judgment of the investigator and this is of particular concern in those areas where the ASU do not assume the responsibility of disclosure officer. Yet, even within such forces, the approach which is actually adopted often owes more to extraneous factors than to CPIA. For example, it is not unknown for an ASU officer to take a calculated risk and bend the rules for an OIC whose judgment they trusts<sup>31</sup> and, in other cases, sheer pressure of time limits the amount that can reasonably be done, as one ASU officer revealed when considering whether to refer files back to the OIC.

'We would never get rid of the files. It would just cause a logjam. If a file comes in to me and it is all OK it can be gone in 5 minutes. If I have to go into the computer to generate a letter to send back to the OIC, it takes 20 minutes. I am only here for 7 ½ hours in the day, excluding meal breaks, so I can only do 15 files. I get too many to do that so there are certain things that you have got to let go.'<sup>32</sup>

The mathematics make this a compelling argument but this also demonstrates how easily the chain of communication which is fundamental to CPIA can break

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<sup>30</sup> ASU 8/4.

<sup>31</sup> 'There are certain people, both uniformed and CID, that come into our office and they are good police officers, they are good at paperwork, they work hard and yes, I would probably do it for somebody like that. But not for other officers - we've had too many problems.' [ASU 7/51].

<sup>32</sup> ASU 12/72. This is also recognised by the CPS, 'If something new comes in at a later stage, I am not sure that the OIC would see that. It would normally be done by the ASU or by someone here...and it does raise an issue of continuity because the only person who really understands it is the person who investigated it originally. Everyone else is just second-guessing.' [CPS 3/138].

down. In this case the OIC has acted as disclosure officer, but has not been consulted on developments as the ASU officer makes an assessment, based on the initial information provided by the OIC, and decides how to respond. The difficulty is that any material which the OIC may not have included in the initial file will not be included in this decision making process.<sup>33</sup>

### **12.11. how can we know?**

Whether the function of disclosure officer is performed by the OIC or the ASU, the ASU office retains a role in dealing with any subsequent queries and here the ASU officer is inevitably dependent on the initial judgment of the OIC<sup>34</sup> who may, or may not, fully understand the disclosure provisions. The ease with which the investigator can shape both the file itself and the schedules of unused material leaves the OIC enormous discretion in shaping what is, from that point onwards, accepted as the definitive prosecution version of events.<sup>35</sup>

In general, the ASU staff interviewed acknowledged that, if the OIC chose to use this discretion to omit information which was seen as either irrelevant or harmful to the case, their chances of identifying such conduct were minimal.

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<sup>33</sup> 'We get the views of the CID filtered by the ASU and so you often don't know what has been said...they [CID] seem to think that the ASU just do all of the paperwork and one of the problems is that the ASU will sometimes pick up a query and answer it without even consulting with the OIC and we get officers saying to us, "I didn't even know that you had asked for that".' [CPS 1/86]. Such cases led the CPS to conclude, 'In some cases the prosecutor may not be aware of the existence of material until the defence raises the issue. It is essential for the prosecutor to be made aware of the existence of all relevant unused material that has come to the notice of the disclosure officer, whether or not there is a requirement under the code of practice for it to be listed on the appropriate schedule.' Crown Prosecution Service Inspectorate. *Report on the Thematic Review of the Disclosure of Unused Material*. 2/2000 (March 2000). [8.22].

<sup>34</sup> A fact well recognised by CID, 'To be honest, ASU have no idea at all what should be on your unused material list because they haven't been there.' [CID 5/67].

<sup>35</sup> In their own review of the processes, the CPS concluded, 'At the moment an unsatisfactory situation prevails. The disclosure officer reveals and identifies unused material, and prosecutors make decisions entirely based upon this. The disclosure officer identifies whether any of the unused material might undermine the prosecution case or might assist the defence. If he says there is none, then the prosecution duly informs the defence there is nothing to disclose; if he says there is such material, then the prosecutor duly discloses it. Many of these decisions are uninformed because of lack of detailed descriptions or personal assessment of key material.' Crown Prosecution Service Inspectorate. *Report on the Thematic Review of the Disclosure of Unused Material*. 2/2000 (March 2000). [13.17]. This was supported by one CPS interviewee in the current work, 'Often you just get a list of documents and you don't know what they are so you just have a stab at it given the operating resource problems that we have. So you are very heavily reliant, as a CPS prosecutor or caseworker, on what the police tell you and we have to operate on the basis of trust and that they are doing their best to do it properly.' [CPS 3/59].

'There could be a whole heap of unused material which I'm completely ignorant of, I've no idea that it exists and that file could go through and some of that could well undermine the prosecution case but I'm totally ignorant of it.'<sup>36</sup>

This is a stark recognition of the limits of the ASU role and the result is a system of disclosure which is, in many respects, illusory. The ASU make an assessment of the unused material which is frequently based on little more than the track record of the particular OIC in relation to the quality of their paperwork and the appearance of the schedules.<sup>37</sup> If the schedules appear to be appropriate for the type of case in question then, in the absence of any first hand knowledge of the case, the ASU officer is likely to approve its contents.<sup>38</sup> This is done in the expectation that any subsequent problems will be highlighted by CPS.

"We rely an awful lot on the CPS to pick things out and to send a memo saying, "Are you sure that this is all there should be on this schedule?"'<sup>39</sup>

Unfortunately, the CPS lawyer or caseworker is even more removed from the initial assessment of the unused material conducted by the OIC and so is unlikely to be in a position to identify anything but the most obvious errors.

'You wouldn't know if there was anything further, if there was anything else that should have been there, unless it is obvious...you just wouldn't know. You are relying on the honesty of the OIC.'<sup>40</sup>

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<sup>36</sup> ASU 1/138.

<sup>37</sup> The extent to which the identity of the submitting officer may influence the approach of the ASU mirrors an earlier study of file preparation in the USA which noted that some officers' files received far more scrutiny than others, depending on their perceived reliability. From there, consideration turns to the 'downstream consequences', which may be limited to possible evidential problems but could also include, 'identifying and assessing...what is likely to happen at future institutional decision points if "a case of this sort" were to move forward.' Emerson. R.M., Paley. B (1992) 'Organisational Horizons and Complaint Filing', in Hawkins. K. (ed) *The Uses of Discretion*. Oxford: Clarendon. p 239.

<sup>38</sup> 'We have no way of checking on what decisions that officer has made...what we do in here is check the schedules, check the match with the unused. We are not in a position to ask, "Haven't you got a piece of paper with that on?" or "Where's this and that?" We're just checking that what is in the file is correct, that the actual forms are in there. If the forms aren't there then we chase them up.' [ASU 11/35].

<sup>39</sup> ASU 11/33. One CPS lawyer, however, was highly critical of this approach, 'I don't see my role as looking for faults and what I really don't like is spotting obvious faults which should really have been picked up much earlier in the process. That is a waste of my time and there at least 2 people lower down the chain who should have done that instead of passing the buck to me. It is very dangerous because what if I don't spot it?' [CPS 4/250].

<sup>40</sup> CPS 7/96.

The result of this mutual dependency is that both ASU and CPS believe that the other will identify any problems with disclosure when both are ultimately dependent on the OIC who may not be able or willing to make the existence of such material known. Once again, this means that the OIC is able either to mask their lack of knowledge of the disclosure provisions, or to take a calculated risk on whether or not to make material known to the prosecution, based on the low probability that errors will be detected.<sup>41</sup>

Paradoxically, even where anomalies are detected, pressure to expedite files means that the emphasis remains very much on the administration of file preparation and, on occasion, the result appears to be a greater emphasis on the correctness of the paperwork than on the underlying integrity of the disclosure.

'I think that, in relation to most of the files that I see, I could tear the unused material apart in the sense of things haven't been entered. I had one the other day where officers had gone and searched a property for drugs and the sensitive schedule was nil. I said, "It can't be nil, you must have gone there on the basis of some intelligence or whatever and so it must exist and, if it exists, I have to have it on the MG6". It is things like that they don't pick up on. Typically you will get the MG6 back, completed properly, but with no explanation as to why it wasn't done right in the first place. But all I really want is the form done correctly.'<sup>42</sup>

This is a telling example of the extent to which disclosure has become an essentially administrative process. In this case the OIC has either made an error as to whether or not to include the intelligence data on the MG6D or, more seriously, has made a conscious decision not to do so. In any event the concern for the ASU was not the omission, but rather the fact that the form was completed correctly, with neither a request for an explanation nor any suggestion of sanction for the officer involved. In this instance the system has rectified the mistake but, whether this resulted from genuine error or not, there was nothing to suggest that the same thing would not happen again. Also, the fact that the OIC

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<sup>41</sup> An indication of this approach can be seen in the following comments from a detective when considering the quality of defence solicitors. 'Occasionally, the legal representative is an ex-policeman and they are the most difficult to deal with because they have an idea of how we conduct our enquiries, what we are likely to have, and they will make the pertinent and important points, which the solicitors tend not to.' [CID 11/625].

<sup>42</sup> ASU 14/52.

omitted any mention of intelligence data, in circumstances where it so obvious that it must have existed, demonstrates either a degree of contempt for the procedures or a woeful lack of understanding as to the status of such intelligence as unused material.<sup>43</sup> This is especially worrying when, as in this case, non-disclosure involves sensitive documents.

This raises the question of how much material fails to reach the ASU and, in doing so, pass even the first interface in the disclosure process.<sup>44</sup> Here there appears to be a widespread acceptance that the notion of full disclosure is illusory with even investigators recognising the extent of the problem.

'You can't know what unused material there is unless you are involved and I am quite sure that, if you were to stick a video camera on an officer and follow him around as he dealt with a case, that by the time he put the file in an independent person could look at that tape and say, "Hang on, look at this material that he has completely overlooked" but, because there isn't a camera following them around seeing what they are doing, you sit on the outside. If you could see it all then maybe you would realise how much was being missed.'<sup>45</sup>

The OIC controls the flow of information and shapes the file which forms the basis for the remaining stages of the prosecution. If the expectation becomes that officers are simply 'doing their best', then there must be a reduced expectation of all subsequent stages of the disclosure process.<sup>46</sup>

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<sup>43</sup> Such basic omissions are by no means confined to sensitive material and often include the most routine of police documents, 'You can read a file and then the unused material and think, "There's got to be a first description". You know - 3 people seen running away from the scene, put it up on the computer and, sure enough, there it is - first description.' [ASU 7/49].

<sup>44</sup> If the information does not reach the ASU then there is little likelihood that it will reach the CPS as one prosecutor noted, 'The OICs have so much information about the case just in their heads and we have so many cases where we get to conference and the OIC will say something to the barrister and we think, "We knew nothing about that".' [CPS 5/131].

<sup>45</sup> CID 5/53.

<sup>46</sup> There is some evidence that, in places, this limited aspiration pervades the process, 'I can at least make sure that there are some forms there with some unused material on it, together with some kind of assessment of that unused material. That is the bare minimum that will go through...' [ASU 10/47].

### **12.12. how much to ask**

Against this background of limited expectation of the accuracy of the initial schedules, there are a number of issues affecting the extent to which the ASU may wish to question the initial judgment of the OIC in matters of unused material. Factors such as operational pressure and lack of confidence on the part of some ASU staff may combine to produce a view that, if the schedules appear to be logical and nothing is obviously amiss, then there is little incentive for the ASU officer to press further, when the result will only be to create additional delay and possibly to antagonise the OIC. In addition, as the OIC is the only person who can truly know the nature and extent of the unused material generated in the investigation, there is an element of futility in asking anything but the most obvious questions and, without first hand knowledge of how the enquiry was conducted, the ASU will frequently have little idea of even what questions to ask. They are effectively acting in the dark and acting almost exclusively on trust.<sup>47</sup>

### **12.13. how much to do**

On occasion, however, the defects in file preparation are so serious that it cannot proceed without additional work and the question then becomes whether the ASU should expend time on remedying the defects or, instead, return the file to the OIC. In discussions with ASU staff it was noticeable that this presented one of the principal areas of conflict, with many ASU staff resenting the additional work involved in bringing files up to scratch, a situation made worse by the perception that many OICs took advantage of the procedures to abdicate what was essentially investigative responsibility to the ASU. This was manifested in a noticeable attitude within some ASUs that patience was wearing thin with certain investigators who persistently professed ignorance of the disclosure provisions

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<sup>47</sup> 'I think it's a matter of do you trust your colleagues really. It's down to trust. I'm not saying there's a lot of mistrust amongst officers but I think that some people would like to think, "Well if there is anything wrong with that, I'm sorry but it's not coming back to me. I'm not disclosure officer for that - the officer in the case is" and, as I've said to you, depending on the type of case it is and who is investigating it, you may well push it back and say "I'm not prepared to do that in this case".' [ASU 5/8].

and so attempted to avoid responsibility for disclosure and the consequences of their errors.<sup>48</sup> The dilemma then becomes at what point does tidying up the file become re-investigation? A task for which the ASU are ill-equipped.

Of even greater concern were those cases where additional work undertaken by the ASU had revealed not only disclosure related defects but also more fundamental deficiencies in the investigation itself.

'When I got it there were parts of it that made me think, "Well I'd better just have a look at that a little bit". It was all there but, because I'd looked at two or three little bits of the evidence and I thought, "What the complainant is saying in her statement isn't the complete story". So I've got an 8 page statement from a woman but then, when I went back and revisited her, intending to get a short statement to cover these few points, I got a much bigger picture and I ended up taking a completely new statement from her which was 25 pages long and I thought, "Well how do we present this case now? I've got one statement from her taken by the OIC which says this much - and now I've got THIS much, so where do we go from there?". As it turned it didn't go anywhere and the accused ended up with a caution out of it, because the statement didn't present the full picture, but I basically re-investigated that case.'<sup>49</sup>

There may be a number of reasons for the apparent discrepancy between the two statements. It is conceivable that the IP may have remembered more details of the incident by the time of the second interview, although the dramatic increase in the length of the statement suggests something more fundamental. Alternatively, the ASU officer may have been a more effective interviewer than the OIC, or the OIC may have, consciously or unconsciously, limited the scope

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<sup>48</sup> 'You know they'll continue to plead ignorance like, "Oh I don't really understand it" or whatever, but it's essentially because they can't be bothered.' [ASU 4/129]. Another ASU officer was even more forthright in his criticism, 'You have some thick plod out there who has done 15 years in the army as an engineer or something. He comes into this job and thinks he can scribble a few lines together and put it on a form. As far as he is concerned, if the CPS don't take it then it is because they don't have the bottle to give it a run at court, forgetting all about the fact that we have to prove it beyond all reasonable doubt.' [ASU 12/134].

<sup>49</sup> ASU 5/20.

of the statement to support the prosecution version of events.<sup>50</sup> This type of case construction is not necessarily the product of an overt desire to deceive or obfuscate but, as with other aspects of the relationship between OIC and ASU, the discovery of such a flawed statement was largely a matter of intuition on the part of the individual ASU officer serving to remedy either a lack of skill or lack of openness on the part of the OIC.

#### **12.14. ASU as trainers**

The fact that material may be inadvertently missed is not the only disadvantage the ASU has in dealing with problems in the file themselves, without reference to the OIC. The paucity of training in relation to new legislation formed a recurring theme in discussions with police officers of all ranks and in the case of CPIA, this has contributed to the evolution of working practices largely by trial and error. Against this background the ASU performs a vital function in attempting to correct officers' disclosure errors and in providing more general guidance as to good practice. That is not to say, however, that such input is either welcome or heeded by investigators and there is also the issue of how far ASU officers are prepared to go in compelling OICs to change their practices and comply more fully with the disclosure provisions.<sup>51</sup>

In assessing the training role of the ASU it is possible to make a distinction between training by dissemination, where general guidance is circulated to investigators in the hope that this will produce an improvement in practice, and training by correction, where individual errors are corrected in the hope that

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<sup>50</sup> Research conducted in the West Midlands in 1989 found that half of the written records of interview examined did not provide fair summaries, with a third containing material that gave a misleading or distorted view of the interview. Baldwin, J., Bedward, J. 'Summarising Tape Recordings of Police Interviews'. [1991] Crim LR 671. A study of police interviews with juveniles revealed a similar mismatch between interview and transcript. Evans, R. 'Police Interviews with Juveniles.' in Morgan, D., Stephenson, G.M. (1994) *Suspicion and Silence: The Right to Silence in Criminal Investigations*. London: Blackstone. This is supported by an early assessment of the operation of CPIA conducted by ACPO, which concluded, 'With interviews, many officers do not listen to what is actually said in the interview. The record of tape recorded interviews are often appalling.' ACPO. 'Disclosure and the CPIA: Implementation in Practice.' Police Staff College Seminar. 12/5/98.

<sup>51</sup> 'They do respect my opinions now, but there have been some hellish arguments on the way and you do become extremely unpopular, EXTREMELY unpopular.' [CID 6/28].

explaining the problem to the officer involved will prevent any repetition. In relation to the former, some ASUs have attempted to take a more proactive approach to disclosure and to educate officers by means of memos or newsletters. The results, however, are often disappointing.

'We used to do a newsletter and use that to highlight problems and I used to send it to every part of the division and it made not one iota of difference, so I stopped doing it. You can bang your head against a wall for so long and then you get a headache and then you don't want to do it any more. So I stopped doing them and maybe that's not the right attitude.'<sup>52</sup>

'I must have photocopied so many sheets and sent them off to different parts of the force and police officers still ignore them, so you think, "Well they are just ignoring them anyway". When you try to guide them it doesn't seem to help.'<sup>53</sup>

Significantly, both of these officers worked within ASUs which did not perform the role of disclosure officer and, as such, received their files from OICs making their own decisions as to the relevance of any unused material. The fact that advice on how to perform this task is ignored so frequently as to generate this level of disillusionment on the part of ASU staff cannot enhance the credibility of the procedures.

This leaves the strategy of training by correction as the only mechanism by which the ASU might seek to alter the disclosure practices of CID officers and here the dilemma becomes one of time. It has already been seen that the potential delay incurred by returning files to officers acts as a disincentive for ASU staff and leads them to address all but the most serious defects themselves, even where this encroaches into the investigative function of the OIC, but this is not without difficulty. If problems with the file are dealt with by the ASU staff rather than being referred back to the OIC, then a vital training opportunity has been lost as this reinforces the officers' perception, not only that what they have produced in terms of the initial disclosure schedules is adequate, but also that

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<sup>52</sup> ASU 7/97.

<sup>53</sup> ASU 12/72.

there is little likelihood of files being returned once submitted.<sup>54</sup> The temptation then becomes to submit the file, even where weaknesses are recognised, and take a gamble that it will not return.

Even in those cases where the decision is made to return the file to the OIC for correction, the nature of the relationship between the CID and the ASU means that the request is more likely to be perceived as a nuisance than as an attempt to remedy real defects in the file. Because of the low status of paperwork when compared to 'real' policework and the dismissive attitude of some CID officers towards their ASU counterparts, the temptation for detectives and their supervision is to work together in order to minimise the interruption and return the paperwork to ASU as quickly as possible. Against this background, the supervising officer is less likely to support the ASU in criticising the work of the OIC, than to side with the detective and simply facilitate the re-submission of the file. Providing that the case progresses, the fact that the file was returned becomes insignificant and there is little attempt to investigate the reasons for the initial rejection of the file.<sup>55</sup> Files are returned and re-submitted, but with little indication of any action being taken by supervision to remedy the underlying faults. The result, for many ASU officers, is exasperation.

'You get sick of picking schedules up and your head is in your hands - "I don't believe this. They just haven't looked at this obviously." It happens all the time and it's very frustrating...the Superintendent should get onto the Sergeants as supervisors and say, "Look, this has been in force for X number of years now and there's no reason whatsoever why this shouldn't be done properly. People have had all the teaching that they require. You're police officers, you're professionals, you're getting paid well. There's no reason why you shouldn't be able to compile these schedules properly and I'm telling you now that I'm demanding that it is done - I'm not asking you, I'm telling you".'<sup>56</sup>

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<sup>54</sup> 'It's pointless me just writing it down or completing the MG6C for them because then they think "Everything is hunky dory now - I must be doing the file right" when, in fact, all they maybe have is the log entry, crime report, detection sheet, and no explanation.' [ASU 2/23].

<sup>55</sup> 'It goes to their supervisor. It goes to the officer and there is a slip of paper attached to it which says 'before this is returned it must be checked by your supervisor'. 90% of them probably come back not signed [by the supervisor] and the rest of them come back signed but I don't think they check them.' [ASU 7/143].

<sup>56</sup> ASU 4/79.

Such sentiments were repeatedly expressed in interviews with ASU staff and the question of to what extent poor disclosure practice by OICs is exacerbated by inadequate supervision must be considered.

### **12.15. line management and sanction**

Although the role of supervision in monitoring the performance of investigators in relation to disclosure has been largely ignored, this clearly represents one of the principal mechanisms for correcting mistakes and for improving the way issues of disclosure are addressed. However, it was apparent that, within the forces studied, this did not operate as might be expected. It soon became clear that, within a number of the CID offices studied, an essentially pragmatic approach to disclosure had evolved, which sought to minimise wasted effort and capitalise on the limited ability of ASU and CPS to adequately scrutinise the initial decisions of the OICs, due to the operational pressures which affect those departments as much as the CID. This required investigators to undertake calculated risks in terms of what material to make known to the ASU and what to omit. Some cases resulted from a limited appreciation of the provisions, but lack of knowledge cannot explain those instances where non-disclosure arose from a deliberate decision by the OIC to withhold material. In these cases, officers make a judgment as to the likely consequences of discovery and, in part, this must be influenced by the almost total absence of sanction within the police service for defective disclosure.

'I think you will find that there is no great appetite for that [sanctions]. In this job now all you have to say is, "It's a developmental need" [laughs]. So it's a "training need" rather than "neglect of duty" and you think "how many times does this officer have to do this before this level of inactivity becomes neglect of duty?" But all they will say is "ah yes, it's a training need"...that is the way it is done, so there is no sanction. Even if we lose it at court and you go back to the complainant and he says "well why did we lose it?" we can say "we lost because that video, which shows nothing, the defence made a big play on it" and so the police aren't considered the villains of the piece.'<sup>57</sup>

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<sup>57</sup> ASU 12/132.

The result for investigators is a climate where there appears to be little or no risk attached to defective disclosure,<sup>58</sup> with their own supervision unlikely to impose any real sanction, and with a number of other stages of the criminal justice system to blame, if necessary, for the ultimate failure of the case.<sup>59</sup> Because the challenge has come from outside the CID, officers are able to close ranks and to unite against any interference with operational practice.<sup>60</sup> In relation to file preparation and unused material, supervision effectively shield the OICs from any criticism from ASU or CPS either by dismissing any knowledge deficit as purely an issue of training or by simply paying lip-service to notions of reprimand. In this way, repeated requests for action from the ASU can be brushed aside with minimal inconvenience.

'We have said, "This is neglect of duty - can you do something about it?" and the response is "I've had a word with him and it won't happen again". So it happens again and it is still, "I've had a word with him and it won't happen again". Also, if it were about disclosure the answer would be "well I don't know about disclosure so I don't know how you expect him to". So there is no point trying to apply a sanction in relation to disclosure, unless it was a MAJOR hash - you wouldn't get anywhere.'<sup>61</sup>

The extent to which OICs are likely to be reprimanded on issues of disclosure by supervisors who may themselves be unclear of the nature of the duties is uncertain but, even where the supervisor is more confident in addressing failures in disclosure, there was evidence of at least one instance where this more interventionist role had led to friction.

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<sup>58</sup> Negligence or incompetence in the exercise of an officer's duties are not actionable, *Hill v Chief Constable of West Yorkshire* [1989] 1 AC 63 HL; *Elguzouli-Daf v Comr of the Metropolis* [1995] QB 335 CA.

<sup>59</sup> A situation recognised by the CPS. 'I have never, ever heard of an OIC being subjected to any disciplinary proceedings for defective disclosure and you can't really discipline the disclosure officer when they don't know all the material collected during the enquiry. If you have an OIC who has failed to take a statement, whether he is incredibly lazy or incredibly dishonest, how is anyone going to know that material ever even existed? The only person who can know is the OIC.' [CPS 3/245].

<sup>60</sup> 'You are trying to change their culture of many years, especially officers who have been on major enquiries and in-depth enquiries for many years. You are asking them to make notes of things and to look in detail at material and some of them can become quite angry at that. It is as if you are questioning their ability as an officer whereas what you are actually doing is trying to help them to be a better investigator. But do they resent being asked to disclose properly? - Definitely!' [CID 6/14].

<sup>61</sup> ASU 12/158.

'He had a go at them and they went to the federation. The quote was, "I know you're an ambitious Sergeant", so the implication was he was having a go at them just to get on himself. He's taken the bull by the horns, because he's a good Sergeant, but other Sergeants would have backed off from that. There are other Sergeants who wouldn't bother, but he's interested. He wants to know why the officer hasn't done the job well. But they are few and far between.'<sup>62</sup>

This illustrates the cultural disincentives within the police service which make it even less likely that defective disclosure practice will be properly challenged. The priority is to process cases as quickly as possible and, whereas supervision in relation to operational aspects of police work may be seen as necessary, criticism arising from the performance of purely administrative duties is less acceptable to both OIC and supervision. Again, the underlying factor is the concept of 'real' police work and the extent to which administrative competence is seen as compatible with the skills and values which underpin this ideal. Senior officers are reluctant to reprimand otherwise highly competent investigators for shortcomings which they themselves do not see as affecting the central function of the detective. Similarly, OICs are able to dismiss any perceived faults in their file preparation far more easily than any criticism of their operational competence, as administrative weakness does not undermine (and may even enhance) their status as 'real' police officers.

#### **12.16. dealing with the defence**<sup>63</sup>

Another critical aspect of this point in the process is that it marks the end of the initial stages of the disclosure process, which are controlled entirely by the police and the CPS. Subsequent disclosure entails either direct or indirect input from the defence and this introduces an agenda which is not only obviously in conflict with that of the police and the prosecution, but is also beyond their control.

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<sup>62</sup> ASU 7/149.

<sup>63</sup> Parts of this section were reprinted in, 'Stating the Obvious: The Misuse of Defence Statements under the Criminal Procedure and Investigations Act 1996.' *Police Journal* 74 (2001) 155.

Up to this point the focus has been the process of primary disclosure, which requires the prosecution to:

- (a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which in the prosecutor's opinion might undermine the case for the prosecution against the accused, or
- (b) give to the accused a written statement that there is no material of a description mentioned in paragraph (a).<sup>64</sup>

It has been seen how the disclosure officer makes an initial assessment of the unused material generated in the case, to be listed on the MG6C and D, the first of which is submitted to the defence and acts as the starting point for any further disclosure requests. It will be remembered, however, that the effect of CPIA was not only to refine and restrict the prosecution duty of disclosure but also, and for the first time, to impose a corresponding (albeit more limited) duty on the defence. For this reason, once the schedule has been passed to the accused, the defence also finds itself required to 'disclose' by means of a defence statement addressing the following issues:

- (a) setting out in general terms the nature of the accused's defence,
- (b) indicating the matters on which he takes issue with the prosecution, and
- (c) setting out, in the case of each such matter, the reason why he takes issue with the prosecution.<sup>65</sup>

The submission of the defence statement serves to trigger a re-examination of the unused material by the prosecution who must:

- (a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might be reasonably expected to assist the accused's defence as disclosed by the defence statement given under section 5 or 6, or

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<sup>64</sup> s 3(1).

<sup>65</sup> s 5(6).

(b) give to the accused a written statement that there is no material of a description mentioned in paragraph (a).<sup>66</sup>

Having outlined the difficulties which exist in compiling primary disclosure, based on the persistent failure of OICs to adequately identify and schedule unused material, the situation is further complicated by the addition of the defence with their obviously competing agenda. What remains to be considered is how the defence approach the task of eliciting disclosure from the prosecution and the extent to which the strategies employed by both prosecution and defence serve to undermine the theoretical operation of secondary disclosure.

### **12.17. defence statements**

Just as the process of primary disclosure relies almost entirely on the initial judgment of the OIC, the defence statement assumes crucial importance to the operation of secondary disclosure by indicating the proposed character of the defence and so identifying to the prosecution aspects of the original investigation which may not previously have been considered relevant. Such material may have the effect of undermining the prosecution case and/or assisting the defence and, for this reason, it might be assumed that the defence would be eager to exploit the opportunity to extract additional information from the prosecution and would utilise the defence statement to this effect, yet an examination of committal files reveals this to be far from the case.<sup>67</sup>

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<sup>66</sup> s 7(2).

<sup>67</sup> In 2000 the revised Attorney General's Guidelines were still attempting to sell to the defence the benefits of providing a proper defence statement. 'A defence statement should set out the nature of the defence, the matters on which issue is taken and the reasons for taking issue. A comprehensive defence statement assists the participants in the trial to ensure that it is fair. It provides information that the prosecutor needs to identify any remaining material that falls to be disclosed at the secondary stage. The more detail a defence statement contains the more likely it is that the prosecutor will make a properly informed decision about whether any remaining material might assist the defence case, or whether to advise the investigator to undertake further inquiries. It also helps in the management of the trial by narrowing down and focussing the issues in dispute. It may result in the prosecution discontinuing the case. Defence practitioners should be aware of these considerations in advising their clients. Legal Secretariat to the Law Officers. *Attorney General's Guidelines: Disclosure Of Information In Criminal Proceedings*. 29th November 2000.

Some five years after implementation of CPIA defence solicitors continue to submit statements which are, at best, vague or which frequently fail to address the issues at all, as in this example taken from a 1998 case file.<sup>68</sup> The charge was handling stolen goods (in this case a car) which occurs where the accused:

'...knowing or believing them to be stolen goods he dishonestly receives the goods, or dishonestly undertakes or assists in their retention, removal, disposal or realisation by or for the benefit of another person, or if he arranges to do so.'<sup>69</sup>

Following primary disclosure by the prosecution, a defence statement was received, worded precisely to comply with s 5(6), and reading as follows:

1. The nature of the accused's defence is:

The accused denies that he dishonestly received the vehicle and that he knew or believed that the same was stolen.

2. The accused takes issue with the prosecution in relation to the following matters:

That he dishonestly received the vehicle and that he knew or believed that it was stolen.

3. The accused takes issue with the prosecution about these matters for the following reasons:

They are untrue.

For the purposes of secondary disclosure such a defence statement was clearly of negligible value, as it provided no information on which to base a re-assessment of the material held by the prosecution, but, equally, the defence strategy of supplying such an anodyne statement can hardly be seen as surprising.<sup>70</sup> By reasoning that, in the majority of cases, the likely defence will have become

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<sup>68</sup> PCI/21.

<sup>69</sup> Theft Act 1968, s 22(1).

<sup>70</sup> Of the cases studied as part of the Home Office research, 52% of defence statements were either a bare denial of guilt or otherwise did not meet the requirements of s 5. Plotnikoff, J., Woolfson, R. (2001) *A Fair Balance? Evaluation of the Operation of Disclosure Law*. London: HMSO. p 72.

apparent to the police during the conduct of the initial investigation,<sup>71</sup> the defence may conclude that there is little further to be achieved by providing the prosecution with a detailed defence statement, as this sacrifices the tactical advantage provided by disguising the nature of the proposed defence until trial. As the prosecution have already been compelled to disclose unused material under the broad definition of primary disclosure, it could be argued that the likelihood of any genuinely valuable material emerging through secondary disclosure is slight,<sup>72</sup> particularly when viewed against the background of the Attorney General's 'Points for Prosecutors'<sup>73</sup> which provides:

'Disclosure of material which might assist the defence is not contingent upon a statement being provided - the prosecutor has a continuing duty under section 9 to keep disclosure under review throughout the trial process.'

If the prosecution is thereby required to disclose even without the submission of a defence statement, there can be little or no incentive for the defence to assist the prosecution by providing a comprehensive account of the proposed defence and this view was supported by the comments of a number of defence solicitors interviewed, where the notion of submitting a defence statement was viewed with antipathy.

'I don't usually send a defence statement, not because I'm planning some sort of "ambush" defence, but I just don't want to give them too much information too early'<sup>74</sup>

For most defence solicitors, this remains the principal consideration; to reveal as little as possible to the prosecution and police and, for many, the policy has become either to submit the barest of denials as a defence statement or not to submit a statement at all. As with the OICs, this is on the basis that, even where there is a deliberate refusal to comply with the provisions of CPIA, there is

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<sup>71</sup> As the Bar Council Concluded, 'It is our experience that in the vast majority of cases the issues are apparent on the face of the witness statements or can be deduced.' Bar Council (1992) 'The Efficient Disposal of Business in the Crown Court.' London: Bar Council. p 630.

<sup>72</sup> Although at least one CPS caseworker thought otherwise. 'Maybe they think that they will have got everything already through primary disclosure and so there is nothing to be gained by providing a detailed defence but they are naïve if they think that.' [CPS 5/27].

<sup>73</sup> Sept 2000.

<sup>74</sup> D 1/30.

unlikely to be any redress<sup>75</sup> despite the fact that CPIA explicitly provides for the drawing of adverse inference where the defence:

- (a) fails to give a defence statement under that section,
- (b) gives a defence statement under that section but does so after the end of the period which, by virtue of section 12, is the relevant period for section 5,
- (c) sets out inconsistent defences in a defence statement given under section 5,
- (d) at his trial puts forward a defence which is different from any defence set out in a defence statement given under section 5,
- (e) at his trial adduces evidence in support of an alibi without having given particulars of the alibi in a defence statement given under section 5, or
- (f) at his trial calls a witness to give evidence in support of an alibi without having complied with subsection (7)(a) or (b) of section 5 as regards the witness in giving a defence statement under that section.<sup>76</sup>

Initially, the threat of adverse inference might appear to be a powerful inducement for the defence to submit a defence statement. The reality, however, appears to be exactly the opposite, with practitioners reluctant to commit themselves to a detailed statement of the nature of the defence case, fearing that where a more detailed defence statement is submitted, there is an increased likelihood that any later changes to the defence case might be portrayed by the prosecution as sufficient to justify adverse inference under s 11(1)(d).

Guidance on this point came from the Court of Appeal in *R v Tibbs*,<sup>77</sup> where the defence sought to argue that only the most general terms, such as 'self defence' or 'lack of intent,' were required to comply with s 5(6)(a).<sup>78</sup> Furthermore, it was suggested that the terms 'defence' and 'defence statement' were not synonymous

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<sup>75</sup> As one defence solicitor noted, 'You can provide one on the day of the trial or not at all and there doesn't seem to be any sanction - nothing happens.' [D 1/24].

<sup>76</sup> s 11(1). The factors to be considered when drawing adverse inference were also set out in *Cowan and Others* [1996] 1 Cr App R 1 CA.

<sup>77</sup> [2000] Cr App R 309 CA.

<sup>78</sup> Echoing the original recommendations of the Royal Commission.

and, therefore, a change to the defence statement did not necessarily represent a change to *the defence*. The court, however, declined to approve so narrow and interpretation, stating that to do so would be to render the provisions virtually meaningless.<sup>79</sup> The defence statement was ‘...a statement of the matters to be relied on in his defence’, leaving the judge free to comment on any differences between the statement and the defence presented at trial with a view to possible adverse inference.<sup>80</sup>

On this interpretation, the accused risks adverse inference under s 11(1)(d) if the defence presented at trial differs from that set out in the defence statement and so, tactically, it is advisable for the defence to couch the statement in as oblique a fashion as possible to allow for any developments between the submission of the statement and the commencement of the trial without the dangers presented by a defence statement indicating a different line of defence.<sup>81</sup>

In practice, such distinctions are largely irrelevant as not one interviewee, from police, prosecution or defence, was able to recall a case where adverse inference had been drawn following either the failure to submit a defence statement or any subsequent discrepancy between the defence outlined in the statement and that which was ultimately presented at trial. The reasons for this apparent reluctance on the part of the courts to employ the sanction of adverse inference is not immediately clear, but it is evident that defence statements represent one of the weakest elements of the current disclosure regime. In the cases examined, examples were found of almost all of the grounds in s 11(1). In particular, there were numerous instances of defence statements served on the prosecution well outside the time limits provided by the Act and, in a number of cases, a statement

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<sup>79</sup> Although there is some support for this interpretation in the wording of s 11(1)(d) itself, which applies where the defendant ‘*at his trial puts forward a defence which is different from any defence set out in a defence statement*’

<sup>80</sup> As in *R v Wheeler* [2000] 1 Cr App R 150, which led to instruction that defence statements should be signed by the defendant (rather than by the solicitor) in order to signify their accuracy.

<sup>81</sup> Such concerns were expressed by a number of the defence practitioners interviewed, ‘I am very wary of defence statements because the nightmare scenario is the client in the box saying one thing and a prosecutor waving a defence statement and saying, “But this says something different”, particularly if the client signed it.’ [D 1/26]. It might also be argued that the submission of a defence statement amounting merely to a denial of the charge represents an eminently logical tactical ploy as, whatever defence is finally put forward it must, in essence, amount to such a denial and, hence, not at variance with the content of the earlier statement.

was not provided until the day of trial.<sup>82</sup> In others, the defence submitted a second defence statement, outlining an entirely different defence, when the first failed to elicit further information from the prosecution.<sup>83</sup> Against this background, it is scarcely surprising that the 'simple denial' form of statement is rarely, if ever, the subject of judicial comment but the fact that the defence is able to ignore the requirement for a defence statement so easily was clearly a source of resentment for investigators.

'If we get a defence letter saying "Our client denies the offence, can you disclose items 1,3,5 and 7?" my first reaction is that's not a defence. He hasn't said "I didn't do it because I was with so-and-so at such-and-such a pub at the time"...what they are saying is, "No I didn't do it - so give me all the unused".'<sup>84</sup>

### **12.18. secondary disclosure**

Under CPIA the defence statement serves two functions. Firstly, to compel the defence to indicate the nature of the proposed defence case at a relatively early stage of the proceedings. Secondly, to compel the prosecution to revisit any unused material which remains undisclosed to ensure that it is not, in fact, relevant to the defence as set out in the statement. In this way the process of secondary disclosure was intended to represent one of the principal due process safeguards under CPIA, by ensuring that the initial assessment of relevance made as part of primary disclosure, did not exclude material from later consideration when the nature of the proposed defence case became more apparent.

Inevitably, the refusal of many defence solicitors to comply with the spirit of the Act makes it more difficult for the prosecution to address secondary disclosure and to ensure that all potentially relevant material is made available to the defence. In addition, the poor quality of many defence statements, as typified by

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<sup>82</sup> One detective recounted the following example, 'There were two defendants and the barrister for one of them said, "My client hasn't told me what his defence is." I thought "Well what can I do about that?" [laughs]. So we presented the prosecution witnesses for him to listen to and, half way through the trial, he decided what his defence was going to be, and he was allowed to do that.' [CID 7/48].

<sup>83</sup>The fact that these are forwarded to the police for secondary disclosure suggesting that they have been accepted by the CPS.

<sup>84</sup> CID 7/46.

the 'simple denial' statement, renders the entire process pointless for many officers as the statement is insufficiently precise to permit any meaningful consideration of the unused material. The result, as with many other aspects of the disclosure regime, is that the forms are passed between police and CPS and so create the impression that the duties have been performed, but closer examination reveals serious flaws at every stage of this process. If the object of secondary disclosure is to identify additional unused material then one indicator of its success would be the incidence of further material being disclosed following receipt of the defence statement. Examination of case files, however, reveals little evidence of this, a view supported by CPS caseworkers.

'When we get the replies to the defence statements from the police, there is never anything relevant. Never, ever in secondary disclosure is there anything relevant. You will get a statement when you are preparing the file and you might keep it to one side because it is obviously going to potentially undermine the prosecution case when the defence statement comes in. You end up sending it off yourself because when you get the reply from the police it says, "In light of the defence statement there is nothing relevant for secondary disclosure". So I don't think they actually go through and read it when they get the defence statement I don't think they go back and look at it. They look at the schedule and just say, "Nothing relevant". I have had cases where we have had the response from the police that there is nothing relevant for secondary disclosure when they clearly knew that there was.'<sup>85</sup>

If the ASU are not referring the defence statement to the OIC for comment then there is little or no chance that further material will be identified for disclosure and, even in those police forces where the ASU perform the function of disclosure officer, it is difficult to see how any worthwhile re-assessment of the

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<sup>85</sup> CPS 1/203. In their own research the CPS concluded, '...material was disclosed at the secondary stage in 23 out of 344 cases (6.7%) where a defence statement was provided. We did not come across any case where the prosecutor identified any further assisting material not listed in the second MG6E by the disclosure officer. This is a significant finding and emphasises the extent to which the disclosure regime at present relies on the police.' Crown Prosecution Service Inspectorate. *Report on the Thematic Review of the Disclosure of Unused Material*. 2/2000 (March 2000). [5.56], and continued, 'There were also some cases where we could not satisfy ourselves that formal secondary disclosure had been undertaken. In many instances, the CPS had sent the defence statement to the police, who had not responded.' [5.61].

unused material in the case could be made without input from the investigator.<sup>86</sup>

Even where the defence statement is passed to the OIC for consideration there remains the question of officers' understanding of CPIA and the extent to which they appreciate the requirements of secondary disclosure. Particularly in the case of 'simple denial' statements, there is frequently an air of futility to the exercise on the part of both ASU and OIC, as in the following account from one ASU officer of how defence statements are dealt with on arrival.

'What we tend to do is get the defence statement, dig out the unused material, attach it to the schedules and stick a note on it, "Please check for secondary disclosure - if unsure give us a call" [laughs]...the most frequent question from the bobbies is, "I don't understand what they want. What are the defence saying?" and we have to tell them, "They are saying he didn't do it - is there anything in your unused material to say that he didn't do it?" [laughs]. What more can you do? I think it's a bit of a game and I sometimes wonder if the defence think, "Oh I better submit a defence statement because that is what I'm supposed to do".'<sup>87</sup>

Again, this demonstrates how the various elements of the process can inadvertently conspire to impede the disclosure of potentially relevant material. The defence, in seeking to avoid revealing too much of their case before trial, provides the prosecution with a bland statement which, although sufficient for them to state that they have complied with CPIA if challenged, fails to outline the proposed defence in sufficient depth to permit any real consideration of the remaining prosecution unused material. In turn, this permits the police to retain any remaining material on the basis that the defence did not indicate, by means of the defence statement, that it was relevant.

Somewhat surprisingly, this is much as the [then] government envisaged in proposing the legislation, as revealed by examination of the parliamentary progress of the Bill. One of the most telling exchanges concerned the proposal,

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<sup>86</sup> This certainly appeared to be the case in at least one of the divisions sampled where officers were rarely consulted following receipt by the ASU of the defence statement. 'We don't really come into contact with the defence statements, as investigating officers we don't really see that, we just put our package together, forward it to CPS and they have any correspondence with the solicitors, and we're only there to facilitate any access to the evidence through the CPS.' [UNI 2/86].

<sup>87</sup> ASU 6/181.

in the committee stage of the Lords, to remove the reference to disclosure of material which might undermine the case for the prosecution in favour of a simple test of 'relevance.'<sup>88</sup> This was rejected as presenting little advance on the former position under the common law as the government explained.

'a test of relevance includes everything which might possibly have a bearing on the case. But that is very different from whether it has a bearing on the defence which the accused actually relies upon in court.'<sup>89</sup>

The government logic on this point revealed an acceptance that the scheme as proposed could facilitate the withholding of otherwise relevant material.

'a test of 'relevance' is inconsistent with the rest of the disclosure scheme. If the prosecutor discloses everything which might be relevant, there is no point in requiring secondary prosecution disclosure of material which might reasonably assist the defence, because there would be nothing left to disclose.'<sup>90</sup>

The aim was clear, to impose a duty of disclosure on the defence by means of the explicit threat of adverse inference at trial, together with the implicit threat that failure to comply would result in incomplete disclosure by the prosecution. Here it would appear that the Act has failed, for not only do defence solicitors ignore the provisions with little or no fear of adverse inference, they have also devised alternative mechanisms for extracting further information from the prosecution without the risks associated with the submission of a defence statement.

### **12.19. subsequent requests**

How then do the defence obtain further material from the prosecution without a defence statement? In many cases they simply ask for it.

'I don't send a defence statement, I just write a letter asking for what I want. They send it anyway and I haven't given anything away.'<sup>91</sup>

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<sup>88</sup> HL Debs. vol.567., col.1436.

<sup>89</sup> Baroness Blatch (HL Debs. vol.567., col.1437).

<sup>90</sup> Baroness Blatch (HL Debs. vol.567., col.1438).

<sup>91</sup> D 1/29.

Here the entire concept of CPIA disclosure, as a three-stage procedure imposing obligations on the defence as well as the prosecution, has collapsed, for if the defence succeed in obtaining further information without revealing anything of their case, then a process which was designed to return much of the control of unused material to the police and prosecution appears, once again, to be largely in the hands of the defence. Yet this cannot occur without the tacit co-operation of the police and CPS and so raises questions as to why such simple strategies are not challenged more actively by those in a position to restrict defence access to unused material, in order to ensure that the defence more actively meet their obligations under CPIA.

The answer may be nothing more complex than time pressure, exacerbated by disillusionment with the disclosure regime in general as, for many police officers, any desire to hold the defence to their obligations under CPIA is tempered by the realisation that this is unlikely to be supported by others within the system. The result is an understandable degree of frustration.

'We have been very awkward at times, and rightly so, in not letting them have things. But when they have gone to the judge, the judge has said "Let them have it" and the CPS say "The judge has said give them it" and he's a judge and, if he says give them it, what are we going to do?'<sup>92</sup>

The approach of the judiciary towards CPIA and the manner in which defence requests are dealt with by the courts remain to be examined, but it is clear that one of the principal sources of the continuing friction between CID and CPS is the perception, on the part of many police officers, that they do not receive adequate support from CPS in refusing defence requests for additional information. It has already been shown that this lack of confidence in ability or willingness of the CPS to adequately safeguard information, may prevent OICs from being entirely candid in scheduling material, particularly in relation to

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<sup>92</sup> ASU 6/173.

intelligence information<sup>93</sup> and, due to the relationship between the CPS and ASU, some investigators may even conclude that revealing such information to the ASU presents too great a risk. On occasion, this reluctance to schedule information is made more explicit, as in the case of complaints and discipline, where solidarity within the police service can come into conflict with the requirement to disclose potentially undermining material.

'In one case, we knew that there was an officer involved with a conviction for excess alcohol but the disclosure officer wasn't allowed details of that by complaints & discipline. We only knew because we had dealt with him previously but, if we hadn't raised it, it might never had made it onto the schedule. That is a real problem. Complaints & discipline won't speak to the ordinary officers and the disclosure officers are meant to pick up things like convictions but, quite often, they don't. This officer had been involved in another case that I knew of a few weeks previously and I know that there was no reference made to his excess alcohol in that case either.'<sup>94</sup>

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<sup>93</sup> 'I had one case where I knew that the OIC has a document in his desk drawer that he had not disclosed to me. We went and obtained it and, in that case, it wasn't a misunderstanding. It turned out to be a sensitive document that, for some reason, he just felt that we shouldn't have. When it happens like that, then the wheel can come off.' [ASU 7/153]. This may, in part, result from the common misconception that any listed material is automatically disclosed to the defence and this illustrates the confusion which operates at all levels. 'I try to get across to them is that, just because there is a name and address on it does not make it a sensitive document because they can be edited out, but they turn around and say, "But the defence will see that won't they?" And I have to tell them, "No, they won't see it until we decide to disclose it and that is your decision through primary disclosure". This is the understanding that a lot of people have got.' [ASU 14/67]. 'I think that some officers believe that, if it is listed on the MG6, then the defence are going to get it automatically and they don't realise that the defence only get what we say they can have because it assists or undermines. Some officers see it as just giving the defence the key to the filing cabinet to see everything. I also think that some prosecutors think that as well and, because they are still really operating the old system of disclosure, they think they have to give the defence everything when they don't.' [CPS 4/344]. 'The majority of officers don't understand that the CPS don't actually get the unused material that they put in the envelope on the file. They think they do...the officers don't understand that the defence get the schedules - they don't understand that.' [ASU 7/223].

<sup>94</sup> CPS 1/373. Such concerns were echoed by the CPS Thematic Review. The JOPI (Annex A) provides that previous convictions or disciplinary findings against police officer witnesses should be recorded on an MG6B and the form should contain sufficient detail to allow the prosecutor to assess whether the contents are relevant to the case in question. However the Review concluded that "our file examination confirmed that many files are silent about whether police officers have disciplinary matters recorded against them. The JOPI requires that where there are no findings of guilt against a police officer, there should be a positive statement to that effect on the MG6. We are satisfied that this is not being done in all cases." Crown Prosecution Service Inspectorate. *Report on the Thematic Review of the Disclosure of Unused Material. 2/2000* (March 2000). [4.152]. Examples cited included an officer with 2 disciplinary findings for 'falsehood' yet, despite this, 'No detail was provided and none was requested. The prosecutor had merely endorsed 'not undermining' on the envelope that contained the MG6B.' [4.154]. Similarly, the present study found one case where complaints & discipline went to great lengths not to disclose details of an investigation into the conduct of one officer and even giving the information to the CPS was resisted on the basis that they might accede to defence demands for disclosure. Only after high level meetings was the information eventually produced. [PO/11/99/12].

This lack of confidence does little to enhance the relationship between CID and ASU but, in considering the working practices and attitudes of the CPS towards defence requests it is clear that police suspicions are not without foundation and, certainly in relation to non-sensitive material, it is true that the CPS offices studied did not generally regard strict adherence to the procedures for primary and secondary disclosure as either practical or necessary. For many prosecutors, there was no apparent benefit in a strict application of the disclosure provisions when it came to dealing with defence requests for additional information.

'I think that, sometimes, you do things just for a quiet life. The attitude is, "Why not?" There might be some 3rd party unused material on file which is neither here nor there. The defence might ask to see it and you think, "Oh, for goodness sake, who cares? Let them have it".'<sup>95</sup>

Interviews with ASU staff revealed numerous examples of the ASU arguing against disclosure, on the grounds that the material was either not disclosable under the tests of CPIA, or that a satisfactory defence statement had not been received to facilitate secondary disclosure, only to be overruled by CPS.<sup>96</sup> The result is widespread disillusionment on the part of ASU staff, who have concluded that CPS are likely to pass on material to the defence regardless of their views. This sense of fatalism frequently causes them to abandon any attempts to apply the provisions rigorously. The priority becomes simply administrative, to pass the file as quickly as possible to CPS and, with it, any decisions over additional disclosure.

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<sup>95</sup> CPS 4/357.

<sup>96</sup> Such as a murder case where, 4 days before the trial was due to start, the disclosure officer in the case was contacted directly by the defence and asked for access to all the unused material in the case. The reviewing lawyer contacted the defence and pointed out that they had not submitted a defence statement, but was told that they still wanted access to the unused material before the trial. Concluding that to refuse them would be to invite an adjournment, the lawyer relented. When interviewed she admitted that she could see why the disclosure officer in that case might well have wondered why he had bothered complying with the provisions of the Act in the first place. [M/CPS/2/2].

'As far as I am concerned if they want it - they can have it. I'm just telling them that, as far as I am concerned, it doesn't undermine and it doesn't assist. Once it goes from my hands to the CPS then it's their decision as to what to do with it and I don't make an issue of it. If that is what they want to do with it and that is what they think is the right thing to do with it then it's fine by me.'<sup>97</sup>

The effects of this refusal by the CPS to act in the spirit of CPIA when dealing with defence requests for additional material are pernicious, in that the message for ASU and, in turn CID, becomes that there is little advantage to applying CPIA correctly, as the CPS are likely to disclose to the defence any material which they ask for.

Unsurprisingly, this message has also reached defence solicitors, who have not been slow to capitalise on the opportunity which it presents. If demands for material are likely to be met without the need to submit a defence statement, then the way is open for precisely the types of 'fishing expeditions' that the Act was intended to prevent. For larger firms in particular, commercial pressures may make spending time to consider the file in detail an unattractive option. If a demand for blanket disclosure is likely to be met then, just as police trainers devise lists of probable examples of unused material for inclusion in the schedules, the defence can compile similar lists which evolve into pro-forma requests for disclosure. The creation of such letters is a simple administrative task but, for the police, the additional burden they create may be considerable.

'The letters they send are standard letters kept on a word processor and they are just a shopping list. They haven't even read the file or studied the case...they have just pushed a button to print a standard letter. It is no effort for them, but they might have wasted 15 hours of the OICs time in collecting all of the stuff together and photocopying it, but the fact that they have created work and expense to us doesn't matter to them.'<sup>98</sup>

The benefits for the defence are obvious as there exists the possibility that material which undermines/ assists will be obtained without the risks inherent in submitting a defence statement which, ultimately, may not represent the defence

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<sup>97</sup> ASU 5/174.

<sup>98</sup> ASU 13/48. Although one detective readily acknowledged the influence of time on his decision making, 'Are we refusing to give them it because it isn't relevant or because it will take me 8 hours to do it?' I would suggest that the reality is probably both.' [CID 9/102].

put forward at trial. For the police, however, the result is merely to create additional pressure to deliver material which, in many cases, is of no value to the defence.<sup>99</sup> Some support for this view could be found in those cases where a request for additional information had been refused by the police and, rather than pursue the matter further, the defence had been content not to pursue the matter,<sup>100</sup> as in the following case concerning doctor's notes.

'Sometimes they won't let the notes go or even a copy of the notes. So more often than not I write back to the defence and say, "They are not going to let us have them" and nine times out of ten we never hear any more about it.'<sup>101</sup>

In such cases it is difficult to see how, if this material was of sufficient importance to the defence to warrant its request from the police, that it did not justify any further efforts and the suspicion must be that the material was sought on a speculative basis, rather than as a result of any clear link to the matters at issue.

#### **12.20. confidence in the system**

At all stages of the process there is a marked absence of confidence in the disclosure regime as it currently operates. The ASUs recognise that their ability to identify omissions on the part of the OIC is limited and the CPS, who are one stage further removed from the initial decision making process, can do even less to correct any errors in the initial disclosure.

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<sup>99</sup> In one case a pro-forma defence letter demanded disclosure of the interview tapes of any other person arrested in relation to the offence, '...so the defence requested a copy of the interview tape of another person arrested at the same time which was a no-comment interview. What were they going to gain from listening to him refuse to answer the questions? It wouldn't have been so bad except that the defence solicitor requesting the tape was the same one who had been sitting beside this guy advising him when he was giving the no-comment interview.' [CPS M/9].

<sup>100</sup> Contrasted with the intransigence of the defence in *R v X Justices, ex p J and Another* [2000] 1 All ER 183, in insisting on copies rather than access to surveillance tapes.

<sup>101</sup> CID 13/218.

'We have to take it on trust that the police will do it properly in the first place. Of course that pre-supposes that they understand it and that they know what they are supposed to be looking for, and of course there are occasions where they don't bother to tell us. That is your starting point really.'<sup>102</sup>

There remains a widespread acceptance that disclosure duties are not addressed consistently by OICs and, some years after implementation, ASU officers and reviewing lawyers were still being confronted with case files which demonstrate a fundamental misunderstanding of the requirements of CPIA.

'We constantly get things put on the wrong schedules or they are just missed off altogether. I could give loads of examples of cases where there has been no accounting for a particular statement or something just hasn't been put on the MG6C or the MG6D. We lost one trial because there was no mention in the file that one of the co-accused had assisted the police. That should have been on the D and then we could have gone and seen the judge about it. As it was we had to pull the plug because he would have been identified in court.'<sup>103</sup>

Such cases merely serve to reinforce the findings of the 2000 CPS review where, in 41% of the reports studied, the MG6E was incorrect, in 4.3% of cases potentially undermining material had been omitted<sup>104</sup> and in 10 cases the disclosure officer had listed material which was evidence in the case.<sup>105</sup> A number of reasons for this continuing failure of the disclosure procedures have already been identified and, as the file progresses towards trial, additional factors

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<sup>102</sup> CPS 3/13.

<sup>103</sup> CPS 1/69.

<sup>104</sup> Such omissions are still made, 'We had a trial 2 weeks ago where the OIC came along with 2 extra statements - "you might want to see these". They were obviously relevant, one of them concerned a counter allegation but the whole of that file hadn't been disclosed to us.' [CPS 8/23].

<sup>105</sup> This included cases where the ROTI was included even though the accused denied the offence, leading the researchers to conclude, with considerable understatement, 'This displays a substantial misunderstanding of the system on the part of those disclosure officers.' Crown Prosecution Service Inspectorate. *Report on the Thematic Review of the Disclosure of Unused Material*. 2/2000 (March 2000). [4.91]. The present study found a number of examples of evidence wrongly classified as unused material. In one case, two videos of a traffic accident had been included in the unused material and was only discovered when the reviewing lawyer examined the material, 'That was evidence - good evidence as well - and yet it had been put in the unused. The lawyer said he'd be pleased to show that at court, because the bobby had the presence of mind to run all these sequences. It was a marvellous job, it's not very often someone goes to the trouble to do it as well as that, and then goes and puts it in the wrong pile.' [ASU 6/135]. Similarly, a CPS memo from another force revealed considerable irritation, 'This committal file is totally inadequate. PC XXX has omitted all the crucial evidence from his statement. Why on earth is the HORTI in the unused? It needs to be exhibited.' [NCI/42/29].

will act to impede effective disclosure. It is this cumulative influence which undermines the operation of CPIA.

## **13. Stage 4 - the Prosecution Process**

### **13.1. leaving the police arena**

The submission of the case file by the police to the CPS represents a pivotal point in the criminal justice system as it marks the distinction between the investigation, which is conducted almost totally under the control of the police, and the prosecution, which takes place in an environment where the police have little or no influence on proceedings – the court.

This study was not intended to examine in depth the operation of disclosure by the courts, concentrating instead on the work of the police which controls the initial flow of information and creates the definitive 'prosecution' version of events, but the way in which disclosure is handled by the courts does have an impact on the handling of subsequent cases and, for this reason, cannot be ignored. Interviews with groups such as CPS staff and defence lawyers raised a number of factors arising at this stage of the process which are detrimental to the operation of CPIA disclosure and which can be seen to provide additional motivation for the decision making of some CID officers. For this reason it is important to consider some key aspects of disclosure at trial.

### **13.2. continuity**

It is important to recognise that the court is alien to many police officers who do not have the same involvement as their predecessors who prosecuted their own cases, prior to the Prosecution of Offences Act 1985. The effects of this are twofold: firstly, officers frequently lack confidence in presenting their

evidence,<sup>1</sup> and secondly, they see the prosecution as the work of the CPS and, therefore, no longer their responsibility, as one ASU officer commented.

'The problem, as I see it, is that when the CPS came in the police moved out of the courts so most OICs now don't see a court from one year to the next, for whatever reason, and they don't see how a prosecution takes place. So, they investigate, they put a file in and they see that as the end, because they have done their job and it's gone.'<sup>2</sup>

It has already been noted that the traditional antipathy between police and CPS provides a cultural justification for this approach, enabling officers to distance themselves from the work of prosecutors and to blame them for any ultimate failures in the case. It has also been seen that officers complete the disclosure schedules only to a standard sufficient to ensure that the file passes the administrative hurdle represented by the ASU, before then moving on to the next investigation. This creates an appearance of disclosure, as the correct schedules have reached both the reviewing lawyer and the defence, but that does not mean that everything which should be disclosed necessarily has been. It may be that additional material may become disclosable as a result of issues raised at trial; however, as one ASU caseworker noted, that is dependent on someone being present who actually appreciates what material is held by the prosecution.

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<sup>1</sup> A survey of police officers found that 24% actively disliked giving evidence, finding it a nerve racking experience and often saying they 'hated' or 'detested' going into the witness box. Stockdale. J.E., Gresham. P.J. (1995) 'The Presentation of Police Evidence in Court.' Police Research Group, Series Paper 15. London: HMSO. p 4. This view was supported by an ASU officer who concluded, 'It doesn't matter how many times you go, I don't think anybody particularly relishes having to go to court. I mean there aren't that many people who actually enjoy having to go and be asked questions in front of an audience and, you know, possibly being made to look a fool. So it's just the fact that they are at court and the butterflies and the nerves about having to give evidence and they maybe do get a bit of stage fright and so just sit there, wait until it's their turn, and then disappear.' [ASU 5/142]. One CPS lawyer went further, 'Most of the officers you meet now have never even been to Crown Court and they are petrified about what is going to happen. It is a very strange training that officers get now in that it is not a full criminal justice system training.' [CPS 5/227].

<sup>2</sup> ASU 10/139.

'As a caseworker, I have never reviewed the unused material, I have seen the schedules and the barrister is there who has seen the schedules, but the disclosure officer who compiled them isn't in court and, more often than not, the CPS lawyer who reviewed the schedules isn't in court either. So there is no-one in that court who is in a position to say if an issue arises which means that we should really be reviewing the unused material because it contains something which might now be relevant. You are in their blindfolded really. Most time the defence don't make an issue over disclosure and they accept what they are given on the schedules, but I think that is a real problem that no-one is there who would know if an issue arose which made some material relevant.'<sup>3</sup>

Clearly this situation is unlikely to arise in the most serious cases, where the disclosure officer is likely to be present, but such comments do raise questions over the integrity of the process in the 'middle' cases which formed the basis for this research and illustrate, on a broader level, how easily the increasingly administrative nature of the criminal justice system can mask potentially dangerous deficits in knowledge by means of apparently 'correct' paperwork.

### **13.3. public interest immunity**

The difficulties surrounding the disclosure of sensitive material, particularly where this relates to informants, have already been mentioned, but it is in court where issues of PII are decided. The way in which the courts deal with such cases sends important messages back to CID officers and may impact on their willingness to acknowledge the existence of intelligence material in subsequent investigations. Protecting informants is of paramount importance and officers approach the area with considerable trepidation, in view of the dangers presented by even acknowledging the possibility of an informant.

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<sup>3</sup> CPS 5/16. The CPS review expressed similar concerns, '...there may be no member of the prosecution team in court who has personal knowledge of the contents of all the unused material. This is especially so in Crown Court proceedings. In major or particularly sensitive cases, prosecuting counsel is generally instructed to consider all the material and so can perform the duty in an informed manner. In other cases there is less clarity. The disclosure officer may play little or no part in the later stage of proceedings. The prosecutor who took the decisions on primary and secondary disclosure will not ordinarily be present.' Crown Prosecution Service Inspectorate. *Report on the Thematic Review of the Disclosure of Unused Material*. 2/2000 (March 2000). [7.6]

'The very nature of PII is such that, when you have it granted, it virtually answers the question that the defence posed in the first place. It's a bit like being in the box and the defence lawyer saying, "Was there an informant involved?" You can't say "No," because that would be lying on oath, and you can't say "Yes" clearly because you would be condemning him. So you are advised to answer words to the effect of, "I am prepared to answer that question but not in this court at that time" which is as good as saying "Yes" isn't it? It's a nonsense.'<sup>4</sup>

In this climate, if officers do not have confidence in the courts to preserve the anonymity of sources, then this must increase the likelihood that such material will be concealed rather than disclosed.

In considering applications for PII, it is established that the court must balance the safety of the informant and the potential for future assistance to the police against the right of the accused to challenge the information against him/her<sup>5</sup> and the courts have consistently indicated that this balance should operate in favour of the defendant. Consequently, where the result would be to deprive the accused of a fair trial, the identity of an informant cannot be suppressed<sup>6</sup> and, in such cases, it is for the prosecution to decide whether to proceed or to drop the charges in order to protect their source.<sup>7</sup> In those cases where informant issues might arise this becomes a major consideration for the police undertaking the file preparation process and, as has been shown, the disclosure regime places the greatest discretion in the hands of the investigator who is unlikely to be challenged by the CPS for failing to adequately reflect the role played by an

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<sup>4</sup> CID 9/116.

<sup>5</sup> *R v Trevor Douglas K* (1993) 97 Cr App R 342.

<sup>6</sup> *R v Agar* [1990] 2 All ER 442.

<sup>7</sup> *R v Langford* [1990] Crim LR 653. In *Powell v Chief Constable North Wales* (Times Feb 11<sup>th</sup> 2000) the court held that, once it had been determined that the public interest in maintaining the anonymity of the informant outweighed any benefit to the claimant, it was not for the court to seek to circumvent this by, for instance, ordering evidence to be given in camera. The following example illustrates the practical difficulties presented by this approach, 'A few years ago we had a surveillance camera over the lock-up used by a regular villain to store stolen gear. We filmed him for a while taking stuff in and out but, when it came to court, he asked to be told where the camera had been sited. Now this was a very intimidating fellow and we had got permission from somebody to put the camera where we put it and that was on the sensitive [schedule] - the address of the person's house. That collapsed. The prosecution withdrew it because we weren't prepared to disclose that.' [ASU 13/50].

informant. Furthermore, even where the MG6D acknowledges the use of such sources, the references are unlikely to contain any information on which disclosure can be addressed. This leaves the court to conduct the 'balancing act,' not always with successful results.<sup>8</sup>

Such cases produce a number of potential hazards. As with all other aspects of the prosecution, applications for PII are made on the basis of information collected and (more importantly) interpreted by the police. Particularly in the case of *ex parte* hearings, this leaves considerable scope for the police to tailor the application.

'Recent experience demonstrates that inaccurate submissions are sometimes put before the trial judge in support of an application for non-disclosure. The conduct of the PII hearing itself during which submissions are made seems alarmingly informal. Police officers for example are simply being able to pass information to prosecuting counsel which is then simply repeated to the judge without this information either first being verified by anyone or secondly being reduced into writing.'<sup>9</sup>

The recent cases of *R v Jackson*<sup>10</sup> and *R v Vasilou*<sup>11</sup> highlight the dangers. In *Jackson*, a mistaken version of the circumstances of a drugs find had been given to the judge in the course of the PII application, prosecuting counsel having relied on the version supplied by the investigating officer. Discrepancies in the story only became apparent at a later hearing where the same counsel was appointed to prosecute a related case and, in upholding the appeal, the Court acknowledged the value to the defence of the withheld information. Similarly, in *Vasilou*, an *ex parte* PII hearing proceeded on the basis of flawed police records of the previous convictions of key prosecution witnesses, including one with a

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<sup>8</sup> *R v Turner* [1995] 3 All ER 342.

<sup>9</sup> Corker, D. Focus on CPIA Disclosure PII/ Overlap and CPIA's Third Party Disclosure Provisions; defence Practitioners' Suggestions for Improved regimes. Disclosure Under the Criminal Procedure and Investigations Act 1996, Conference Papers (1999) London: British Academy of Forensic Sciences (BAFS) p 15.

<sup>10</sup> [2000] Crim LR 377.

<sup>11</sup> Unreported, Feb 4<sup>th</sup> 2000.

series of serious convictions and an outstanding arrest warrant for dealing Class A drugs at the time of the case. In each case it proved alarmingly easy for the judge to rule on disclosure in the absence of key information and without an opportunity for the defence to challenge the accuracy of the prosecution application.

An additional factor which may influence officers' decision making in relation to informants is the manner in which PII applications are dealt with by the courts. A number of the CID officers and CPS staff interviewed expressed concerns over the apparent lack of understanding of some judges when considering such matters, as in the following example.

'We had a drugs case with an informant where there were numerous PII applications throughout the trial. The judge has practically revealed the identity of the informant because the PII applications, which were *ex parte*, were made known to the defence because the court clerk just thought they should know that there had been a PII application. Then we told the judge during the PII application that the informant was in danger and that the defendant might have an idea who the informant was because of what had happened and the judge actually said in open court, "Why are you arguing about this? The defendant knows who the informant is and I understand that he has seen him in this court" – so that was it. But, fortunately, the person was on a witness protection programme.'<sup>12</sup>

Such examples can do little to enhance the confidence of CID officers that their informants will receive adequate protection from the courts and, once again, the danger is that fears of such treatment will encourage officers to conceal the presence of intelligence information.

#### **13.4. judges and CPIA**

'The judges have basically decided to act as if CPIA doesn't exist - no one will actually come out and say that but that is the truth of the matter.'<sup>13</sup>

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<sup>12</sup> CPS 1/416.

<sup>13</sup> CPS 2/42. As the CPS recognised, 'it is clear that the operation of the present regime does not command the confidence of criminal practitioners or the judiciary.' Crown Prosecution Service Inspectorate. *Report on the Thematic Review of the Disclosure of Unused Material*. 2/2000 (March 2000). [13.1].

If the judicial approach towards PII applications creates uncertainty for the police which may prompt less than full disclosure, then the way in which judges tackle CPIA disclosure in general is even more problematic. There is widespread acceptance that both judges and counsel are prepared to ignore the Act, despite the undermining effect which this has on the legislation, and the result is a climate where none of the protagonists, police, CPS or defence, expect the disclosure rules to be followed.

It could be argued that the reluctance to apply the provisions as Parliament intended is understandable given the high levels of inconsistency in police performance. Many judges appear to err on the side of caution and allow full disclosure, for fear of a miscarriage of justice.

'At Crown Court, to barristers and judges, CPIA means nothing to them. Disclosure is disclosure and if you argue that the tests of relevance have not been satisfied you will be told, "It is better to disclose than to face an appeal".'<sup>14</sup>

Despite this logic, the results of this unspoken policy are pernicious. For the police, there is the frustration of knowing that, despite calls for them to address unused material more rigorously by means of primary and secondary disclosure, time spent on this task may, ultimately, be wasted. It would appear that the courts will, in most cases, accede to defence requests for additional disclosure, irrespective of whether an adequate defence statement has been served and regardless of the time or cost implications. The resentment which this produces on the part of the police is palpable.

'There are some judges who would say, "If it is not relevant to their defence then it is not going to help them anyway, so just show them." But they say that without understanding the implications of say photocopying 10 years of bank statements or whatever and, for me, it is frustrating because it takes up so much time and it means that, next time, instead of sticking to the rules and saying, "It doesn't pass the relevance test so you are not having it" I know what is going to happen ultimately so I end up saying "Oh, alright. I will give it to you".'<sup>15</sup>

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<sup>14</sup> CPS 5/43.

<sup>15</sup> CID 9/8.

This resignation demonstrates the cumulative effect of such judicial disinterest in the disclosure provisions. The detective has reached the logical conclusion that there is little point in adhering to the disclosure tests and, from that point onwards, disclosure as applied by this particular officer is inevitably weakened. Of course the situation is somewhat different for the defence, who are the principal beneficiaries of a failure to apply CPIA. If the defence know that the judge is likely to order disclosure in any event, then there is little reason to comply with the process by submitting a defence statement, particularly as there is little likelihood of adverse inferences being drawn.<sup>16</sup>

For the CPS the position is more ambiguous. Under the Act it is the reviewing lawyer who takes final responsibility for compliance with the disclosure provisions, but there is little to be gained from arguing the point in court. Furthermore, many of the CPS staff interviewed were sympathetic to the viewpoint that the defence should be afforded full disclosure even where there had been no defence statement.

'I have heard a Crown Court judge say that he would NEVER direct a jury to draw adverse inference for the failure to submit a defence statement. Judges don't like being told what to do by the government and they see this as a fairly blatant blackmail of the defence...if counsel stands up in court and says, "My client's defence is this, and I believe that this document will assist that defence" then the judge is not going to turn to the prosecutor and say, "I realise that you cannot reveal that document because the defence have not served a defence statement". We just don't have those arguments in court. It just doesn't happen because it is silly! It is not fair, it is not cricket, and I have some sympathy with them.'<sup>17</sup>

### **13.5. informal disclosure**

In discussions with CID officers perhaps the greatest single complaint over the handling of unused material at trial was the extent to which the CPS were

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<sup>16</sup> Although it has been suggested that defence solicitors need to use the law creatively in order to, '...make the best out of a situation where the ultimate outcome for the defendant [is] at no time in doubt.' Travers. M. (1990) *Persuading the Client to Plead Guilty: An Ethnographic Examination of a Routine Morning's Work in the Magistrates' Court*. Manchester: University of Manchester, Dept of Sociology.

<sup>17</sup> CPS 4/379.

prepared to engage in the informal disclosure of material.<sup>18</sup> The frequency with which this occurs has serious implications not only for the integrity of the disclosure process but also for the overall credibility of CPIA and, together with the judicial approach to the Act, raises some of the most intractable problems for those seeking to encourage good disclosure practice on the part of investigators.

It has already been shown that, in the pre-trial stage, many CPS lawyers are willing to furnish the defence with material which does not satisfy the tests for disclosure and which does not relate to anything contained in the defence statement (if indeed there is one). The justification for this is that, as the court is likely to order disclosure in any event, there is no reason to insist on a strict application of the provisions and the fact that the Act provides for defence applications for additional disclosure under s.8 is largely irrelevant. As with the police, the result can be frustration.

'But, you see, the wheel never does come off because we never get into the s.8 application scenario. The defence ask for it and, if we do reject it, they either get the judge to order disclosure at the pdh, or they get it under voluntary disclosure because we know they are going to get it anyway. The defence don't care how they get it as long as they get it. It is a lot more hassle because you are trying to stand up and do it correctly but what is the point? I have no faith in the system at all.'<sup>19</sup>

However, this view, from a CPS caseworker, can be contrasted with the altogether more pragmatic perspective of a CPS lawyer.

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<sup>18</sup> When surveyed for the Home Office study, 78% of prosecution barristers claimed they would allow the defence access to non-sensitive material which fell outside the statutory criteria for disclosure. Only 4% said they would resist such a request. It was also found that unscheduled unused material was disclosed in 45% of cases. Plotnikoff, J., Woolfson, R. (2001) *A Fair Balance? Evaluation of the Operation of Disclosure Law*. London: HMSO. p 72.

<sup>19</sup> CPS 7/62.

'There might be the odd conversation where the defence will ask to see something and we will show it to them. It doesn't bother us. As the case has progressed, you might have had requests from the defence to see certain items from the schedules and you may have refused that on the grounds that they haven't satisfied the test of relevance or they haven't provided a defence statement but, what usually happens is that, on the day of the trial you have the police file there and so you will show it to them anyway if they ask – "There it is, have a look at it".'<sup>20</sup>

It might be argued that the lawyer is more informed as to the tactical implications of providing the defence with unused material in this way and has a greater appreciation of the 'realities' of such informal disclosure. However, even accepting this view, there are very real hazards associated with disclosure addressed on such an informal level, as the CPS itself recognised.

'Informal disclosure sometimes takes place by way of correspondence before the start of the trial...it also takes place at court at the PDH, before the start of the trial or even, in some cases, during the trial. When informal disclosure takes place in these circumstances we found that there is no system to ensure that a record of what is disclosed is kept on the prosecution file. This made it difficult to say with any certainty what material had been disclosed. More importantly, it means that it is difficult, if not impossible, for anyone looking at a file to be certain that material has been disclosed. This could be vitally important in any appeal.'<sup>21</sup>

On a practical level, the main result is even more disillusionment for the police who feel further alienated from a process which many characterise as 'lawyers together.'<sup>22</sup> This serves to strengthen the barriers between police and CPS and to reinforce many of the traditional suspicions. There is little the police can do, however, to prevent informal disclosure and compel the CPS to comply with CPIA and, eventually, this relaxed approach permeates down to the ASU.

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<sup>20</sup> CPS 4/318. The same lawyer continued, 'If you decide that something neither assists the defence nor undermines the prosecution and there is no harm in disclosing it, then why shouldn't you disclose it? it will get the defence solicitor to shut up! Why shouldn't his client know that item 23, which he thinks might assist him, in fact doesn't? It is transparent justice and it means you have a person with one less reason to feel aggrieved at his conviction. Also, what if I am wrong? If their explanation isn't quite clear enough and I look at the document and say "No, you are still not going to have it" and I am wrong?'

<sup>21</sup> CPS Thematic Review 2000 [9.16]

<sup>22</sup> 'Lawyers are part of a professional body which is sympathetic to itself throughout and I'm convinced that judges are no exception and, as a consequence, the prosecution can see what the defence need, the judge can see what the defence need.' [ASU 1/261].

'You get to Crown court and get, 'Can you send me so-and-so quick?' and I know why - because the prosecution barrister has asked for it and he is going to give it to the defence barrister. Don't ask me to prove it but I'm sure it happens. The poor bobby, unless it is someone really switched on, doesn't know any different and I would suggest that he doesn't really care, because now the trial is going on and he wants it to go on. The case is here, the witnesses are here, we're ready to go - are we going to stop and object over a piece of paper which, again, probably doesn't show a lot? - yeah, let them have it!'<sup>23</sup>

With this disclosure comes full circle. The investigators, whose initial judgment determines what material falls to be disclosed, are disillusioned due to informal disclosure by judges and the CPS. The ASU, whose task is to ensure that the OICs comply with CPIA, are similarly disillusioned and the CPS, who are ultimately responsible for disclosure, cannot overcome resistance from the judiciary to apply the provisions. Against this background, it is the defence which manages to circumvent their obligations under the Act and still secure full disclosure.

'In many respects it has actually worked out to our benefit because the CPS are so worried about meeting the time limits and are under so much pressure that they will give us anything we ask for because they know that, if we aren't happy, we will simply request an adjournment and 9 times out of 10 we will get it'<sup>24</sup>

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<sup>23</sup> ASU 6/185.

<sup>24</sup> DQ 1/31.

**SECTION 4.**  
**CONCLUSIONS**

## 14. conclusions

'I wouldn't wish to paint it as a very common problem but there are certainly occasions where you wonder why an officer has left something off a schedule which they must know should have been on it. I think it is improving but we may never get a full picture because this is information which is very close to the police officers and, quite frankly, if they want to withhold it, the chances of it being found in many cases is very slight.'<sup>1</sup>

'I am not really that interested in why the police don't list things on the schedules properly - that's not my problem. All I am interested in is getting the material that I ask for'<sup>2</sup>

'The only problem that could arise is if there was something there that I was not aware of but, in the scenario where you are OIC and disclosure officer, that is quite unusual. It might happen in a larger case where you couldn't possibly know what was in existence but, at the moment, everything seems to be tickety-boo.'<sup>3</sup>

The above comments, from a CPS lawyer, a defence solicitor and a detective respectively, succinctly convey the picture which emerges from this research, of a disclosure regime which is fundamentally flawed and which, on occasion, operates perilously close to real crisis. As stated at the outset, the intention has been to highlight issues of concern identified by the study and to explore their ramifications on an ongoing basis. However, the end of this work provides an obvious opportunity to make some general points on what has been learned from three years of study of how disclosure operates in two police force areas in order to draw some broader conclusions in attempting to assess the effectiveness of CPIA disclosure nationally.

The timing of this work is propitious, as it closely follows both the Auld Report and the subsequent White Paper *Justice for All*,<sup>4</sup> which represented the most recent assessments of the working of the criminal justice system, including disclosure.

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<sup>1</sup> CPS 6/195.

<sup>2</sup> DQ 1/31.

<sup>3</sup> CID 11/960.

<sup>4</sup> Cm 5563.

This study, therefore, provides an opportunity to consider not only the deficiencies of disclosure under CPIA as it currently operates, but also the proposed remedies put forward by the Government and, in doing so, we return to the questions posed at the beginning of this work.

1. Is there any evidence that disclosure does not operate as intended?

It would be disingenuous to suggest that this work was undertaken with the expectation of discovering a system of disclosure which operated smoothly and entirely in accordance with the legislation as, without exception, all of the previous studies into the operation of CPIA disclosure have been highly critical of the way in which the provisions are applied. For example, the research commissioned by the Home Office as part of the Auld Review found 88% of barristers, 87% of defence solicitors, 84% of CPS respondents and 61% of judges expressing dissatisfaction with the operation of CPIA<sup>5</sup> and, in his final report, Auld identified a familiar list of problems with disclosure:

‘...a lack of common understanding within the Crown Prosecution Service and among police officers of the extent of disclosure required, particularly at the primary stage; the conflict between the need for a disclosure officer sufficiently familiar with the case to make a proper evaluation of what is or may be disclosable and one sufficiently independent of the investigation to make an objective judgement about it; the consignment of the responsibility to relatively junior officers who are poorly trained for the task;...frequent inadequate and late provision by the prosecution of primary disclosure; failure by defendants and their legal representatives to comply with the Act’s requirements;...confusingly different tests for primary and secondary prosecution disclosure...’<sup>6</sup>

To this list might be added insufficient scrutiny of the work of disclosure officers; the absence of any discernible sanction for defective disclosure; and judicial reticence to apply the provisions or to countenance the use of adverse inference as a sanction for inadequate defence statements. Such problems are also well recognised

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<sup>5</sup> Plotnikoff, J., Woolfson, R. (2001) *A Fair Balance? Evaluation of the Operation of Disclosure Law*. London: HMSO. p 121.

<sup>6</sup> Para 167.

on an unofficial level within the police service,<sup>7</sup> although they remain largely unaddressed, resulting in a system which many feel to be fundamentally flawed.

'I shouldn't say this, but our standards here have gone down and it has been accepted that we will make more mistakes. Now, when we are dealing with this type of work, I don't think that should happen. Yes, we will always have human error but there shouldn't be an "acceptable level" and to knowingly cut corners and to do things that you know are going to cause problems further down the line...standards are going down, mistakes have been made and it has become accepted that standards will go down and we can't do anything about it. It is, "Oh well, you can only do what you can do". The nature of this department is that you jump from one crisis to another.'<sup>8</sup>

Throughout the fieldwork for this study there was a high degree of fatalism on the part of almost all of the interviewees when called upon to consider the overall effectiveness of CPIA disclosure, a pessimism which must, inevitably, have a detrimental impact on morale. Such attitudes are the result of widespread acceptance within the criminal justice system of the failure of the disclosure regime yet what is perhaps more alarming is the extent to which the system continues to generate the *impression* of operating effectively. As has been seen at a number of points in this work,<sup>9</sup> there is an emphasis at all stages of the disclosure process, on making the files appear 'correct', frequently with minimal expectation that all the required duties have been adequately performed. The decisions of those earlier in the chain of file preparation are largely accepted as objective fact and the mechanisms which exist for that earlier judgment to be scrutinised are generally ignored due to pressure of work. As a result, the system generates an air of efficiency which is illusory.

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<sup>7</sup> 'I know that unused material is a problem and, for our force in general, unused material is a problem. I have always said this in my position and my colleagues have always said this we have written a number of substantial reports which have gone to the Chief Constable saying "unused material is a problem" and, sooner or later, something will fall apart, a big case will be lost because of it and that is how we have taken it - we have voiced our concerns to the chief, that something needs to be done regarding the training of people and their understanding of this, otherwise there is going to be a problem.' [ASU 10/51].

<sup>8</sup> ASU 11/79.

<sup>9</sup> See, for example, Chapter 11.7.

## 2. What are the potential consequences?

Given the central role of non-disclosure in many of the most infamous miscarriages of justice, there must be concerns that the current system is facilitating further wrongful convictions and this study found a number of individuals who shared such fears.<sup>10</sup> Unsurprisingly, the police appeared less concerned than others,<sup>11</sup> such as CPS and defence lawyers but, even within the police service (most notably among the ASUs) there is apprehension that there will be a serious case of non-disclosure at some point and this is discussed in detail in Chapter 12. Such fears are supported by the collapse of a number of high profile cases during the course of this study and it is inevitable that there will be further appeals based on defective disclosure, which will be assisted by inconsistent practice with regard to the handling and storage of unused material. At the same time, the development of domestic jurisprudence on the overlap between CPIA and HRA, discussed in Chapter 4<sup>12</sup>, increases the likelihood of a fundamental challenge to the basic principles of the 1996 Act. However, until this occurs, there seems little prospect of structural reform of the disclosure regime, beyond the limited proposals contained in the White Paper.

## 3. Can the reasons for any perceived failures be identified?

As a result of this study it may be concluded that there are a number of key factors which combine to ensure that CPIA does not operate as intended.

Some of the difficulties with CPIA stem directly from the legislation itself and the political agenda which lay behind the original proposals. In moving away from the

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<sup>10</sup> The view expressed by one CPS lawyer being typical, 'I think it is clear that it is not working properly and, if it is not working properly then there is a potential for disasters and whether or not you find out about them is really just a matter of luck.' [CPS 1/385]. Another added, 'I am sure that there is unused material that exists that we never even know about on occasions and the potential for things to go awol is huge. It just comes down to trust and the point at which you have to accept what you are told.' [CPS 8/119].

<sup>11</sup> 'I'm not sure there is any risk that people will be unfairly convicted although, as a bobby, I would always say that wouldn't I?' [ASU 12/130].

<sup>12</sup> See section 4.7.

Runciman recommendations, the Conservative government sought to strengthen the provisions and to bolster its law and order credentials and, in the process, employed sometimes tortuous logic which manifestly failed in its objectives and which has generated enormous confusion for those involved in the implementation of the Act. Two provisions in particular have contributed to this: firstly, the adoption of separate tests for primary and secondary disclosure, which has led to considerable uncertainty on the part of disclosure officers; secondly, the linkage between secondary disclosure and the submission of a defence statement which is fatally flawed and widely ignored. It has been shown in Chapter 12 that the initial suggestion of a defence statement which would assist the prosecution in identifying the key issues in the case and, in the process, suggest possible lines of secondary disclosure, has proved fallacious and, as a consequence, the defence statement has been reduced to the status of a token gesture in many cases. However, as will be seen, this did not prevent the Government from continuing to pursue the objective of greater defence disclosure in the most recent recommendations.

On a practical level, many of the operational difficulties with CPIA are exacerbated by the absence of any uniform policy within the police service. Forces and even individual divisions enjoy wide discretion in the implementation of disclosure practice, leading to confusion (particularly where inquiries involve cooperation between more than one force) and impeding the development of recognised standards for disclosure. The most important example of this is the division of roles between CID and ASU staff and the question of which assumes the responsibility of disclosure officer. Some of the difficulties which this creates are outlined in Chapter 12.2, as the implications of the two different approaches to the problem are described and one of the earliest findings of this research was that this interface, between the CID and ASU, represents one of the weakest links in the disclosure procedures, whichever model is adopted. Where the role of disclosure officer and OIC are combined the investigator has almost total control over the treatment of any unused material, with the ability to steer the course of the inquiry away from potentially problematic areas or to succumb to basic errors in the categorisation of

material. Where the role of disclosure officer is performed by a member of the ASU, the potential for communication breakdown renders the decision making of an individual who was not involved in the initial collection of evidence dubious from the outset.

It has repeatedly been shown that the entire disclosure process relies on the judgment and discretion of the OIC, who not only controls what information is brought within the ambit of the investigation, but also determines the status which that information will be given, including that which is to be categorised as 'unused material'. Chapter 10 illustrates how officers are able, by accident or design, to discount specific material and entire lines of enquiry with relative ease, based on an instinctive knowledge of 'guilt' influenced by the 'crime control' nature of the police personality. Auld considered the effects of this and concluded.

'...there are many who believe that one of the greatest flaws of the scheme of disclosure continued in the 1996 Act is the trust that it reposes in the honesty, independence and competence of investigating police officers.'<sup>13</sup>

In charting the processes of investigation, file preparation and submission it has been evident that the OIC is able to exert enormous influence over the final appearance of the case, with numerous opportunities to minimise the impact of potentially undermining material, a situation made more serious by poor training and the effects of police culture which combine to produce support and justification for often flawed disclosure judgments.

This must raise questions over the high level of autonomy afforded to officers in deciding matters of disclosure and yet it is clear that supervision of officers, in the form of line management, is often reduced to the level of tokenism. The absence of effective supervision which challenges the decision making of OICs means that

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<sup>13</sup> Para 173. Roger Leng, in a contribution to the Review, observed, 'There is no historical justification for investing police and prosecutors with this degree of trust, if it can be avoided'. Leng, R., 'Disclosure: A Flawed Procedure'. Paper delivered to the Justice Seminar on 12<sup>th</sup> June 2000 for the Criminal Courts Review.

investigators have almost unfettered discretion in creating the case file and Chapter 11 outlines the mechanisms employed by officers to make the file appear both 'suitable' for the offence charged and 'prosecutable' in order to satisfy the thresholds presented by the CPS. Pressure to expedite files and to minimise delay produces a disclosure process which ensures that the correct schedules and forms are submitted, but within an environment where much of the content is taken at face value. Consequently, the reality of disclosure is often far less effective than the accompanying trail of documentation would suggest, as one CPS caseworker commented:

'It appears to work because the schedules are done and they go to the right people but it is only when they are scrutinised, usually by counsel, that the cracks start to appear. You sit in court and think, "I can't check that because I was never told about it and it isn't in the file".'<sup>14</sup>

Another factor which contributes to poor disclosure practice is the widespread disillusionment on the part of police officers at the way in which their initial judgments on unused material are either ignored by CPS, usually by means of informal disclosure, or overruled by the courts. If officers conclude that time expended on considering and scheduling material has been wasted, then there is little incentive for them to apply the provisions rigorously to future cases and the result is a fatalism which encourages officers to make only half-hearted attempts at disclosure. The fact that judges will usually accede to defence requests for further disclosure and that prosecution counsel will allow the defence sight of documents at court, have entered the folklore of the police and, by doing so, have undermined any attempts to promote good practice.

The final contributing factor to the current poor levels of performance is the lack of any real sanction for those officers who engage in perfunctory disclosure or for those defendants who refuse to provide a defence statement as a trigger for secondary disclosure. Without the fear of sanction there is little reason for either group to

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<sup>14</sup> CPS 5/229.

provide possibly damaging information, yet it is generally accepted within the police service that defective disclosure carries no real penalty. It has been shown the operational culture of the police condones perfunctory disclosure as a reflection of the concentration on 'real policework', at the expense of paperwork<sup>15</sup> and this unspoken understanding between investigators allows officers to make token disclosure without undermining their status within their peer group. This is critical to understanding the apparent apathy on the part of many operational officers towards matters of disclosure.

#### 4. Are the causes of any perceived failures innocent or otherwise?

It would be naïve in the extreme to suggest that the errors made by the police in relation to disclosure all arise from innocent misunderstanding of the provisions and that material which may be of use to the defence is never knowingly excluded from the disclosure process. However, it would also be unfair to portray the police as systematically destroying potentially valuable evidence on an everyday basis in order to secure convictions. The reality is that, despite its origins in the miscarriages of justice of the 1970s, there is little within CPIA that makes the task of hiding material any more difficult for the officer who decides to embark on this course of conduct and, as has already been suggested, the 'Ways & Means Act' will continue to be invoked within the operational culture of the police to secure the convictions of the 'plainly guilty'. It is probable that, in some cases, this does lead to serious and deliberate concealment, but the overwhelming impression in conducting this research was that such cases are very much in the minority. It is suggested that the greater danger lies in the enduring mindset of the police as pursuing a conviction, rather than seeking the truth, and Chapter 10 outlines the way in which this over-alignment with crime control values can distort the consideration of issues such as 'relevance' to undermine the consideration of contradictory lines of enquiry and, with it, the operation of disclosure.

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<sup>15</sup> See section 11.3.

## 5. Can any perceived failures be remedied?

Having set out both the failures in the current system and the reasons for them, what remains is to consider whether there is anything which could be done to remedy the worst defects and to remove the greatest risks of further miscarriages of justice. At this point it is appropriate to consider both the recommendations of the Auld Report in relation to disclosure and the Government's own proposals for reform which are, themselves, problematic.

Despite the extensive consultation which preceded the final report, the reality was that Auld presented little by way of real progress on disclosure, with many of the recommendations amounting to little more than a call for general improvement. Suggestions for the introduction of statutory guidelines for the recording and retention of material as a partial remedy for the failings of CPIA<sup>16</sup> ignored the ease with which officers are able to subvert the existing mechanisms in order to satisfy crime control imperatives and it is difficult to share Auld's optimism (expressed throughout the final Report) that greater use of IT for the storage and exchange of material will, in some way, greatly improve the operation of the disclosure procedures. As such, recommendations for improved all round training for disclosure officers and suggestions that prosecution disclosure should occur, '*in sufficient time to enable completion of mutual disclosure*,'<sup>17</sup> backed by vague threats of disciplinary offences for recalcitrant officers, could hardly be viewed as radical when the system is so palpably failing, as Michael Zander concluded in his response to the report:

Better training could at best have only a marginal effect. Exhortation that people should do their job better is harmless but useless. Making failure to comply a disciplinary offence serves no purpose whatever unless disciplinary charges are actually brought at least occasionally.<sup>18</sup>

Perhaps the greatest indication of the failure of Auld in relation to disclosure reform was the extent to which his recommendations were ignored by the Government

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<sup>16</sup> Chapter 10, Para 174.

<sup>17</sup> Chapter 10, Para 133.

<sup>18</sup> <http://www.lcd.gov.uk/criminal/auldcom/ar/ar3.htm#note>

when the time came to make firm proposals for change. For its part, the Government made clear in *Justice for All* that it perceived inadequate prosecution disclosure and the misuse of defence statements as the two main problems with disclosure as presently operated,<sup>19</sup> and, unlike Auld, such concerns were explicitly couched in the language of the crime control agenda, with the priority on, '*the issue that matters – the search for the truth and convicting the guilty*',<sup>20</sup> and emphasising, once again, that fault lay with defence practitioners who were, '*using disclosure as a procedural tactic to delay the process and cloud the issues.*'<sup>21</sup>

In terms of concrete reforms, both Auld and the *Justice for All* criticised the adoption of dual tests for primary and secondary disclosure, and the Government has proposed their replacement with a single test for both stages of the disclosure process.<sup>22</sup> Although this serves to highlight the extent to which the previous Government was misguided in insisting on a dual standard (in an attempt to lend legitimacy to the concept of defence disclosure),<sup>23</sup> the precise wording of any new single test is, as yet, uncertain and so there remains a very real fear that any replacement test will merely confuse the matter further. It will be remembered that Runciman recommended a single test for both stages of the disclosure process of:

'all material relevant to the offence, the offender or to the surrounding circumstances.'<sup>24</sup>

Auld, however, chose a more detailed test of:

'material which, in the prosecutor's opinion, might reasonably affect the determination of any issue in the case of which he knows or should reasonably expect' or 'material which in the prosecutor's opinion might weaken the prosecution case or assist that of the defence.'<sup>25</sup>

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<sup>19</sup> Para. 3.46. Compared to the CPS Thematic Review which concluded that it was non-observance of JOPI and its ambiguity as non-statutory guidelines which leads to most failings. Crown Prosecution Service Inspectorate. *Report on the Thematic Review of the Disclosure of Unused Material. 2/2000* (March 2000). [Para 3.26].

<sup>20</sup> Home Office. (2002) *Justice for All*. Cm 5563. London: HMSO. Para 1.9.

<sup>21</sup> *ibid.*

<sup>22</sup> Home Office. (2002) *Justice for All*. Cm 5563. London: HMSO. Para 3.48.

<sup>23</sup> See Chapter 4.6.

<sup>24</sup> Para 5.2.

<sup>25</sup> Chapter 10, Para 184.

As with CPIA itself, the weakness of this test is that it employs the subtle phraseology of the legal profession to create a test intended for application by operational police officers. By choosing not to endorse Auld's proposed wording, the Government acknowledged the dangers inherent in replacing the present, already confusing, tests with one which is, at the same time, both objective and subjective in character, being based on an assessment of what '*...in the prosecutor's opinion, might reasonably affect.*' One of the principal weaknesses of CPIA identified in Chapter 10 of this study is the inability of OICs to adequately apply the existing tests, with many officers remaining uncertain as to the precise scope of the standards to be applied. In light of this fact it is strongly suggested that a straightforward objective test, such as that proposed by Runciman, would be infinitely preferable. This would have the additional benefit (for the defence at least) of making disclosure decisions more amenable to subsequent review. It remains to be seen, however, what the wording of the proposed test will be.

Turning to the second main area of concern for both Auld and the Government, the widespread misuse of defence statements, both concluded that there remained a valuable role to be played by this requirement of limited disclosure on the part of the defence. It should be remembered that the introduction of defence statements represented one of the most radical aspects of CPIA, but this research has amply demonstrated<sup>26</sup> the degree to which they have failed to expedite the process and to extract meaningful disclosure from the defence as was originally envisaged. As a result they have become largely irrelevant to the operation of disclosure, being reduced to the level of a token gesture by many defence solicitors. Despite this, Auld concluded that they remained a valuable tool for early identification of the issues in the trial<sup>27</sup> and so recommended their retention within the disclosure procedures. However, he further added that the requirement should be for:

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<sup>26</sup> See Chapter 12.17.

<sup>27</sup> Chapter 10, Para 156.

'a defence statement identifying those issues to the extent that they are not otherwise apparent to the prosecutor at the outset.'<sup>28</sup>

Given the widespread flouting of the existing requirements of the defence statement, it is difficult to envisage widespread defence cooperation with this objective, yet Auld suggested no mechanism for achieving compliance. Unsurprisingly, the Government was more willing to countenance penalties on the defence for non-compliance, as this clearly fitted with their 'crime control' perspective towards disclosure in general and the defence in particular, and the preferred sanction remains the facility for the drawing of adverse inference. In pursuing this as a means of coercing the defence into greater compliance, the Government studiously ignored the widespread reluctance of the courts to make use of the existing provisions, proposing instead:<sup>29</sup>

- Widening the matters on which an inference may be drawn to include any significant omission or anything that the defendant could reasonably be expected to have mentioned in the defence statement; and
- Removing the present requirement for permission from the judge before making comment on discrepancies between the defence statement and the defence at trial.

What would the effect of these changes be? On the basis of this study there would appear to be little benefit for the prosecution in widening the grounds for adverse inference when the courts have already demonstrated an implacable opposition to the notion of adverse inference in such circumstances. There is also the question of what constitutes a '*significant*' omission and how that which the defendant '*could reasonably be expected to have mentioned*' might be determined. Similarly, permitting the prosecution to comment on differences between the defence statement

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<sup>28</sup> Chapter 10, Para 171.

<sup>29</sup> Para 3.52.

and the defence put forward at trial still leaves the judge free to direct the jury as (s)he thinks fit. More importantly, increasing the pressure on the defence to reveal more of their case in this way must increase the likelihood of challenge under Art 6.

Aside from the proposals for defence statements, the government also used the White paper to promise, '*a variety of incentives and strengthened sanctions to encourage the parties to comply with their disclosure requirements.*'<sup>30</sup> Such 'incentives' included:

- Requiring prosecuting counsel to play a more active role in advising on and challenging the adequacy of defence statements.
- Giving the prosecution a right to apply for an early judicial ruling in circumstances where the defence statement is accompanied by unreasonable requests for long lists of prosecution documents.
- Equipping the judiciary with the right case management skills to take a robust line at preliminary hearings, to ensure that both prosecution and defence have complied with the disclosure process to identify the triable issues
- Enhancing the requirements of the defence statement.
- Requiring the judge to alert the defence to inadequacies in the defence statement from which adverse inference may be drawn.

Once again, the proposals are predicated on a level of intervention and cooperation from the judiciary which has hitherto not been forthcoming in matters of disclosure and this must reduce the probability of any sudden improvement.

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<sup>30</sup> Para 3.54.

What is noticeable in the White Paper is the absence of any reform of the disclosure mechanisms aimed at correcting police practice or of strengthening sanctions for those officers who attempt to evade their disclosure responsibilities. In light of the pivotal role of the OIC in collecting and classifying unused material this is, to say the least, curious and it is here that this study disagrees most strongly with the White Paper. There can be little hope of seriously addressing the defects of CPIA as it currently operates without first tackling the underlying cultural and operational imperatives which govern police attitudes and which leave the practice of disclosure prone to distortion in the unsaid quest for 'crime control' values. This is essential because, however the disclosure regime is structured in future, there is no viable alternative to having the initial assessment of unused material conducted by the OIC. Auld recommended that consideration of unused material for disclosability should pass from the police to the CPS, with the renaming of disclosure officer as 'collation officer.'<sup>31</sup> However, the Government correctly chose not to follow this, for it is difficult to see how this proposal would do anything to remedy the failings identified in this study. The OIC, as the investigator, would still retain the ability to suppress or ignore information during the course of the enquiry and so any perceived benefit of having the assessment of unused material conducted by the CPS would be largely cosmetic when reviewing lawyers are both overworked and unfamiliar with the actual conduct of the investigation.<sup>32</sup>

Acknowledging that the function of dealing with unused material must remain with the OIC merely serves to emphasise the difficulty of altering police attitudes sufficiently to allow effective disclosure to take place. Chapter 10.11 illustrated the dilemma of officers attempting to make an objective assessment of unused material in the case of those whom they 'know' to be guilty and the cultural perspective of the police service will always impose additional pressure to focus on that which is inculpatory, bringing into direct conflict the formal and informal rules of policing.

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<sup>31</sup> Para 176.

<sup>32</sup> In addition, on Home Office estimates, examination of all unused material by CPS lawyers would cost an additional £30 million. Plotnikoff. J., Woolfson. R. (2001) *A Fair Balance? Evaluation of the Operation of Disclosure Law*. London: HMSO. p.109.

Real change requires the *internalisation* of rules for, as Goldsmith<sup>33</sup> pointed out, external rules are less likely to effect changes to police practice where there are competing internal rules and, for this reason, it is necessary to bring the ethos of disclosure within the *working rules* of the police. This simple statement cannot begin to convey the scale of the task as what is required is a fundamental re-evaluation of the nature of the police work, with officers committing to the concept of their role as 'seekers of truth' rather than 'agents of the prosecution'. In effect, what is required is for officers to abandon the 'crime control' ethos in favour of a more widespread acceptance of 'due process' values in matters of disclosure. Such a change in outlook may, ultimately, prove impossible but, without it, the danger of more miscarriages of justice based on non-disclosure will always be present.

On an immediate, practical level, it is suggested that the only solution is to introduce uniform practices across all police force areas, based on a recognised division of roles between OIC and ASU, rather than the current situation where the ASU assume the role of disclosure officer in some force areas but not others. It is clear that there is a training deficit which needs to be addressed but, equally, this must be accompanied by real sanctions for non-compliance by disclosure officers, in order to counter the 'have a go' culture which influences some in their file preparation. Auld noted that some forces have adopted a policy of blanket disclosure of routine documentation (such as crime reports, etc.)<sup>34</sup> despite the fact that, by effectively abandoning the relevancy test, such practice runs directly counter to the provisions of CPIA. In addition, the fact that this approach is far from universal has generated geographical inconsistencies which result in something akin to a lottery for defendants.

Regrettably the ultimate conclusion of this work must be that the 'crime control' ethos of the modern detective remains largely intact and continues to conflict fundamentally with the 'due process' requirements of CPIA disclosure. In addition,

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<sup>33</sup> Goldsmith, A. (1989) 'Taking Police Culture Seriously: Police Discretion and the Limits of the Law'. In Reiner, R. (ed) *Policing Vol II*. Aldershot: Dartmouth.

<sup>34</sup> Chapter 10, Para 136.

the ease with which investigators can conceal or simply fail to recognise potentially undermining material means that information which could be of assistance to the defence is routinely lost from the chain of communication and the operational pressures which exist at all stages of the investigation and file preparation process mean that there is little likelihood of such omissions being discovered at a later stage. Any attempt to remove from the OIC the function of collating unused material would still rely on that officer for the raw material and, as such, would still permit the investigator to control what did and did not fall to be disclosed, a situation which would apply equally were CPIA to be abandoned entirely and the previous common law rules of disclosure to be resurrected. Against this background, the only realistic measures which can be taken are to impose more stringent sanctions on officers for defective disclosure, so that the cultural acceptance of perfunctory disclosure outlined in Chapter 11.3. is overtaken by fear of harming career prospects, and to simplify the existing mechanisms, particularly by the introduction of a single test for all stages of the disclosure process. The retention of the defence statement by the Government is a matter for regret, as it merely encourages the police to believe that there is a justification for retaining material (on the basis that its disclosure has not been specifically required by the terms of the proposed defence) however, if defence statements are to continue, then their format should follow the basic 'checklist' format recommended by Runciman,<sup>35</sup> rather than the more detailed (but ignored) format of CPIA.

It is, perhaps, appropriate that the final word should fall to Michael Zander, who played such an important role in the deliberations of the RCCJ and who concluded in his response to Auld:

'it might be as well if it were generally accepted that there is no way that the disclosure system can be made to work satisfactorily. Every reasonable effort must of course be made to make it work as well as possible. But at its best it will still work badly. The evidence for this is overwhelming.'<sup>36</sup>

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<sup>35</sup> See Chapter 4.6.

<sup>36</sup> <http://www.lcd.gov.uk/criminal/auldcom/ar/ar3.htm#note>

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