Chapter One - The Rise of Managerialism: The Impact of Swift and (Un)sure Justice on Disclosure in Criminal Proceedings

Dr. Ed Johnston*

On coming to power in 1997, New Labour continued in the same vein of the previous government by attempting make criminal justice more swift and efficient. The new Prime Minister, Tony Blair, wanted to increase efficiency by implementing 'fast-track, efficient procedures from arrest to sentencing; improving services to witnesses and victims; and ensuring the component parts of the system were performing to their maximum potential.'[1] These goals were consolidated in the Criminal Justice Strategic Plan 1999-2001 which had the goal of dispensing justice 'fairly and efficiently,'[2] and were underpinned by Lord Justice Auld's comprehensive *Review of Criminal Process in England and Wales* in 2001. The *Review* was designed to inquire into the 'practices and procedures of the rules of evidence … with a view to ensuring that they deliver justice fairly, by streamlining their processes, increasing their efficiency and strengthening the effectiveness of their relationships with others across the whole criminal justice system.'[3] This chapter will analyse how the mechanism of defence disclosure has been cultivated to feed this agenda of increased efficiency of the CJS, often with little regard to pivotal due process safeguards that have been ridden roughshod in pursuit of these goals. The chapter will examine the socio-political climate that allowed both the creation of a defence disclosure regime via the Criminal Procedure and Investigations Act 1996 (CPIA 1996) and its subsequent extension into the magistrates' court via the Criminal Procedure Rules (CrimPR). The chapter will also examine the inequality between the defence and prosecution disclosure obligations, and their subsequent treatment in court in terms of consequences non-compliance.

Efficiency or Fairness: can you have both? The 1960s-2000s

Whilst defence disclosure is a relatively new creation, the notion of prosecution disclosure has been an integral part of criminal procedure since the mid-1940s. *Bryant and Dickson*[4] is generally regarded at the dawn of the modern disclosure regime, whereby the prosecution ought to be compelled to disclose any material that may lead to the acquittal of the defendant. This importance of this provision was later re-enforced by Lord Justice Denning in *Dallison v Caffery*[5] where he claimed that should a prosecutor 'know of a credible witness who can speak [of] material facts which tends to show the prisoner to be innocent, he must either call the witness himself or make his statement available … it would be highly reprehensible to conceal [the evidence].'[6] This remained the case until the mid-1960s; disclosure was exclusively placed on the prosecution to reveal facts of their case to the defence.

---

* Dr. Ed Johnston is a Senior Lecturer in Law at UWE, Bristol, edward2.johnston@uwe.ac.uk

1 See E. McLaughlin, J. Muncie and G. Hughes 'The Permanent Revolution: New Labour, New Public Management and the Modernization of Criminal Justice, Criminal Justice 2001 1(3) 301-318 at 307.

2 Home Office, Criminal Justice System: Strategic Plan 1999-2002 (1999) at para 1.3

3 R. Auld, *A Review of the Criminal Courts of England and Wales,* (2001) Chapter 1, paragraph 1.

4 [1946] 31 Cr App R 146.

5 [1965] 1 QB 348.

6 *Ibid* at 369.

However, the Criminal Justice Act 1967 represented a turning point, as the first foray into the realm of defence disclosure. Section 11 required the defendant to disclose details of any alibi witnesses for trials on indictment. This remained the only defence obligation until the mid-1980s. The Roskill Committee (1987) was launched to examine the process of fraud trials in E&W. The committee's final report recommended an extension to the regime of defence disclosure, stating that the public believed the legal process to be 'an open invitation to blatant delay and abuse.'[7] In order to tackle this abuse the committee argued that forcing the defence to outline its case in advance of trial would make the process fairer, shorter and more efficient. Further, it would also allow the jury a greater understanding of the issues at hand if they were aware which elements of the prosecution's case the defence wished to challenge. Requiring an outline of its case in advance would greatly dilute the scope for the defendant to fabricate a defence. This suggestion garnered support; Michael Levi believed having cases outlined at the start would assist in 'comprehension and inhibit the development of irrelevant lines or arguments in the hope of causing maximum obfuscation and uncertainty over guilt.[8] Roderick Munday supported the notion that these changes ought to reflect the wider criminal process rather than being limited to fraud trials alone.[9] Whilst the then government did not fully implement these provisions, the Crown Court (Advance Notice of Expert Evidence) Rules[10] were established as a result of the Committee's report. This meant that, as well as an alibi witness, any expert evidence the defence sought to rely be disclosed in advance of trial.

Disclosure in the mid-twentieth century represented a regime of pragmatic fairness. The subsequent developments during the 1990s would have seismic consequences for this concept. The decade began with a succession of successful appeals centred on false confessions[11] and the then government responded by establishing the Royal Commission on Criminal Justice (RCCJ). This sought to examine potential reforms to the CJS and to tackle the 'excesses of the adversarial system.'[12] One identified excess was the right to silence; the then-Home Secretary, Michael Howard, famously proclaimed that 'the right to silence will be abolished [and] the innocent have nothing to fear.'[13] This clear conflation between silence and guilt was endemic in government criminal justice policy of the time, and was reflected in legal circles.[14] It was thought by amending the silence provisions, the threat of an ambush defence would be greatly reduced.[15] The Royal Commission and the existing empirical evidence on this matter suggested otherwise.[16]

---

[7] The Fraud Trials Committee, Chairman: The Right Honourable Lord Roskill, P.C., (HMSO: 1986) p.1. Paragraph 1.
[8] M. Levi, 'The Future of Fraud Prosecutions and Trials: Reviewing Roskill' Company law (1986) 7(4) 139-146 at 140.
[9] R. Munday, 'The Roskill Committee on Fraud Trials' (1986) Cambridge LJ, 175-179 at 177.
[10] SI 1987/716.
[11] The Birmingham Six (*McIKenny and Others* [1992] Crim LR 117; Stefan Kisko (Kiszko 1992); The Cardiff Three (*Paris, Abduallahi and Miller* [1993] 97 Cr App Rep 99; and Judith Ward (*R v Ward* [1993] 1 WLR 619, 96 Cr App Rep 1).
[12] S. Field and P.A. Thomas, 'Justice and Efficiency? The Royal Commission on Criminal Justice, (21) JL Soc'y (1994) 1-19 at 13-14.
[13] A. Travers (1993) 'Right to Silence abolished in crackdown on crime' *Guardian* 7 October
[14] Lord Lane had to recuse himself in the Winchester Three Appeal, *R v McCann, Cullen and Shanahan* (1991) 92 Cr. App R 239. See also Lord Denning's comments in 'Free Justice From Silence' *The Sunday Times* (London, 20th September 1987)
[15] R. Leng, 'Losing Sight of the Defendant: The Government's Proposals on Pre-Trial Disclosure', Crim LR 704 (1995)
[16] See R. Leng *The Right to Silence in Police Interrogation: A study of some of the issues underlying the debate*, RCCJ Research Study no 10 (1993)

Furthermore, Greer suggested that those who stayed silent are more, rather than less likely, to be charged and subsequently enter a plea of guilty.[17] A further 'excess' of the adversarial system was the notion of partial defence disclosure. The Commission suggested that amendment could 'bring forward the moment at which the issues [in the case are] …clearly and concisely laid out';[18] as a result, the adjudication should become more efficient. For example, more weak cases would be dropped at an earlier stage and more cases would 'crack', saving resources; trial dates would be fixed earlier, with better estimates of duration of trials, allowing more effective deployment of resources.

The suggestion of an enhanced defence disclosure regime was met with vehement opposition from Michael Zander. Dissenting from the Commission's general recommendations in this regard, he outlined four grounds as to why the proposals should not be followed. First, the proposal was inconsistent with the burden of proof, as the defendant should not be obliged to assist the prosecution; second, the changes suggested were designed to combat ambush defences, a problem not underpinned by strong evidence; third, advance disclosure was unlikely to streamline the process and render it more efficient; and fourth, sanctions for failing to comply with disclosure were difficult to enforce.[19] The government largely ignored both the empirical evidence and this dissenting commentary and pressed ahead with a new regime of defence disclosure, under the CPIA 1996. Critics have suggested that both the CJPOA 1994 and CPIA 1996 were designed to 'mollify a police force in the wake of the Police and Criminal Evidence Act 1984 [PACE 1984]… and to restore the governments tattered law and order image.'[20] Quirk suggests that these crime control policies were the 'trade-off' for the enhanced due process protections afforded by PACE.[21] The CPIA 1996 fundamentally altered pre-trial procedure in E&W. Previous to this, defence disclosure was extremely limited and non-contentious. If the defence wanted to offer alibi or expert evidence, it only seemed equitable to ensure the prosecution were aware of such witnesses and could properly test the veracity of their evidence. However, what was required under s.5 CPIA 1996 was a greatly enhanced approach to defence disclosure. For trials on indictment, the defendant now needs to provide a written statement outlining the following:

> s.5(6)
> (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;
> (c) setting out, in the case of each such matter, the reason why he takes issue with the prosecution.

What followed was almost universal criticism of the regime, from suggestions that it ignored the operational cultures of the actors involved in the process,[22] to the general unworkability of the

---

[17] S. Greer, 'The Right to Silence, Defence Disclosure and Confession Evidence, in S. Field and PA Thomas, , 'Justice and Efficiency? The Royal Commission on Criminal Justice, (1994) Oxford: Blackwell's at 104.
[18] The Royal Commission on Criminal Justice, *Report*, Cm 2263, (HMSO 1993) p.84 at para 3.
[19] *ibid Note* of Dissent, M. Zander at p.222.
[20] S. Greer, 'The Right to Silence, Defence Disclosure and Confession Evidence, in S. Field and PA Thomas, , 'Justice and Efficiency? The Royal Commission on Criminal Justice, (1994) Oxford: Blackwell's at 104.
[21] H. Quirk, 'Twenty Years on, the right of silence and legal advice: The spiralling costs of an unfair exchange' (2013) NILQ, 54(4) 465-83 at 466.
[22] See H. Quirk, 'Disclosure: Significance of Culture in Criminal Procedural Reform' (2006) 10 E&P 42-59.

regime for both the prosecution and the defence in terms of timeframes.[23] Owing to this, s.33 Criminal Justice Act 2003 amended the provisions and inserted a new s.6A into the CPIA 1996. This change meant that the defence statement now contains elements which:

(a) Set out the nature of the accused defence, including any particular defences on which he intends to rely;
(b) Indicating matters of fact on which he takes issue with the prosecution;
(c) Setting out, in the case of each such matter, as to why takes issue with the prosecution and;
(d) An indication of any point of law (including any point as to the admissibility of evidence or an abuse of process) which he wishes to take and any authority he intends to rely on for that purpose.

As such, s.6A greatly increased the disclosure obligations of the defendant in very broad terms and mirrored the tone that was being reflected by the courts in the wake of the *Auld Review*. In the *Review*, Lord Justice Auld, perhaps inadvertently, created a mantra that would define the criminal process for the next twenty years (and currently shows no signs of abating). He stated that the 'criminal trial is not a game under which a guilty defendant should be provided with a sporting chance…'[24] He went on to define the trial as:

> …a search for the truth in accordance with the twin principles that the prosecution must prove its case and that a defendant is not obliged to inculpate himself, the object being to convict the guilty and acquit the innocent. Requiring a defendant to indicate what he disputes about the prosecution case offends neither of these principles.'[25]

The courts were quick to adopt this mantra and implement an apparent desire for a more efficient process. For example, in *Jisl*[26] Lord Justice Judge stated that the starting point of any criminal case is 'simple':

> 'Justice must be done. The defendant is entitled to a fair trial and what is sometimes overlooked, the prosecution are equally entitled to a reasonable opportunity to present the evidence against the defendant. It is not however a concomitant of the entitlement to a fair trial that either or both sides are further entitled to take as long as they like, or for that matter, as long as counsel and solicitors, or the defendants think appropriate. Resources are limited … time itself is a resource…' [27]

Whereas the defence disclosure regime was merely voluntary in summary-only trials,[28] the advent of the Case Management provisions of the CrimPR effectively rendered this null and extensive disclosure is now, in effect, mandatory in the magistrates' court.

---

[23] J. Plotnikoff and R. Woolfson, 'A Fair Balance? Evaluation and Operation of Disclosure Law' RDS Occasional Paper no 76, 2001.
[24] *Supra* n.4 at paragraph 154.
[25] *Ibid.*
[26] [2004] EWCA Crim 696
[27] [2004] EWCA Crim 696 at 114.
[28] S.6 Criminal Procedure and Investigations Act 1996.

The advent of the CrimPR in 2004, as recommended by the *Auld Review,*[29] effected a 'sea change in the way that cases should be conducted … the Rules make it clear that the overriding objective is that criminal cases must be dealt with justly'.[30] Importantly, 'Rule 3.2 imposes upon the court a duty to further the overriding objective by actively managing the case'.[31] As the court highlighted in *Chorley* Justices, '[t]he pertinent part … is the early identification of the real issues.'[32] This is eerily similar to the contents of the defence case statement outlined by the CPIA 1996. It is here that a great threat to traditional adversarialism exists; with the advent of the CrimPR, the defendant is now compelled to assist the prosecution fairly extensively in their pursuit of a conviction, potentially impinging upon key due process safeguards such as the privilege against self-incrimination, the presumption of innocence, and the burden of proof.

Defence Disclosure under the CrimPR: The Enabler of Managerialism

The overriding objective of the CrimPR has effectively allowed the courts to 'manage' the trial with the goal of increased efficiency and economy, combating the negative impact of the 'excesses of the adversarial system'.[33] This agenda has been readily accepted by the courts. Lord Justice Judge highlighted the problems of failing to curb such excesses in *Jisl*:

> 'Every day unnecessarily used, while the trial meanders sluggishly to its eventual conclusion, represents another day's stressful waiting for the remaining witnesses and the jurors in that particular trial, and no less important, continuing and increasing tension and worry for another defendant or defendants, some of whom are remanded in custody, and the witnesses in trials who are waiting their turn to be listed. It follows that the sensible use of time requires judicial management and control.'[34]

With the language and tenor of the courts focusing on the elements of cost saving and swifter trials, it has been evident that the overriding objective of the CrimPR has been enthusiastically embraced by the judiciary. In particular, the notion of 'dealing with cases justly' in the post-CrimPR era is defined as:[35]

> (a) Acquitting the innocent and convicting the guilty
> (b) Dealing with the prosecution and defence fairly
> (c) Recognizing the rights of defendant, particularly those under Article 6 of the European Convention on Human Rights; and
> (d) Respecting the interests of witnesses, victims and jurors and keeping them informed of the progress of the case.

---

[29] *Supra* n.4 at para 184.
[30] R *(On the Application of the DPP) v Chorley Justices* [2006] EWHC 1795 Admin per Thomas LJ at para 24.
[31] *ibid* per Thomas LJ at para 25.
[32] *Director of Public Prosecutions v Chorley Justices* [2006] EWHC 1795 (Admin).
[33] S. Field and P.A. Thomas, 'Justice and Efficiency? The Royal Commission on Criminal Justice, (21) JL Soc'y (1994) 1-19 at 13-14.
[34] [2004] EWCA Crim 696.
[35] by CrimPR Rule 1.1(1)

This suggests that there is a shared desire to achieve the overriding objective and instill a culture of co-operation between the prosecution and defence. However, it does little to reflect the fact that each side effectively remain adversaries with very different goals and roles within the CJS. In this sense, the CrimPR 'drives a stake through the heart of traditional adversarial understandings…'[36] Arguably, assisting the prosecution (and the court) to satisfy something other than the best interests of the client is adverse to the traditional role of the defence lawyer, which Lord Reid described in *Rondel v Worsley*[37] as '…one who fearlessly raises every issue, advances every argument and asks every question, however distasteful, which he thinks will help his client's case.'[38] As such, the defence lawyer's fundamental loyalty, within an adversarial context, is to his client. This basic level of loyalty is well illustrated by O'Dair when he says that the duty of the defence lawyer is to present the facts of the case 'as persuasively as he can… as seen from the standpoint of his client's interests.[39]' By presenting the facts as persuasively as he can, the lawyer transforms himself into a part of his client's will. The issues he raises and the presentation of facts favour his client's perspective; they are presented in a way that his client would present, if he could.

Notions of fearlessness and partisanship are often interwoven. In order to give a full defence to a suspect, the defence lawyer must be fearless in his approach to protection of their interests. The client will often meet a lawyer post-arrest in the police station, which can be viewed as a hostile environment for a suspect. The police will interrogate the suspect in order to extract a confession from him, and this can then be used as a basis for prosecuting. Police questioning may well be hostile and, as such, the defence lawyer will need to act with both 'courage and devotion'[40] in order to protect his client. As Lord Reid identified, a partisan defence lawyer must do all he can to advance his client's case, which also includes being prepared to do 'whatever it takes to improve the client's position.'[41] As such, he may offend others who may be uncomfortable with his actions; he may have to ignore certain evidence in order to present his client's case in a more favorable light and to induce the jury or judge to find a verdict that it favorable to the client. Indeed, this approach – within an adversarial system – is mirrored by the police and prosecution, seeking to present as strong a version of their case as possible.

In the context of the CrimPR, this is one example of the tension and conflict that the defence lawyer faces. As a partisan defender of the accused, he is not concerned with seeking the truth or helping the 'opposition'. He has an aim of serving the best interests of the client and attempts to persuade others to reach a decision that will fulfil that aim. Despite causing a potential conflict with the defence lawyer's other obligations, the principle of partisanship is described as the 'virtue that trumps all other values and virtues.'[42] Therefore, the obligation of partisanship should take precedence over the other obligations the defence lawyer has; namely, to the court and the public. This notion is supported by Charles Curtis, who said that the 'lawyer's official duty… is to devote

---

[36] M. McConville and L. Marsh, *Criminal Judges: Legitimacy, Courts and State Induced Guilty Pleas in Britain'* (2014) (Edward Elgar: Northampton) at p171.
[37] [1967] 3 WLR 1666.
[38] *Ibid* per Lord Reid at para 8.
[39] R. O'Dair, *Legal Ethics Text and Materials* (Butterworths, 2001) at 152.
[40] G. Lefcourt, *Responsibilities of a Criminal Defence Attorney* 30. Loy L.A.L. Rev., 61.
[41] *Ibid.*
[42] A. Smith and W. Montross, The Calling of the Criminal Defense (1998-1999) 50 Mercer L.R., 522.

himself to the client. The [duty to the] court comes second …'[43]

However, the era of co-operation and mutual goals have rendered this 'type' of defence lawyer a relic and should the lawyer attempt to defend the client with only their best interests in mind, then they will fail in the modern arena. For example, in *Gleeson*[44] the court ruled that the defence tactic of an 'ambush defence', discussed earlier, will no longer be tolerated. This is a clear example of the court emphasizing the discovery of objective truth over adversarial proof. At first instance, the prosecution could not prove the offence with which the defendant was charged (namely, conspiracy to defraud). It could only be proven once the indictment had been amended, something only discovered mid-trial. The court allowed the prosecution to do this and chastised the defence for failing to highlight this mistake. Essentially, this decisions erodes the long-standing 'penalty shoot-out theory' of criminal procedure – that, the Crown had one shot at goal, and if they missed (however unlucky), they do not get another chance.[45] Interestingly, this principle appears to remain important in the modern era, in which parties are expected to 'get it right first time'.[46]

Whilst it appears that the prosecution still has to prove guilt beyond a reasonable doubt, it is clear the defendant now has to assist the them in doing so, at least in some circumstances. Yet it appears that, despite the notion of efficiency and effectiveness coursing through the CJS, the 'tolerance of prosecution errors is alarmingly apparent.'[47] For example, in Payne, the CPS were allowed an adjournment to 'get its case in order.'[48] However, case law suggests the courts are less sympathetic to the defence in this regard. In *Rochford*[49] there was a lack of detail in the defence statement and the judge indicated that failure to complete the case statement in more detail would be treated as contempt of court for both the defendant and the lawyer. As such, tolerance and patience are given to the prosecution but in the quest for truth and efficiency, the defence appear to be treated with less sympathy.

Furthermore, as mentioned earlier, in order to fulfil the goals of the overriding objective, defence disclosure is now effectively mandatory in the magistrates' court. Under the CPIA 1996 regime, defence disclosure was voluntary, although it did trigger secondary disclosure from the CPS. However, under the CrimPR, the case management provisions effectively render voluntary disclosure as obsolete, as even the Case Progression Form is analogous to the defence statement. There is an inherent danger that if completion of such forms – which are arguably administrative in nature – become part of the defence case, this might lead to a breach the privilege against self-incrimination or, at the very least, operate against the best interests of the client. For example, in

---

[43] C. Curtis, *The Ethics of Advocacy* (1951-1952) Stan.L.Rev 12.
[44] [2003] EWCA Crim 3357.
[45] J. Chalmers, F. Leverick and L. Farmer, *Essays in Criminal law in Honour of Sir Gerald Gordon*, 2010 (Edinburgh: Edinburgh University Press) p.323.
[46] See *R v R* [2015] EWCA Crim 1941 and Sir Brain Leveson, *Review of Efficiency in Criminal Proceedings* (London, Judiciary of England and Wales, 2015).
[47] M. McConville and L. Marsh *Criminal Judges, Legitimacy, Courts and State-Induced Guilty Pleas in Britain'* (Edward Elgar: Cheltenham, 2014) p.175.
[48] *R (on the application of Payne) v South Lakeland Magistrates' Court* [2011] EWHC 1802 (Admin) at para 39.
[49] [2010] EWCA Crim 1928.

Firth,[50] the prosecution established the identity of the defendant as the assailant by using an admission on the case progression form. The court allowed the admission and held that 'it does not infringe against the principle that a defendant is not required to incriminate himself for the court to require that the nature of the defence is made plain well before the trial.'[51]

However, theoretically one could argue that this conclusion is questionable; without the completed form, the prosecution had no way to identify the assailant, a key component of their case. The courts have departed from the *Firth* stance in a subsequent case, so long as the 'spirit of the rules' is adhered to. In *Newell*[52] the appellant appealed against a conviction for possession of cocaine with intent to supply. At the Plea and Case Management Hearing (PCMH), the appellant did not serve a defence statement and when completing the Case Management Form, the lawyer, who did not represent the appellant at trial, stated 'no possession'. On the morning of the trial and under the instruction of new solicitors, a defence statement was served in which he accepted possession of cocaine but denied the intent to supply. The CPS sought to cross-examine him about inconsistencies between the case progression form and the defence statement admission. Allowing the appeal, the CACD held that the trial judge should have excluded the case progression form under s.78 PACE 1984, as the sanction of adverse inferences for the failure to serve the defence statement was sufficient.[53] This provides a clear conflict of duties for the defence lawyer. In order to combat the potential breach of self-incrimination, Rhodes suggests that the content of the Case Progression Form should not contain vast amounts of detail.[54] Edwards also suggests that the form should be completed with the word 'privileged.'[55] Whilst the approaches suggested by Rhodes and Edwards appear sound in a theoretical context, the court may well view the approaches as inadequate and per *Newell* may lead the court to believe that the lawyer is acting outside of the spirit of the rules. As such, the court might admit the case management forms in order to help achieve the overriding objective.

Ineffective Sanctions

Although the Case Progression Form now has the potential to further extend the scope of compulsory disclosure regime in the magistrates' courts, completion is not a statutory obligation, thus there is no statutory sanction for failure to do so. However, it is arguable that the defence lawyer will have to notify the both the court and prosecution of the accused's failure to supply adequate information in not completing the form as this could potentially be deemed a 'significant failure' under the CrimPR and therefore hinder the furthering of the overriding objective. As such, the lawyer might, theoretically, be obliged to act against his client's interests by informing both the court and the prosecution that his client did not wish to comply. This places the defence lawyer in a uniquely challenging position. Yet, the sanctions applied for such failures are somewhat ineffective.

Sanctions for non-compliance are set out in sub-rule 3.5(6) of the CrimPR:

---

[50] *Firth v Epping Magistrates' Court* [2011] EWHC 388 (Admin),
[51] *Ibid* per Toulson LJ at para 22.
[52] [2012] EWCA Crim 650.
[53] *Ibid* at para 36
[54] D. Rhodes 'Life in Crime: The Truth is Out There', Solicitor's Journal, vol 156, no 19 16th May 2011.
[55] A. Edwards, 'Case Management Forms' [2011] Crim L Rev 546 at 548.

> 'If a party fails to comply with a rule or a direction, the court may –
> (a) fix, postpone, bring forward, extend, cancel or adjourn a hearing;
> (b) exercise its powers to make a costs order; and;
> (c) impose such other sanction as may be appropriate.'

The biggest threat to the defence is arguably a Wasted Costs Orders (hereafter WCO). In *SVS*,[56] the defence failed to serve a defence statement to the prosecution; However, the defence insisted it was 'essential' to fly a witness from Australia to give evidence. At trial, it was concluded that the witness was not required, despite flying over from Australia. The CPS made an application for wasted costs against the defence. The court held that the firm representing the defendant had failed to '[set] out the grounds of objection to the admission of [the witness'] statement… within the stipulated time or at all' and concluded that this was a 'clear breach' of the CrimPR.[57] As such, the court held that '[t]he judge was entitled to conclude that a cross-application setting out that part [of the defendant's] case that he had to put to [the witness] should have been served' notwithstanding that 'the client refused to sanction this step'.[58] The court stated that 'the appellant firm should have ceased to act for [the client]' because the failure 'was not a mere error of judgment'.[59] Rather, they concluded that '[t]he defendant was manifestly seeking to manipulate the court's processes' by 'insisting on the appearance of [the witness] without disclosing the defence case that was to be put [him]' and that 'the appellant firm made themselves complicit in the manipulation being practiced by their client'.[60] The decision led to the Law Society issuing a practice note informing defence lawyers that, should their client prevent them from complying with the CrimPR, they need to inform the court, as any failure could be interpreted as 'manipulation of its process … and could give rise to a WCO being made against the solicitor.'[61]

This case makes it clear that courts are now actively attempting to ensure the defence complies with the CrimPR; but there remains an inherent difficulty in finding a suitable sanction that will ensure compliance. The threat of a WCO looms heavily over the lawyer, though the primary purpose of the order is 'not to punish but to compensate'.[62] As Wainwright et al. argue:

> 'As the costs order can be regarded as having a penal element when it is ordered against a non-party, a mere mistake by a legal representative (or his employee) is not sufficient to justify an order. There must be a more serious error.'[63]

Should an application to adduce new evidence or introduce a witness be made outside of the

---

[56] [2012] EWCA Crim 319.
[57] *Ibid* at para 24.
[58] *Ibid.*
[59] *Ibid.*
[60] *Ibid.*
[61] Law Society Practice Note: Criminal Procedure Rules 2015: Solicitors' duties (29 Feb 2016) para 4.4. [available here: https://www.lawsociety.org.uk/support-services/advice/practice-notes/the-criminal-procedure-rules-2015-solicitors-duties/] Last accessed October 2019.
[62] T. Wainwright, E. Fenn and S. Begum, *Criminal Disclosure Reference,* 2nd Edition, (2017) Bloomsbury Professional: Haywards Heath p.72
[63] *Ibid* at p.73

prescribed time limits, the court can refuse an application to hear the evidence. In *Musone*,[64] at a late stage in a murder trial, the appellant attempted to introduce hearsay evidence without any prior notice. This evidence was highly damaging to the co-accused. The trial judge refused leave and the decision was upheld. Moses LJ said:

> 'The Act … gives power to the judge to prevent that which, in the judge's assessment, might cause incurable unfairness either to the prosecution or to a fellow defendant. Plainly, the procedural rules should not be used to discipline one who has failed to comply with them in circumstances where unfairness to others may be cured and where the interests of justice would otherwise require the evidence to be admitted.'[65]

Both defendants were blaming the other for the murder. Moses LJ thought it was not possible to achieve the overriding objective if the court had no power to prevent deliberate abuse of the trial process, in this instance denying the co-defendant the opportunity of dealing with the allegation properly. As such the court had the power to exclude the evidence. Furthermore, to combat an ambush defence, the court could allow the prosecution to introduce further evidence even though the prosecution had closed its case. A similar approach was adopted in *Writtle v DPP,*[66] in which the defence sought to introduce an expert report after the close of the prosecution case. The magistrates rejected the application, deeming not relevant to the issues outlined in the case progression form and concluding the defence lawyer was effectively seeking to introduce wholly new evidence. The CACD held that if the expert evidence could have been disclosed at a very early stage and the late application to adduce further evidence would undoubtedly cause delay then this approach was to be 'deplored.'[67] The court held that the defence lawyer either knew the nature of the defence but failed to raise it appropriately, or the defence was contrived at the close of the prosecution's case.[68] The court believed that the efficient administration of justice would be delayed as the prosecution would need adequate time to consider how to refute the 'new' evidence and reiterated the point that the issues in the case should be 'identified well before a hearing.'[69]

Despite not carrying any statutory weight, Case Management Forms are now akin to the defence statement. However, failure to comply with any CrimPR provision carries no express sanction. The CrimPR are administrative rules rather than statutory; as such, it cannot create a sanction of, for example, adverse comment or inferences. Although the rules do not contain an adverse inference sanction, there are other enforcement mechanisms designed to ensure all parties comply with the provisions. Auld LJ noted the problem of creating an enforcement mechanism for compliance, having 'anxiously searched here and abroad for just and efficient sanctions and

---

[64] [2007] EWCA Crim 1237.
[65] R *v Musone* [2007] EWCA Crim 1237 per Moses LJ at para 37
[66] [2009] EWCA 236 (Admin).
[67] *Ibid* at paragraph 14.
[68] *Ibid.*
[69] *ibid*

incentives to encourage better preparation for trial'.[70] He conclude that 'we are not alone in this search and that, as to sanctions at any rate, [the search] is largely in vain.'[71] Nonetheless, the Rules have attempted to fill this apparent gap. Rule 3.5(2) states that should a party fail to comply with a rule of direction, the court may fix, postpone, bring forward, extend, cancel or adjourn a hearing.[72] whilst this is no explicitly penal in nature, the effect may be for the affected party. The court has the power to make a costs order[73] or the court can impose any sanction as may be appropriate.[74] Taken at face value, the final provision appears to give the court a great deal of latitude in administering effective enforcement mechanisms. However, with no statutory weight behind the rules, no clarity or detail about what sanctions to use and when, and little evidence that such sanctions ensure compliance, it is difficult to envisage anything other than the court administering a financial penalty in respect of costs being ordered. Auld LJ did highlight the difficulty of using such tools, believing that orders of costs, WCOs, the drawing of adverse inferences, or depriving one side or the other of the opportunity of advancing an aspect (or all) of their case were not 'apt ways of encouraging and enforcing compliance with criminal pre-trial procedures.'[75] Furthermore, the making of orders directly against defendants are rarely a viable option owing to their lack of means, as well as the difficulty in apportioning blame between the client and their lawyer.

The Blame Game: The Levelling of the Scales

The majority of this chapter has highlighted is the notion that it is primarily the defence who frustrate the CrimPR, based as it is on the stereotypical belief that they are often looking for some tactical advantage to allow their client to escape justice. This has been the prevailing mantra since the first changes to the scope of defence disclosure in the mid-1990s. The advent of the CJPOA 1994 meant that suspects could no longer stay silent in the police station and then ambush the prosecution at trial without the risk of adverse inferences being drawn.[76] As mentioned earlier, this was a key reason the Government highlighted in favour of forcing early disclosure of the defence case, arguing that 'hardened criminals have refused to answer police questions, only to ambush the prosecution by raising a defence at trial for the first time.'[77] However, there was little evidence to suggest that ambush defences posed any threat to the administration of justice. Leng found that 'the proportion of contested cases in which an ambush defence was raised was … at most 5 per cent,'[78] with the vast majority of those defendants being convicted at trial anyway. So, if the use of this form of defence was not problematic in practice,

---

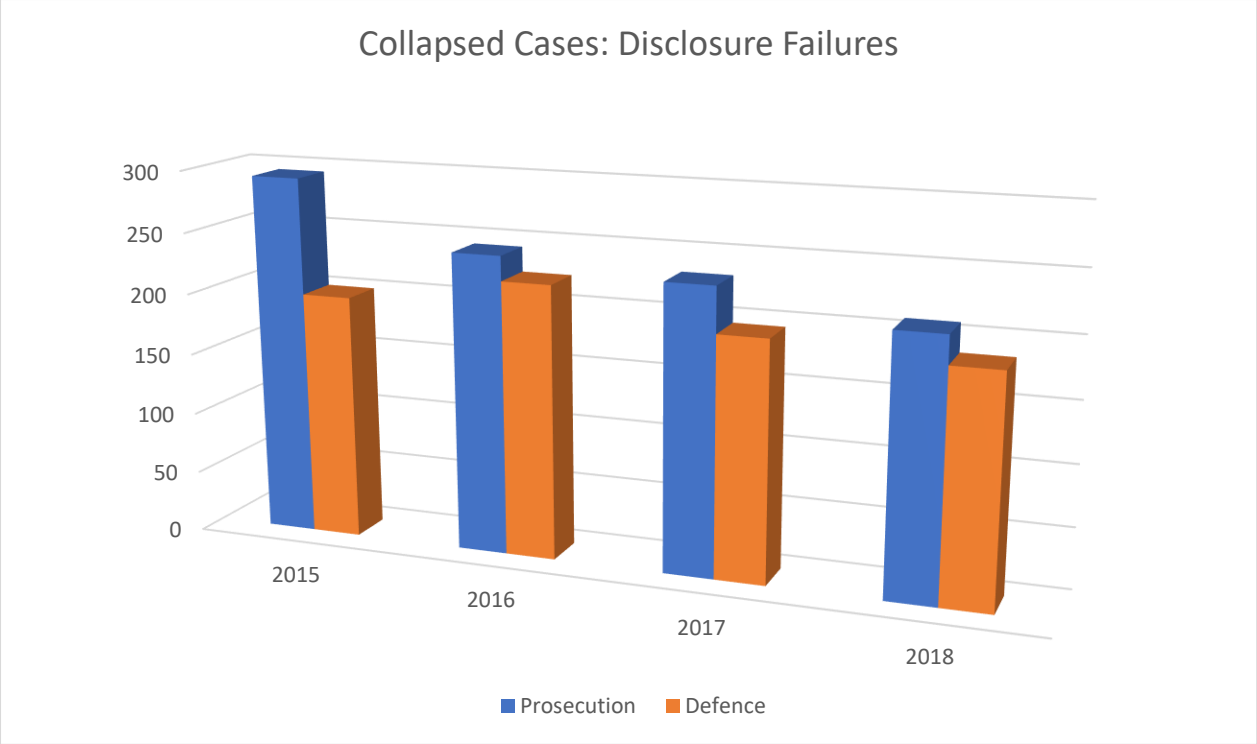
[70] *Supra* n.4 at para 231.
[71] *ibid*
[72] Rule 3.5(6)(a) Criminal Procedure Rules 2015.
[73] Rule 3.5(6)(b) Criminal Procedure Rules 2015.
[74] Rule 3.5(6)(c) Criminal Procedure Rules 2015.
[75] *Supra* n.4 at para 229.
[76] Whilst this is outside the scope of this chapter, the Act represented the first curtailment of the due process rights of the suspects. This was seen as the government taking back some of the rights that have been afforded to the suspect in the police station. See H. Quirk, 'The Right to Silence in England and Wales" Sacred Cow, Sacrificial Lamb or Trojan Horse? in J. Jackson and S. Summers, *Obstacles to Fairness in Criminal Proceedings: Individual Rights and Institutional Reforms*, (2018), Hart Publishing (Oxford), 75-97.
[77] Michael Howard "Crime and Punishment: Restoring the Balance", Frank Newsam Memorial Lecture, Bramshill College, April 19, 1995 as cited in R. Leng, 'Losing Sight of the Defendant: The Government's Proposals on Pre-Trial Disclosure' (1995) Crim L.R 704 at 705.
[78] R. Leng *The Right to Silence in Police Interrogation: A study of some of the issues underlying the debate*, RCCJ Research Study no 10 (1993) at p.58.

was it worth the cost of diluting adversarial norms? Zander strongly disputed this (as mentioned earlier), and argued that, conversely, the cost of delays could be greater, citing the example provided by Levi in his examination of serious fraud trials.[79] He found that disclosures were largely ineffective because the information provided was specific; this, he argued, was likely to cause, rather than remedy delays, as each side demands more information from the other.

Over the last twenty years, the tone and tenor of both the Government and courts has suggested that blame for disclosure failures lie primarily at the feet of the defence. Even when the prosecution have manifestly failed and been sanctioned, the courts cannot resist the opportunity to remind the defence that they have to play by the rules too and should highlight the failures of their counterparts earlier. In *Boardman*[80] the first instance court were 'exasperated with the conduct of the prosecution'[81] who had failed to disclose evidence of telephone data records which could potentially be excluded under s.78 PACE 1984. Despite the failures resting with the prosecution, the CACD sounded 'notes of warning'[82] to the defence as the defendant's lawyers 'did not alert the court to the problems of non-disclosure at a time when something can be done about it.'[83] As such, as well as preparing and advancing their own case, the defence should now be alert to failures of the prosecution - a significant and distinctly non-adversarial burden, which emphasises that the defence must be an active and cooperative participant driven by the shared goal of dealing with cases justly. This was supported in *Hassani*,[84] in which the court reminded the defence that if '[they] are going to suggest that some document or piece of service is missing, they must do so early'.[85] If they failed to do so, it would be 'open to the court to find that the point was raised late, and any direction then sought to produce a document or apply for an adjournment may be properly refused.'[86] These obligations thus mean the defence cannot sit back and do nothing if they notice a fundamental flaw in the prosecution case. McConville and Bridges suggest that 'negative duties on the defence have now become positive duties: the defence is now under a duty to remedy flaws in the prosecution case.'[87] However, when examining the most recent Criminal Justice Quarterly Statistics,[88] it is clear that the rate of failures to be ready for trial (owing to lack of disclosure) are remarkably similar for both parties:

---

[79] M. Levi, *The Investigation, Prosecution and Trial of Serious Fraud,* RCCJ Research Study no.14 (1993) 104, 182.
[80] [2015] EWCA Crim 175.
[81] *Ibid* at para 39.
[82] *Ibid* at para 40.
[83] *Ibid.*
[84] R *(on the Application of Hassani) v West London Magistrates' Court* [2017] EWHC 1270 (Admin).
[85] *Ibid* at para 12.
[86] *Ibid.*
[87] M. McConville and L. Marsh, *Criminal Judges: Legitimacy, Courts and State Induced Guilty Pleas in Britain'* (2014) (Edward Elgar: Northampton) 174
[88] Data taken from 'Trial Effectiveness Tool' Criminal Justice Quarterly Statistics January to March 2019, available here: https://www.gov.uk/government/statistics/criminal-court-statistics-quarterly-january-to-march-2019 [Last Accessed March 2020].



The latest iteration of the CrimPR came into force in 2015 and since then, there has clearly been a vast improvement in the way that the defence prepare and disclosure their cases in advance of trial. However, despite this improvement, the general tenor of the court continues to focus on the danger that the defence will attempt to 'game' the system to frustrate justice. Yet the evidence above suggests the courts might to look the prosecution with similar cynicism in light of the number of failings for which they are responsible. In 2019, a Freedom of Information request submitted by *The Times* revealed that 1,078 cases were discontinued between January and September 2018 due to disclosure failures, marking 53% increase when compared with the whole of 2014.[89] Yet, such cynicism may be placed considering that the CPS may often be boxed in by police behavior in regards to disclosure, as well as the continuing issue of funding. In response to the statistics above, the chairwoman of the Criminal Bar Association hinted at the cause behind such problems, arguing that 'the government has a constitutional and moral duty to ensure there is sufficient funding across the system to ensure a good and proper disclosure regime.'[90] The President of the Law Society echoed this call, stating that the prosecution system 'was starved of funds [and] plagued by endemic delays.'[91]

That being said, funding is a frequently cited excuse; there have been a number of reviews[92] into

---

[89] R. Ellis and J. Ames, '*Evidence failings cause twice as many criminal cases to collapse*', The Times (15th October 2019) available here: https://www.thetimes.co.uk/article/evidence-failings-cause-twice-as-many-criminal-cases-to-collapse-2vm0hn06r [last accessed March 2020].

[90] D. Barrett, 'Twice as many criminal cases collapse due to evidence failings as key information is not disclosed to defence lawyers over the last four years.' *Daily Mail*, 15 October 2019, available here: https://www.dailymail.co.uk/news/article-7573413/Twice-criminal-cases-collapse-evidence-failings-key-information-not-disclosed.html [Last Accessed March 2020).

[91] *Supra* n.89.

[92] See generally, Crown Prosecution Service Inspectorate, *The Inspectorates Report on The Thematic Review of the Disclosure of Unused Material*, Thematic Report 2/2000, March 2000; J. Plotnikoff and R.Woolfson, 'A Fair Balance? Evaluation

the disclosure regime, all suggesting myriad answers – yet none fully tackle the issue of occupational culture. As Chapters 3 and 4 will suggest, the police and prosecution are effectively on the same side with the shared goal of securing a conviction. In practice, it continues to appear that to co-operate with the defence and provide them with information that might undermine the police and prosecution case remains an alien concept, despite two decades of the CPIA 1996 regime. On the contrary, to expect the defence lawyer and his client to co-operate with the prosecution and the court to achieve the overriding objective is fully entrenched and increasingly complied with. This inequality of approach represents a fundamental problem with a managerial approach to a traditionally adversarial system. The current process blunts a number of adversarial weapons and potential safeguards for the defence, with the end goal of an efficient and economic process justifying the means. However, traditional adversarial culture still permeates through the police and the case construction of the prosecution with ineffective sanctions for non-compliance.

Conclusion

This chapter has highlighted the drift toward a less adversarial and more managerial approach to justice and specifically the operation of disclosure post-investigation. This has arguably come at the expense of traditional and vital adversarial safeguards. The defence have consistently been singled out by the courts for failure to comply with the letter and spirit of the CrimPR, an accused of attempting to give clients a 'sporting chance' rather than dealing with a case 'justly'. However, a comparison of the parties in terms of readiness for trial suggests the difference is small, and in fact favourable to the defence.[93] Multiple examples (discussed elsewhere in this book) make it apparent that in serious cases the prosecution are providing inadequate disclosure to the defence, leading to delays at best, or collapsed cases and miscarriages of justice at worst. With these results in mind, embracing managerialist ideology, which incorporates notions of more economic, effective and efficient processes, should be halted. In order to deal with cases justly, this chapter contends that a reversal in procedural culture is needed, in order to restore balance in a system which retains an adversarial architecture. The criminal justice system of E&W ought to reflect traditional adversarial values which continue to, in theory, underpin so much of its construction; reverting to such values would reduce the level of defendant co-operation and re-assert vital safeguards such as the privilege against self-incrimination. Lord Justice Auld's 'sporting chance' mantra, and its mention of the 'twin principles' of the burden of proof and the right to silence, highlights a conflict as such principles are (arguably) an affront to the managerial values adopted as part of the CJS over the last twenty years. The prosecution must prove their case, yet it appears they can now expect assistance from the defence in terms of readily identifying errors or omissions in their case. The privilege against self-incrimination is offended when case management and its associated forms can be used as substantial evidence against the defendant.[94] The criminal courts have adopted a tunnel vision approach to enforcement, believing that it is the defence that will attempt to subvert the overriding objective of the CrimPR. However, statistics tell a different story. The raft of disclosure failures resulting from police and prosecution errors that are discussed in this book and elsewhere add weight to the need for a more equitable approach to sanctioning. Whilst issues of funding and training cannot be ignored, it is perhaps more important that there

---

and Operation of disclosure law' RDS Occasional Paper No 76, 2001; HMCPSI, Making it fair - a joint inspection of the disclosure of unused material in volume Crown Court cases, (2017) and

[93] Table 1

[94] *R v Newell* [2012] EWCA Crim 650.

be a change in culture - either restoring both parties to a classic adversarial approach (in which the defendant is fully protected by vital safeguards); or diluting police and prosecution adversarialism to match the cooperative approach required of the defence.