The Development of the Prosecutor’s Role in England and Australia with Respect to its Duty of Disclosure: Partisan Advocate or Minister of Justice?

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The proper role of the prosecutor, contrary to popular perception, is not that of a partisan persecutor bent on securing the conviction of an accused person but rather that of a quasi-judicial ‘minister of justice’ whose detached function is to seek justice and to ensure fairness. This view of the prosecutor’s role can be traced back at least to the early 1800s and continues to command firm support in both Australia and England.

In considering the development of the role of the prosecutor it is instructive to consider the crucial function performed by the prosecution in the disclosure of potentially significant material in its possession; whether this is evidence upon which the prosecution is choosing to rely at trial or so-called unused material. In this article I will trace the development of the principles relating to disclosure in both England and Australia from the time when the prosecutor was entitled to act as a partisan advocate to the operation for much of the 20th century of the informal ‘Old Boys Act’ approach to disclosure to the modern insistence on candour culminating in the landmark decisions in England in the 1990s and of the High Court of Australia in R v Mallard in 2005. The fundamental theme that emerges in relation to the issue of disclosure is that the prosecutor must act as the frank minister of justice. There is no place in the modern criminal process either for the prosecutor to act as the partisan advocate or to rely on the informal ‘Gentlemen’s Club’ approach to disclosure. It is clear that the operation of the law in England regarding disclosure has given rise to significant practical and theoretical problems and that it would therefore be wise to be wary before importing the English model to Australia. However demanding and problematic as the prosecutor’s duties of disclosure may be, I would argue that in this area, ‘The prosecutor must act as a minister of justice, presenting the

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prosecution evidence fairly, making full disclosure of relevant material and ever conscious that prosecution must not become persecution." 1

Part 1: The Prosecutor’s General Role: Persecutor or Not?

The question of discovery in criminal cases is not the sort of tactical tit for tat or a game of Happy Families 2 played according to technical rules such as if you do not say thank you for the card you lose your turn. It is a serious matter conducted in a court of law and, one piously hopes, in a court of justice as well. 3

This was the pithy comment offered by Rougier J in R v Livingstone 4 in 1993 when denouncing what he saw as the partisan and unhelpful approach of prosecution counsel in that case to the disclosure of probative material in the hands of the prosecution. In contrast to the conception of Rougier J as to the prosecutor’s appropriate role, the prosecuting lawyer has traditionally worldwide been both, historically and in fiction, portrayed as a figure of some suspicion and doubtful merit. 4 The prosecutor has been typically depicted as ‘over zealous, ambitious and hell bent on framing some poor marginalised client.’ 5

In other words, the role of the prosecuting lawyer often been perceived as that of a partisan agent of the state, a persecutor, whose single purpose is the zealous pursuit of securing the conviction of an accused person at all costs. Considerations of fairness and justice or a desire to arrive at the truth have not been expected to feature prominently, if at all, in such a prosecutorial role.

However, the traditional perception of the prosecuting lawyer is fundamentally flawed. While it is accepted that the defence lawyer or advocate in civil proceedings is entitled, even expected, to fearlessly take all legitimate steps to advance the cause of his or her client, the prosecutor is in quite a different position. The role of the prosecutor is not, despite the popular perception, to secure the conviction of the defendant at all costs. Rather, as was observed in 1926 by Sir John Simon

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2 This is a traditional competitive family card game in the United Kingdom.
3 R v Livingstone [1993] Crim LR 597 at 598.
5 Ibid.
The Development of the Prosecutor’s Role in England and Australia

KC, ‘The business of an advocate who is prosecuting a criminal is to be in the strictest sense a Minister of Justice.’ The prosecutor is entreated to assist the court in arriving at the truth of the matter in dispute and in securing justice. In the words of Christmas Humphreys, ‘Always the principle holds, that Crown counsel is concerned with justice first, justice second and conviction a very bad third.’ Moreover, as was explained in 1972 in \( R \v Lucas \) by Newton J and Norris AJ, this lofty duty is not confined to the prosecution advocate at trial. The obligations of the prosecutor as a minister of justice extend to all those involved in the preparation of the prosecution case for trial.

This conception of the role of the prosecuting lawyer dates back to the early part of the 1800s, if not far earlier. The concept gained increasing acceptance in England during the 1800s as the criminal trial changed from an almost casual inquisitorial affair where lawyers where generally conspicuous by their absence to a process resembling the lawyer driven adversarial model of today. By the 1840s such leading criminal trials of the period as Palmer and Courvoisier were far removed from the inquisitorial lawyer free model of the preceding century and are often cited as marking a turning point in the adoption of a modern adversarial system of criminal justice.

The duty of the prosecutor to act as a ‘minister of justice’ cannot be dismissed, even within an adversarial criminal system, as mere rhetoric.

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8 [1973] VR 693.
9 [1973] 693 at VR 705. This is of particular relevance in considering out of court issues such as disclosure.
10 As early as the 1500s Queen Elizabeth famously declared that her Attorney-General was not so much retained ‘pro domina Regina’ as ‘pro Domina Veritae’ (see Rogers, S, ‘The Ethics of Advocacy’ (1897) 59 LQR 259 at 260).
11 See \( R \v Thursfield \) (1838) 8 Car & P 269, \( R \v Berens \) (1865) 4 F & F 842 and \( R \v Puddick \) (1865) 4 F & F 497. The notion of the prosecutor as a ‘minister of justice’ does not seem to have been specifically embraced, at least judicially, in Australia until 1946 (see \( R \v Bathgate \) (1946) 46 SR (NSW) 281 at 284-85).
14 The Farquherson Committee in England in 1986 accepted that this term ‘may sound pompous to modern ears’, but it remained the proper label for the prosecutor’s role (see Counsel, Trinity 1986 quoted in Murphy, P (ed), ‘Blackstone’s Criminal Practice 2005’ (Oxford, OUP, 2005) 1485).
It has been repeatedly affirmed in both England\(^\text{15}\) and Australia.\(^\text{16}\) It finds practical expression in a wide variety of situations in both jurisdictions. However, of all the various manifestations of the prosecutor’s duty to act as a ‘minister of justice’, perhaps none is more crucial to the fairness of the trial or the integrity of the criminal process than the requirement to ensure that all material evidence, whether such evidence advances the prosecution cause or not, is brought to the attention of the court and/or the accused. This requirement appears in two distinct but closely linked prosecution duties. Firstly, there is a widely (though not universally) supported proposition that the prosecutor must, in deciding what witnesses to call at trial, ensure that any significant witnesses, whether their testimony helps or hinders the prosecution case, are called to testify as prosecution witnesses.\(^\text{17}\) Secondly, the prosecution is now required to furnish the accused not only with the evidence upon which it intends to rely on trial, but also with any additional material, so-called unused material, in its possession that may have any bearing on the case.\(^\text{18}\) This duty of disclosure is not confined to material helpful to the prosecution case but extends to any material that assists the defence case or undermines the prosecution case. It is this second duty, the duty of disclosure, which I will focus on in this article, its development, basis, nature and scope.

The whole question of disclosure clearly reveals the tension between the dual roles of the prosecutor, the role of an active advocate in an adversarial system and as the detached ‘minister of justice’.\(^\text{19}\) As an

\(^{15}\) See *Mohammed v State* [1999] 2 WLR 552 and *R v Randall* [2002] I WLR 2237 at 2241-42.


\(^{17}\) See such cases as *R v Holden* (1838) 8 Car & P 606, *R v Bull* (1839) 9 Car & P 22, *R v Lucas* [1973] VR 693, *R v Apostilides* (1984) 154 CLR 563, *R v Shaw* (1991) 57 A Crim R 425 and *R v Dyers* (2002) 210 CLR 285. Though it is beyond the scope of the present Article to consider there is a compelling argument that the ‘minister of justice’ role should not be extended to the choice of the prosecution as to what witnesses to call at trial. It can be argued that those modern cases that do subscribe to this view are not supported by the balance of the historical authorities and additionally do not reflect either the adversarial nature of the modern criminal process or recent developments in criminal procedure. See further *R v Cook* [1998] 2 SCR 829.

\(^{18}\) Various expressions are often used. I will use the term ‘evidence’ to refer to the material that the prosecution will adduce as part of its case and ‘unused material’ to refer to the remaining material in the possession of the prosecution that does not form part of the prosecution case at trial.

\(^{19}\) A similar and longstanding tension can also be identified in the prosecution’s choice of the witnesses to call at trial.
active advocate the prosecution might consider that its role is purely to secure the conviction of the accused and therefore question or doubt the need to assist the accused by giving him or her sight of the prosecution’s intended evidence or any unused material that may undermine the prosecution case. In addition there may well be an inclination for the prosecution to regard the material in its possession as the ‘fruits of the investigation’ and not something that should be shared with the defence. There are fears, which remain pertinent today, that such disclosure could lead the accused to ‘tailor’ or ‘concoct’ his or her defence to fit the disclosed prosecution material. There are especially powerful fears that disclosure might expose the prosecution witnesses to intimidation or coercion to retract their accounts or change their testimony to assist the defence.

Though the fundamental shortcomings of such a narrow and partisan adversarial role to disclosure will become apparent in the course of this article, it is my argument that the adversarial model of criminal justice as practised in both England and Australia gives rise to a potential tension within the prosecutorial role. The rationale of the adversarial process is that the truth is most likely to emerge from the fray of a vigorous and partisan contest between two opposing sides. If one of the parties to the process, the prosecution, assumes the detached and semi-judicial role of a ‘minister of justice’ and plays a lesser adversarial role than the defence lawyer, then how is the adversarial system supposed to function in the way that it should? The adversarial process requires the

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20 Such a narrow and adversarial view has certainly been held in the past by some parts of the prosecution. The cases at Fn 93 and 97 provide striking examples of such a partisan attitude. Various commentators in England have speculated that the police even today retain a hostile mindset to disclosure (see Samuels, A, ‘Disclosure’ (2000) 164 JPN 64).

21 See R v Stinchcombe (1992) 68 CCC (3d) 1 at 7.

22 This was the argument was raised against the imposition of any prosecution duty of disclosure in R v Stinchcombe (1992) 68 CCC (3d) 1.

23 See R v Connor (1845) 1 Cox CC 233, R v Duffy (1848) 3 Cox CC 367 at 368 and 389 and Maddison v Goldrick [1975] 1 NSWLR 557 at 567. Some of these fears, notably, in relation to the fear of witness intimidation, are not without substance. Witness intimidation remains a major problem in modern times (see R v Davis and Ors [2006] EWCA 1155).


26 This rationale of the adversarial system was provided as early as 1824 by Sydney Smith (see Rogers, above n 10, 263).

27 It has been accepted that there are clear dangers in emasculating the role of the prosecutor to a mere passive spectator. As Sir Patrick Devlin noted, there is a risk in
prosecutor to act as an active and involved advocate with a legitimate interest in seeking the conviction of the accused. Accordingly, the prosecutor 'is entitled to discharge his duties with industry, skill and vigour.' As was made clear by the Tasmanian Court of Criminal Appeal in *R v McCullough*, the adoption of the role of the active advocate by the prosecutor is not incompatible with his or her status as a ‘minister of justice’. However, there are strict limits to the ability of the prosecutor to act as an active advocate. As was emphasised in *McCullough*, even when acting as an advocate, the prosecutor must always act ‘temperately and with restraint, constantly bearing in mind that his primary function is to aid in the attainment of justice, not the securing of convictions.' The prosecutor’s paramount role of a minister of justice always remains. Whether this tension in prosecutorial roles can ever satisfactorily or entirely be reconciled is debatable.

The courts in both England and Australia have recognised the tension in the prosecutor’s role and have sought, not always successfully, to reconcile this tension in a variety of ways. Significant divergences in practice and experience in Australia and England have developed. However, despite these differences, it is now clear in both Australia and England that the prosecutor, while acting in an adversarial process, must never lose sight of his or her paramount duty as a ‘minister of justice’ in performing the crucial function of disclosing relevant material to the defence.

**Part 2: Developments in Disclosure 1554 to 1900: The Shift From ‘Trial by Ambush’**

Disclosure of the prosecution case to the defence is now an established feature of criminal trials in this country. No-one now seriously disputes the proposition, that where allegations of a criminal nature are made against an individual, the accused person is entitled to know the substance of the case against him in advance of trial.
Though this proposition may now appear to be self-evident, the entitlement of the accused to know the details of the prosecution case against him or her is a comparatively recent development in the common law. Indeed, in respect of the entitlement of an accused to unused material that may be probative, the insistence of the common law on frank and full disclosure is, especially in Australia, an extremely recent development.

The common law was traditionally opposed to the notion that an accused should be permitted to know in advance of trial the details of the prosecution case that he or she would have to face. Until very recent times discovery had no place in a criminal trial. It was perfectly proper for the prosecution to 'ambush' the accused at trial. The accused was not even permitted to know the prosecution witnesses who would be called at trial or to sight the indictment in order to know the precise charges that he or she would face. The decision to keep the accused in such a state of ignorance was not a ploy to guarantee a successful prosecution, 'though this may have been the outcome in many instances,' but rather was motivated by the firmly held view of the period that the truth of the case and the 'right' verdict would be best determined if the accused were confronted with the evidence only when in the courtroom at trial. The only concession in terms of disclosure was that conferred by the Treasons Acts of 1695 and 1707. These provisions allowed defendants facing charges of high treason to be provided a copy of the indictment and the names and details, though not the anticipated evidence, of the prosecution witnesses. The measure of disclosure granted by the Treasons Acts, modest as they may appear to a contemporary observer, represented a radical departure from the prevailing wisdom of the period. These concessions were not motivated by any sense of altruism by Parliament but rather by a vested self-interest on the part of its members. As Stephen commented it was an issue of personal interest, if not self-preservation, to members of the legislature that trials for treason were not grossly unfair. After all it was legislators and their friends who were most at risk of prosecution for treason. In contrast, the fate of people accused of sheep-

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34 Arguably this was not finally confirmed until the decision of the High Court in *R v Mallard* (2005) 224 CLR 125.
36 *Montague v Dudman* (1751) 2 Ves Sen 396 and *R v Hamiguchi* [1908] Qd SR 224.
stealing, burglary, or murder was to prove an issue of legislative indifference.\(^{39}\)

The case of \(R\) \(v\) \(Holland\)\(^{40}\) in 1792 illustrates the common law position at this time. The accused faced charges of corruption and public maladministration while holding 'a position of great trust and importance under the East India Company.'\(^{41}\) A report of a Board of Enquiry in India into the conduct of the accused essentially formed the prosecution case. The defence were unaware of the contents of the report and they sought an order of the court, either as a legal right or in the discretion of the court, to allow inspection of the report in order to prepare for the trial.\(^{42}\)

Prosecuting counsel, the Attorney-General, opposed the defence application:

> There never was yet an instance of such an application as the present, to give the defendant an opportunity of inspecting the evidence intended to be produced against him upon a public prosecution. It would lead to the most mischievous consequences.\(^{43}\)

The court shared these concerns. Lord Kenyon CJ observed:

> I am extremely clear that we ought not to grant this application. There is no principle or precedent to warrant it. Nor was such a motion as the present ever made; and if we were to grant it, it would subvert the whole system of criminal law.\(^{44}\)

The other members of the court agreed.\(^{45}\) There was no basis under statute or common law, either as a legal right or a matter of discretion, for an accused to have access to the evidence on which the prosecution case was founded until the very hour of trial. Grose J considered that anything else 'would be dangerous in the extreme, and totally unfounded on precedent.'\(^{46}\)

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40 (1792) 4 TR 691.
41 (1792) 4 TR 691.
42 This application when viewed through modern eyes seems perfectly legitimate. How else could the accused even begin to prepare his defence and decide what witnesses to bring over from India without sight of the report? One must also note the not inconsiderable cost and risks in 1792 of bringing a potential witness all the way to England from India.
43 (1792) 4 TR 691.
44 (1792) 4 TR 692.
45 Ashurst, Grose and Buller JJ.
46 (1792) 4 TR 694.
Though *Holland* is now largely forgotten, in England at least, it was to cast a baleful light over this branch of the law for the better part of the following two centuries. The prosecutor may have been increasingly cast as a ‘minister of justice’ as opposed to a partisan advocate, but that role did not, for a long time, find expression in any requirement to furnish the accused with its intended evidence, let alone any significant unused material. In relation to disclosure at least, the prosecutor was still entitled at this time to act as a partisan advocate and the whole notion of trial by ambush was considered both unobjectionable and perfectly normal.

This proposition was increasingly challenged in the 1800s. As Stephen notes, there was a ‘growing sense of unfairness’ at the ‘gross injustice’ that denied accused persons access to the evidence against them. There developed a rule of practice encouraging, if not requiring, the prosecution to call at trial any witnesses named on the back of the indictment, whether such a witness assisted the prosecution case or not. Indeed, in some cases this obligation was even extended to witnesses present at the events in question who were not even named on the back of the indictment and who were positively hostile to the prosecution case. The courts in England became increasingly wary of the notion that it was permissible for the prosecution to ‘ambush’ the accused at trial by introducing evidence of which the defence were unaware. There were also occasional judicial comments encouraging or conferring some entitlement to disclosure on an accused. Bentley notes the case of *R v Pook* in 1871 where he asserts that Lord Cockburn CJ in a murder trial took the bold step for the time of insisting that the prosecution ensure that the

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48 See *R v Sheridan* (1811) 31 St Tr 544 at 545 and 557, *R v Thurtel, The Times*, 31 Oct and 5 Dec 1823 (quoted by Stephen, above n 39, 227-28) and *R v Duffy* (1847) 1 Cox CC 367 at 369.

49 Stephen, above n 39, 228.

50 See *R v Bull* (1839) 9 Car & P 22 and *R v Carpenter* (1844) 1 Cox CC 72.

51 See *R v Holden* (1838) 8 Car & P 606 and *R v Stronger* (1845) 1 Car & K 650.

52 See the comments of Willes J in connection with *R v Greenslade* (1870) 11 Cox CC 412 at 413 at note (a).


54 *The Times*, 8 June 1871.
defence were provided with all the information that was available and in
the possession of the police.55

However, it is important to bear in mind the strict limitations of these no
doubt well intentioned efforts at alleviating the disadvantageous position
of the accused in the criminal process. Despite the development of the
role of the prosecutor as a minister of justice it is clear that, in relation to
questions of disclosure at least, the practical impact of such a role was
limited in the nineteenth century. In summary cases there was no
entitlement to disclosure of even the evidence, let alone unused material
of significance.56 Similarly, in respect of indictable cases, the entitlement
of the accused to knowledge of material in the hands of the prosecution
remained strictly limited. It is especially notable that neither \textit{R v Pook} nor
even the rule that the prosecution must call all the witnesses at a trial
regardless of their value to the prosecution case gained a lasting hold. As
Bentley notes, ‘Neither doctrine took root and by 1900 the law still
imposed no duty on the prosecution or police to disclose information in
their possession helpful to the defence case.’57

A fundamental inroad into the common law position as stated in \textit{Holland}
was achieved, not as a result of judicial development, but by the
\textit{Prisoners Counsel Act 1836} and the \textit{Indictable Offences Act 1848}58
which gave the accused the right to inspect and copy the depositions of
the prosecution witnesses taken at committal.59 After some initial
equivocation60 the courts demonstrated that they were unwilling to allow
the new provisions to be evaded by an unscrupulous or especially
adversarial prosecutor who might still seek to ‘ambush’ the defence at
trial by withholding the most important witnesses at committal and

55 Bentley, D, ‘English Criminal Justice in the Nineteenth Century’ (London,
Hambleton Press) 40. My scrutiny of both \textit{The Times} and the transcript of the actual
diary do not bear out this interpretation of \textit{Pook}.
56 See \textit{O’Shea v Bandiera} (1968) 62 QJPR 138 where the court noted that over the
previous 125 years there had been no case throughout the Commonwealth in which
the defence had been held to be entitled to the statements of the prosecution witnesses
in a summary case. In practice now, at least in England, the custom is to provide such
statements.
57 Bentley, above n 55.
58 Also known as ‘Sir John Jervis’s Act’ to reflect his role in its passage.
59 Previously, the Magistrates had not been compelled to permit the accused to be
present during the taking of the depositions (as happened in \textit{R v Thurlot, The Times},
31 Oct and 15 Dec 1823). Even if the accused were present only a small number
ended up with any note of the proceedings as many were illiterate and almost all
lacked any form of legal representation (Bentley, above n 55, 36).
60 \textit{R v Connor} (1845) 1 Cox CC 233 and \textit{R v Ward} (1848) 2 C & K 759.
obtaining a committal on the barest minimum of testimony and then only introducing the evidence of the withheld witnesses at trial. Though the courts were unwilling to subscribe to the robust proposition that the ‘new’ evidence would be automatically excluded, they expressed their strong encouragement to the prosecutor to serve on the defence, prior to trial, both the details of any witness who had not given a deposition and their expected evidence. If the prosecution, despite such encouragement, still sought to introduce at trial evidence that had not previously been furnished to the defence, then the defence were entitled to an adjournment of the trial in order to deal with the new evidence.

By 1900 the notion of trial by ambush in cases to be tried on indictment was simply no longer ‘the done thing’. The prosecutor was no longer permitted to act as an adversarial or partisan advocate in relation to the evidence it was proposing to adduce at trial. As was noted in 1882 at the Central Criminal Court in R v Harris, ‘Modern practice concedes to every accused person the right to know, before his trial, what evidence will be given against him.’

However, it is important to bear in mind that the prosecution’s duty of disclosure remained limited. The prosecutor still retained a broad ability to act as a partisan advocate. The accused in indictable cases remained in the profoundly unsatisfactory position of not knowing if the prosecution were in possession of unused material that could assist in showing his or her innocence and the complete lack in summary cases of any form of entitlement to disclosure remained.


...the public interest is involved. This the courts must keep in mind. They must also keep in mind that those who prepare and conduct prosecutions

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61 An explicit statement to this effect attributable to Willes J appears in the report to R v Stiganani (1867) 10 Cox CC 552. However, this was not followed in R v Greenslade (1870) 11 Cox CC 412 as the views of Willes J in Stiganani were explained to have been wrongly reported by the author of the report of Stiganani. One can only assume that the report writer in Stiganani lost his retainer to report for Cox’s Criminal Cases!

62 See R v Greenslade (1870) 11 Cox CC 412 per Brett J and 413 at footnote (a) per Willes J, R v Brown (1869) WW & AB 239 and R v Smith (1872) 11 SCR (NSW) 69 at 73.

63 R v Flanagan and Higgins (1884) 15 Cox CC 403 and R v Wright (1934) 25 Cr App R 35.

64 (1882) CCC Sec Pap xcv 525.
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. We have no reason to believe that this duty is neglected; and if it ever should be, the appropriate disciplinary bodies can be expected to take action. The judges for their part will ensure that the Crown gets no advantage from neglect of duty on the part of the prosecution.65

This observation was made by Lawton LJ in 1978. It will be noted that His Lordship was steadfast in his confidence that the prosecution were complying with their responsibilities as regards disclosure and that the courts would be vigilant in the protection of the position of an accused and ensuring that the prosecution did not gain any unfair advantage. Unfortunately, as events would prove over a decade later, especially in England, this confidence was shown to be misplaced. In a number of cases the arrangements governing disclosure were found to be painfully inadequate.

Despite, the passing reference by Lawton LJ that the prosecution should furnish ‘all relevant evidence of help to an accused’, it is striking that during the period from 1900 to 1981 the formal arrangements or rules in respect of disclosure remained comparatively limited. In the decades after 1900 there was no sudden or dramatic extension to the prosecution’s duty of disclosure in criminal cases. What developments did take place at this time tended to be strictly limited in scope and occur on a case by case basis66 with the notable and often overlooked exception of R v Nicholson67 in 1936. The courts avoided, even in those comparatively rare instances where they did confer some measure of disclosure, propounding any general or comprehensive duty of disclosure and were at pains to emphasise, when they did grant disclosure, they were not laying down any general rule.68

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65 R v Hennessey and Ors (1978) Cr App R 419 at 426.
66 For instance the prosecutor’s duty to furnish to the defence for the purpose of cross-examination a prior account of a prosecution witness that differed from his or her testimony at trial (see R v Clarke (1931) 22 Cr App R 58) or to furnish the defence with the actual convictions of prosecution witnesses (R v Collister and Warhurst (1955) 39 Cr App R 104).
67 Unreported but a detailed discussion of it can be found at (1936) 9 JPN 553. This was a first instance decision by Hawk J. The question raised was whether the prosecution should call a medical witness who did not support their case. Though Hawk J held they were not so compelled, he did approve of their action in supplying the unused medical report to the defence. ‘They must give to the defence the whole of the information they have got in their hands in case the defence should desire to use it, and so that no unfairness should be visited upon a defendant’.
68 See R v Hall (1958) 43 Cr App R 29. Even as late as 1990 this theme was still being firmly expressed (see R v Wesley, unreported, 30 July 1990, No 27/1990, Supreme Court of Tasmania, 8 per Zeeman J).
The nearest to any form of general guidance that did emerge during this period in either Australia or England is to be found in the influential decisions in \textit{R v Bryant and Dickson} in 1945, \textit{Dallison v Caffery} in 1964 and \textit{Re: Van Beelen} in 1974. These cases are not entirely satisfactory as they are difficult, if not impossible, to reconcile. Broadly, they do not support the existence of any comprehensive duty of disclosure of unused material upon the prosecution. The suggestion to the contrary in \textit{Nicholson} was overlooked. The prosecution were required to provide to the defence the name and contact details of any witness they did not propose to call. However, crucially, they were not required to furnish to the defence the statement of any such witness. Such a limited obligation, as McCawley notes, 'seems open to criticism.' It would discourage candour on the part of the prosecution and enable it to conceal or suppress the statement of an unused witness and to employ it as the tactical exigencies of the situation might suggest. As McCawley observes, this limited obligation 'would imply that the Crown is entitled to withhold a document and require the defence to guess at the contents and submit to the risk of being ambushed.' Such a scenario seems, as subsequent events would demonstrate, not to be conducive to either a fair trial or the interests of the accused.

The case of \textit{R v Collier} in 1958 illustrates the strictness with which the lack of the entitlement of an accused to knowledge of potentially probative material in the hands of the prosecution was enforced. The accused had been convicted of capital murder. The prosecution case was the deceased was killed on or about 6 October. The accused asserted that a woman and a police officer had seen the victim still alive on 22 October. Neither witness was called by the prosecution at trial. The

\begin{footnotesize}
\begin{enumerate}
\item[(69)] (1945) 31 Cr App R 146.
\item[(70)] [1964] 2 All ER 610.
\item[(71)] (1974) 9 SASR 163.
\item[(72)] Lord Denning MR in \textit{Dallison v Caffrey} would have gone somewhat further than this and required the prosecution to either call or supply to the defence the statement of 'a credible witness who can speak to material facts which tend to show the prisoner to be innocent' ([1964] 2 All ER 6120 at 618). The court in \textit{Van Beelen} suggested that the prosecution need not furnish the statement of a material unused witness but in the case of a credible and material witness who went to the innocence of the accused, the Crown should either call that witness or provide his or her actual statement to the defence (1974) 9 SASR 163 at 248-250).
\item[(73)] McCawley, T, 'The Production of Prior Statements of Prosecution Witnesses and Cross-Examination thereon in Criminal Cases' (1967) 61 QJP 73 at 77.
\item[(74)] \textit{Ibid}.
\item[(75)] [1958] Crim LR 151.
\end{enumerate}
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defence complained of this omission on appeal. The Court of Appeal disagreed. It noted the duty of the prosecution was clear. The prosecution was not obliged to call the witnesses themselves. If in their investigations the prosecution discovered evidence they considered did not reveal the truth, they were not entitled to suppress it. It was their duty, consistent with Bryant and Dickson, to provide the defence with the contact details of the witness but they were under no obligation to furnish the defence with any statement or account provided by that witness.

It is instructive that the gravity of the charge in Collier and the apparently significant nature of the unused material in question still did not translate into any obligation on the part of the prosecution to furnish that material to the defence. Collier illustrates that questions of disclosure in a criminal trial are not just important, but could prove to be matters of life and death. This point also strongly emerges from the case of Giuseppe Maguire who died in prison in England while serving a lengthy sentence for terrorism offences of which he was later acquitted. Prior to his death there had been vital unused material in existence and apparently known to the prosecution which had fatally undermined its case. As Connor notes, ‘[p]erhaps there is no more moving reminder of the power that goes with the control of information. It can be a matter of life and death.’

The comparatively modest formal requirements placed upon the prosecution and the conspicuous lack of any comprehensive judicial or statutory guidance as to the prosecutor’s obligations in respect of disclosure during the period raises the obvious question of how in practice this important function was approached. It would appear that, responding to the shortfall in the law, lawyers dealt with issues of disclosure on a personal and strictly informal basis. Typically,

76 This reflects an ‘adversarial’ prosecutorial role that confers a broad discretion to the prosecutor in his or her choice of witnesses to be called at trial (see R v Woodhead (1847) 2 Car & K 520, R v Edwards (1848) 3 Cox CC 82, R v Cassidy (1858) 1 F & F 79, El Dabbah v Attorney-General of Palestine [1944] 2 All ER 139 and R v Richardson (1974) 131 CLR 116). This role is contrary to the minister of justice’ approach outlined earlier at FN 18. It is unnecessary for the purposes of this article to resolve the preferable approach.

77 However, cases of this period such as R v Mattan (1952 and not reported till a later referral to the Court of Appeal in 1998; The Times, 5 March 1998) and R v Rowlands (1947 and unreported but discussed in Connor, P, ‘Prosecution Disclosure: Principle, Practice and Justice’ [1992] Crim LR 464 at 465) demonstrate how this all too easily could occur in practice.

78 Both Mattan and Rowlands were wrongly hanged for their alleged crimes.


80 Connor (1992), above n 77, 467.
prosecutors dealt with questions of disclosure, not by recourse to statute or common law, but by reference to professional etiquette, their ethical duties and their personal relationship with the defence lawyer. There seems to have been a perception in judicial circles that the whole question of disclosure could be left to professional etiquette, personal ethics and to the individual lawyers involved to resolve between themselves. The prosecutor was, after all, a 'minister of justice' and could be trusted to ensure the fairness of the proceedings. 81

Traynor in 1964 characterised this informal approach to disclosure in England as the 'Old Boys Act' and in the United States as the 'Nice Guys Act'. 82 Traynor described the operation of this approach in England in the following terms:

Whatever the formal restrictions on discovery, there is some relaxation on an informal basis under what the English characterize with bantering aptness as the 'Old Boys Act.'

Though it is nowhere to be found in the statute books, and is far from equivalent to tradition with the force of custom, The 'Old Boys Act' is acted out frequently enough to give it the force of realistic practice, if not of law or custom. Given the high standards of the legal profession in England, most defense solicitors qualify as Old Boys. Then, but only as a professional courtesy, they may be allowed pretrial inspection of prosecution information about the accused that would not otherwise be available under established practices. 83

A similar situation would appear to have existed in Australia. Lane in 1981 was able to describe the Australian practice in relation to disclosure in the following terms:

The general approach of the Australian courts to the non-disclosure of exculpatory evidence is to leave it to the unguarded discretion of the prosecutor. Such an approach seems to be founded on the concept of the prosecutor as a 'minister of justice', who can be trusted to ensure that justice is done. 84

This description was echoed in Victoria, as late as 1985, by the Shorter Trials Committee which noted that the disclosure regime in Victoria was 'imprecise, uncertain and heavily reliant upon prosecution discretion and

81 Niblett, above n 47, 61 and Corker, above n 47, 24.
82 Traynor, above n 35, 767.
83 Ibid.
the strength of professional and personal relationships between individual prosecutors and defence counsel.’ 85

It will be noted that the efficacy of this informal disclosure regime depended heavily upon the practices of the individual prosecutor. An illustration of its practical operation was provided by Christmas Humphreys, who in his 1955 address stressed the ‘duty of prosecuting counsel to assist the defence in every way’ arising from their proper role as a ‘minister of justice’. 86 This influenced his personal practice in relation to disclosure in the following terms:

I have said that all the powers of the prosecution should be available for the defence. The same may be said to apply to information in their possession, although in this matter there is room for difference of opinion. There is always available to the Crown a mass of information, and much of it irrelevant to the issue and much that, though possibly relevant is wholly unreliable. How much of this that is not being used in the depositions and exhibits should be made available to the defence? Generally speaking, any information which the prosecution does not intend to use, but which might, if believed, assist the defence, should be made available [added emphasis].87 The present custom in London is to inform the defence that a witness, giving the name and address, might be able to assist them. For myself, I take the view that a copy of the statement taken should be given to the defence, and I satisfy my own principles by handing a copy of it to defending counsel at the trial.88

Clearly, Humphreys’ approach accords with the notion of the prosecutor as a ‘minister of justice,’ astute to ensure that the defence were made aware of any significant or probative material in the prosecution’s possession. Whatever the law in cases such as Bryant and Dickson may have prescribed, Humphreys saw the prosecutor’s proper role as that of a ‘minister of justice’ and adopted a personal approach to disclosure that exceeded the modest formal obligations cast upon the prosecution by decisions such as Bryant.

Unfortunately, the effectiveness of these informal arrangements for disclosure is open to considerable doubt. For all the laudable motivation

86 Humphreys, above n 7, 741.
87 It will be noted that this highlighted portion of Humphreys’ observations as to what should be furnished by way of what is now known as unused material exceeded the modest disclosure obligations of the time and closely accords with what are the modern obligations on prosecutors in both England and Australia for the disclosure of unused material.
88 Humphreys, above n 7, 742.
of prosecutors such as Humphreys, it became increasingly obvious that reliance on professional etiquette and ethical constraints arising from the prosecutor’s position in the criminal process as a ‘minister of justice’ did not achieve adequate disclosure for the accused. There were two obvious and crucial flaws to the ‘Old Boys Act’ approach to disclosure. Firstly, such an approach was not necessarily adopted by all prosecutors. Further, individual prosecutors were inconsistent in their approach to disclosure, adopting one position in one case and a quite different position in another. Secondly, even the comparatively transparent approach advocated by Humphreys was still crucially dependent upon the police or other investigators furnishing the prosecuting lawyer with any material gathered in the course of the investigation that might be of relevance at trial. Events would show that this might not always occur.

But, despite the apparent recipe for uncertainty and inconsistency, for a long time there was widespread trust and faith in the fairness and impartiality of the informal ‘Old Boys Act’ approach to disclosure. The courts, and even the defence, typically shared the confidence of Lawton LJ and trusted the prosecution to ensure that any significant material was not suppressed and any probative material was revealed to the defence. Such trust, especially through modern eyes, may seem misguided, if not naive. But it is apparent that there was widespread confidence in the prosecution lawyer. After all, he or she was a ‘minister of justice’ and could be trusted to ensure that frank disclosure was afforded and, to use the colourful expression in this context of WB Common QC, that ‘no fast one was pulled’.

In practice, however, these informal and individual arrangements were not guaranteed to ensure a fair trial and to prevent a miscarriage of justice. Scrutiny of the experience of disclosure in England during this period highlights a disturbing number of instances in which significant material was withheld from the defence and defendants were later found to have been wrongly convicted. These cases show a culture of non-
disclosure by the police that extended to the apparently conscious and
deliberate suppression of cogent, even crucial, material that undermined
the prosecution cases on a number of occasions. Even prosecution
lawyers on occasion have not escaped adverse scrutiny through their
adoption of a partisan and less than frank position to disclosure as would
ill befit a so called ‘minister of justice’. Though Australia has
experienced nowhere near the same number of such identified historical
cases as England, it is significant that Australia has also experienced
similar instances of significant material being withheld in cases where
convictions were later quashed. These cases in both England and
Australia confirm that the modest formal obligations and the informality
of the ‘Old Boys Act’ approach to disclosure did not ensure a fair trial
and protect the interests of the accused.

Throughout the 1970s there was increasing awareness of the potential for
injustice arising from the limited obligations of the ‘Old Boys Act’
approach to disclosure and there were increasing calls in various official
and semi-official reports for some form of enhanced and formal

619, R v Maguire [1992] 1 QB 936, R v Kamara (unreported, Court of Appeal, 9 May
2000), R v Cooper and McMahon [2003] EWCA Crim 2257 and R v Kelly and
Connolly [2003] EWCA Crim 2957.

Rowland and Matton are prime examples. See also R v Kiszko (discussed at Niblett,
above n 47, 21).

See R v Ward where both the instructing prosecution solicitor and junior prosecution
trial counsel were rebuked by the Court of Appeal for a ‘wrong’ and even
‘misleading’ approach to disclosure at trial ([1993] 1 WLR 658).

It is questionable whether the police and even prosecutors in Australia possessed a
degree of infallibility in relation to disclosure that was not shared by their
counterparts in England. There were sufficiently regular official reports of police
misconduct and unethical practices during the period in question to demonstrate that
the police in Australia did not operate on a morally higher plane than their English
counterparts (see the acknowledgment by Gibbs J in R v Driscoll (1977) 137 CLR
517 at 539 and the frank discussion of McHugh J in R v Kelly [2004] HCA 12 at [86]-
[95] and the catalogue of official reports in Australia detailing police malpractices as
cited by McHugh J at [82]).

prosecution duty of disclosure. These concerns eventually found expression in England the Attorney-General's Guidelines of 1981.

**Part 4: Modern Approach to Disclosure in England: The Floodgates Unlocked**

The prosecution obligation to make disclosure to the defence in criminal trials has developed with astonishing speed over the last 20 years. These remarks of Butterfield J in 2003 highlight the rapid transformation that the disclosure landscape in England had undergone over a comparatively short period of time. This transformation was prompted by a series of highly publicised miscarriage of justice cases in England during the late 1980's and early 1990's such as the ‘Maguire Seven’, the ‘Birmingham Six’ the Taylor sisters and Judith Ward.

Though there were various factors behind this unedifying chapter in English legal history, a major component in the successful appeals in these cases was the non-disclosure of significant material by the prosecution to the defence.

Against this background, a number of English decisions progressively and rapidly expanded the prosecutorial obligation to disclose both used and unused material. This trend began with the influential first instance decision of Henry J in *R v Saunders*, continued with *Maguire* and reached its pinnacle in *R v Ward* where it was effectively suggested that...
any material gathered by the prosecution was capable of disclosure. As Hinton has noted these cases had a dramatic effect:

The combined decisions in *Saunders* and *Ward* changed the nature and ambit of the prosecutor’s duty to make disclosure to the defence entirely. Everything with the exception of information to which public interest immunity attached was to be made accessible to the defence. This comprehensive duty of disclosure was ‘seen by some as close to opening the police file to the defence.’ It extended both to used and unused material. Effectively, everything in the prosecution file, was ‘fair game’ to the defence and was now capable of falling within the prosecution’s duty of disclosure. The *Attorney-General’s Guidelines*, generous as they had been in 1981, were now outdated and were effectively relegated to history.

Even the hitherto neglected summary courts proved not immune to the effects of this profound shift in policy. In 1991 in *R v Kingston upon Hull Justices, ex parte McCann*, the longstanding lack of the defence to any entitlement to disclosure of the prosecution case in summary cases was challenged. Though the Divisional Court rejected the claim and held that there was no absolute rule requiring the prosecution to disclose its intended evidence to the accused in a summary case, the court indicated that it was preferable that they should. Bingham LJ, noting the practice of at least one branch of the Crown Prosecution Service to voluntarily furnish to the defence its evidence in summary cases, observed that he had no doubt prosecutors would ordinarily ‘be well advised to adopt a policy of disclosing to the defence the material on which they intend to rely.’ Such a policy was not only ‘beneficial’, but in some circumstances might ‘even be necessary in the interests of fairness.’ Bingham LJ emphasised that prosecutors ‘are generally well advised to

106 See *R v Ward* [1993] 1 WLR 619 at 645.
109 It was explained that these guidelines, well motivated as they had been in 1981, were mere guidance to prosecutors and did not, and could not, have the status of law (see *R v Winston Brown* [1994] 1 WLR 1599 at 1604-06).
111 See *O’Shea v Bandiera, ex parte O’Shea* (1968) 62 QJPR 138 as to this longstanding refusal. See FN 57.
follow a policy of glasnost.\textsuperscript{114} This policy was later extended to insistence that the duties of the prosecution with respect to the disclosure of unused material, wide as they were post \textit{Ward} and hitherto confined to cases tried on indictment, applied equally to the summary courts.\textsuperscript{115}

Following \textit{Saunders} and \textit{Ward} it was clear that the prosecutor could no longer cling to any partisan or adversarial position in dealing with issues of disclosure. The prosecutor would be required to act with the utmost candour and objectivity as one would expect from a 'minister of justice' and there was no place in the criminal process for tactical games in relation to disclosure. This theme was reiterated by the decision of the Court of Appeal in \textit{R v Livingstone}\textsuperscript{116} in 1993. The accused had been charged with theft in relation to retaining monies he had received as an agent of a building society. The version of the accused was that it was not incumbent upon him to pay any monies straight into the account of the building society and that there was a 'practice' where by he was permitted to retain the monies, initially at least. This assertion was hotly disputed as 'absolute nonsense' by the main prosecution witness, a Mr Brooks from the building society, who asserted that there was a 'hard and fast rule' that all monies had to be paid promptly by any agent to the building society. Mr Brooks insisted that the manual issued by the building society to its agents bore out his claim. It transpired that the manual, far from supporting Mr Brooks claim, actually supported the assertion of the accused. This manual was provided to prosecution counsel, a Mr Spencer, during the trial. Though Mr Spencer read the manual, he did not provide it or make its contents known to defence counsel. Instead, Mr Spencer left the manual on counsels' bench until, during the trial judge's summing up, the pupil of defence counsel happened to pick up the manual and to read it. The pupil discovered the crucial discrepancy with Mr Brooks' evidence and informed defence counsel, who promptly asked for a copy of the manual. Mr Spencer refused and resisted disclosure on the basis that it was not unused material\textsuperscript{117} and that as the manual had been lying on counsels' bench in full view of the defence during the trial they could have asked for it at any time. Defence counsel explained that as the prosecutor had not made

\textsuperscript{114} (1991) 151 JP 569 at 574.
\textsuperscript{115} See \textit{R v Bromley Magistrates Court, ex parte Smith} [1994] 4 All ER 146.
\textsuperscript{116} [1993] Crim LR 597 (Court of Appeal, 8 March 1993, Transcript Martin Walsh Cherer).
\textsuperscript{117} Just how Mr Spencer arrived at this position is unclear. It is plain, on any view, that the manual was both unused material and relevant. At the Court of Appeal Mr Spencer belatedly accepted this point.
any reference to the manual, he had taken, what the Court of Appeal later described as the, ‘perfectly reasonable view that there was nothing in it for either side…and that the document was silent on this crucial issue.’ The trial judge refused to order disclosure of the manual. The accused was convicted and, unsurprisingly, appealed.

On appeal Mr Spencer relied on the Attorney General’s Guidelines and valiantly contended that it was not the duty of the prosecution, having obtained a relevant document, to place it in the hands of the defence if they were aware of its existence and could have asked for it if they had wished. Rougier J, delivering the judgment of the Court of Appeal, was unimpressed. He emphasised that the question of disclosure in criminal cases was not an adversarial and partisan game. Rather it was ‘a serious matter conducted in a court of law and, one piously hopes, in a court of justice as well.’ His Lordship observed of Mr Spencer’s submission:

In the judgment of this court, which cannot be too strongly emphasised, that view is erroneous. It is the duty of the prosecution in all cases where material, whether documentary or otherwise, which is of relevance to the defence comes into their hands to make the defence a present of such material. The Attorney General’s Guidelines are not exhaustive, as has been shown in the recent case of Ward reported in the latest volume of the Criminal appeal reports, and if that still remains Mr Spencer’s view of the duty of the prosecution we would respectfully suggest that he gives himself a refresher course by looking at chapter 4 of Archbold paragraphs 273 and 294.

Undeterred by this withering judicial rebuke Mr Spencer sought to uphold the conviction by the well known application of the ‘proviso’. Rougier J merely noted that ‘as an act of benevolence’ he would not repeat Mr Spencer’s arguments and ‘in the face of such grave irregularities on a highly material issue’ the conviction had to be quashed.

Though one really cannot quibble with the fate visited upon the unfortunate Mr Spencer in Livingstone, it is notable that the Saunders and Ward disclosure obligations proved unpopular to prosecution lawyers and police officers. They were widely felt to be too onerous and imprecise. Their sheer magnitude and potential impracticability was highlighted by

118 Transcript, 2.
120 Transcript, 2-3.
121 That is by asserting no substantial miscarriage of justice had been occasioned by the error as to disclosing the manual.
122 Transcript, 3.
the decision of the Court of Appeal in *R v Browning*\textsuperscript{123} in 1995. The accused had been convicted of the murder of a female motorist on the basis of detailed circumstantial evidence. The case had been highly publicised and the police had received some 2987 separate messages during the course of their investigation. The Court of Appeal criticised the prosecution for not having revealed to the defence various items of information\textsuperscript{124} including two messages from a person who had not even been called as a prosecution witness at trial on the basis that the descriptions in these messages had not fitted that of Browning. In her commentary on the decision, Birch noted the difficulty for the prosecution in cases involving such voluminous evidence of attaining such an exacting standard of disclosure. ‘Ensuring that nothing has been omitted from the duty to disclose which might benefit the defence in any of the ways described by the court looks to be a Herculean labour, possibly of the Poirot variety.’\textsuperscript{125}

Furthermore, there was a perception after *Ward* in prosecution quarters that some defence lawyers were ‘playing the system’ and were misusing unused material in order to ‘manufacture’ defences while at the same time submitting speculative and excessive demands in the nature of a ‘fishing trip’ into areas of peripheral significance that weren’t really in dispute.\textsuperscript{126} These misgivings were echoed by Lord Templeman in 1994 in *R v Chief Constable of West Midlands, ex parte Wiley*\textsuperscript{127}. His Lordship noted that while in civil proceedings the relevance of a document depended on the written pleadings of the parties, in a criminal context the position was quite different there being no provision in criminal proceedings for written pleadings.\textsuperscript{128} The prosecution could not know with certainty what documents might be relevant to the defence. As a result of the recent cases where the Court of Appeal had quashed convictions on the grounds of the non-disclosure of information deemed material to the guilt or innocence of the defendant,\textsuperscript{129} the prosecution ‘in order to avoid criticism and a miscarriage of justice one way or the other’

\textsuperscript{123} [1995] Crim LR.
\textsuperscript{124} This included the revelation that one prosecution witness had undergone hypnosis and a material statement from another prosecution witness.
\textsuperscript{125} [1995] Crim LR 229.
\textsuperscript{126} See the detailed discussion in Chapter 10 of the ‘Auld Report’ (Auld LJ, above n 108).
\textsuperscript{127} [1994] 3 All ER 420.
\textsuperscript{128} This was to change in England with the *Criminal Procedure and Investigations Act 1996*.
\textsuperscript{129} Lord Templeman was evidently referring to cases such as *Ward, Maguire* and *Kiszko*. See FN 93 and 94.
now felt obliged to ‘disclose documents of doubtful relevance and materiality.’ Lord Templeman highlighted the undesirable consequences of this development:

The result in criminal proceedings is that masses of documents of no or doubtful relevance or materiality are made available to judge and jury. The indiscriminate and undisciplined preparation and presentation of documents for trial increase the length and cost of trial and sometimes enable a litigant to snatch an undeserved victory under a cloak of confusion and obscurity which baffles judge and jury.

Against this unsatisfactory background the Royal Commission on Criminal Justice in 1993 agreed that the obligations imposed by the Saunders and Ward line of authority had gone too far:

... the decisions have created burdens for the prosecution that go beyond what is reasonable. At present the prosecution can be required to disclose the existence of matters whose potential relevance is speculative in the extreme. Moreover, the sheer bulk of the material involved in many cases makes it wholly impracticable for every one of what may be hundreds of thousands of individual documents to be disclosed.

In R v Keane the Court of Appeal sought to introduce some semblance of order and structure into the apparent chaos. The court offered comprehensive guidance to prosecutors as to what unused material was required to be disclosed. The court considered that material should be divulged to the defence, issues of public interest immunity aside, if on a ‘sensible’ appraisal by the prosecution it:

- Was relevant or possibly relevant to an issue in the case;
- Raised or possibly raised a new issue whose existence was not apparent in the evidence the prosecution proposed to use;
- Held out a real (as opposed to a fanciful) prospect of providing a lead on evidence which went to either 1 or 2 above.

This test has proved highly influential in both England and Australia. It was subsequently approved by the Court of Appeal in England in R v Winston Brown which attempted to provide further clarification by...

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131 [1994] 3 All ER 420 at 423-24. This defence technique was well illustrated according to Lord Templeman by R v Preston [1994] 4 All ER 638 and R v Governor of Brixton Prison, ex parte Osman [1991] 1 WLR 281 where the issue of disclosure had been employed by the defence for, as Lord Templeman saw it, inappropriate, if not vexatious, purposes.
133 [1994] 2 All ER 478.
134 [1994] 2 All ER 484.
holding that the phrase ‘an issue in the case’ was to be accorded a broad construction by the prosecutor.\textsuperscript{136} The test in \textit{Keane} and the refinement of it by the Court of Appeal in \textit{Winston Brown} were subsequently approved when the case went on further appeal to the House of Lords.\textsuperscript{137}

It will be seen that whilst \textit{Keane} and \textit{Winston Brown} did provide some welcome guidance to prosecutors in England, the disclosure obligations imposed on the prosecution remained very extensive and far-reaching. Concerns continued to be expressed that the law on disclosure was unduly burdensome on the prosecution and unnecessarily generous to the defence.\textsuperscript{138} It will be noted that \textit{Keane} had firmly placed the onus on the prosecution to identify what was ‘relevant’ and to be disclosed and what was not relevant and accordingly not to be disclosed. This caused, as noted by Lord Templeman in \textit{Wiley}, additional problems. It was still felt that the system was unworkable and open to manipulation by the defence.

The then Home Office Minister in 1995 commented:

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. It is open to the accused, if he so wishes, to seek the disclosure of large volumes of material in an attempt at least to delay the onset of the trial, and if possible to uncover some sensitive material which the prosecutor cannot disclose and thereby cause the abandonment of the proceedings. That is what has happened in practice. In short the current disclosure regime is neither fair, nor efficient, nor effective.\textsuperscript{139}

It was not surprising that the then Conservative Government felt that a whole ‘fresh start’ was required. Accordingly, the \textit{Criminal Procedure and Investigations Act 1996} (‘the CPIA’) was enacted to establish a new comprehensive statutory regime. The CPIA was specifically intended to replace the existing common law.\textsuperscript{140} However, it is debatable to what extent the CPIA did succeed in its stated aim of completely replacing the previous common law. As has been suggested by Leng and Taylor, while obviously Parliament could replace or substitute the existing common law it was less easy to displace the underlying common law concepts.\textsuperscript{141} Any

\textsuperscript{136} [1994] 1 WLR 1599 at 1606-07.
\textsuperscript{137} \textit{R v Winston Brown} [1997] 3 All ER 769 at 775.
\textsuperscript{138} See the view of Barbara Mills, the then DPP in England, expressed on 29 Nov 1994, quoted at Niblett, above n 47, 30.
\textsuperscript{139} Quoted by Butterfield, above n 99, 250.
\textsuperscript{140} See s 21(1) of the CPIA that purports to extinguish the existing rules at common law governing disclosure.
lacuna in the statute will be filled by common law principles very similar to those that were ostensibly abolished. In particular, as the editor of *Archbold* has noted, the prosecutor remains subject to his or her previous professional duties as a 'minister of justice', namely, 'The requirement for a prosecutor to ask himself what fairness and justice demand and then act accordingly is, one of general application and arises from his general responsibility to act in the character of a minister of justice assisting in the administration of justice.' This basic proposition was, of course, left unchanged by the CPIA.

However, putting aside any potential lingering specific common law duties, in the main, the issue of disclosure and unused material in England is now governed by the CPIA. Application of that Act involves a three stage process. In the first stage, by way of 'primary disclosure', the prosecution has to furnish to the defence any material in its possession that it considered 'undermined' the prosecution case along with an accompanying schedule that listed all the non-sensitive unused material in its possession. The next stage then requires the defence to submit a 'defence statement' that sets out the proposed defence of the accused and identifies what portion of the prosecution case he or she disputes. This document is designed to assist the prosecutor in complying with the third stage of 'secondary disclosure'. This requires the prosecution to have regard to the contents of the defence statement and to disclose any item that might reasonably be expected to assist the defence case in light of the contents of the defence statement. The defence under the CPIA are not entitled, in theory at least, to pursue 'fishing expeditions' and are not entitled to material that neither undermines the prosecution case nor assists their case. Under a Code of Practice issued pursuant to the CPIA and additional comprehensive guidelines issued by the Attorney General both the police and the prosecuting lawyers are subject to various requirements and obligations. Notably, the police are now expected to conduct a proper and objective investigation and must take all 'reasonable lines of enquiry' in pursuing an investigation and must look


143 A practical application of this proposition is found in *R v Lee, Ex parte DPP* [1999] 2 All ER 737.

144 The CPIA has been recently amended but the basic procedure remains, albeit with different terminology.

145 This subjective test was widely criticised as even an unreasonable prosecutorial view as to what did not undermine its case was permissible. See Young, R and Sanders, A, 'Criminal Justice (2nd ed)' (London, Butterworths, 2002) 344.

The Development of the Prosecutor’s Role in England and Australia

at material that is both favourable and unfavourable to the prosecution position.147 Prosecutors are exhorted not to accord a narrow definition at either the primary or secondary disclosure stages. There is a further obligation on the prosecution to make active enquiries of its own in relation to any material held by a third party that could be of relevance in the case.148 This remains broadly defined.

Though the CPIA was enacted with broad political support in Parliament it was, and has continued to be, vehemently attacked in certain quarters.149 One criticism was that such an Act undermined the prosecution’s requirement to prove a case beyond reasonable doubt and was contrary to the privilege of an accused person against self-incrimination.150 It was additionally pointed out that the initial problems had arisen in connection with prosecution non-disclosure in the notorious miscarriage of justice cases and the need for an accused person to be aware of the case against him and any relevant unused material should be

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147 Para 3.4 of the CPIA Code. The dramatic and potentially far reaching scope of this provision is noted by Corker and Young (Corker, D and Young, D ‘Abuse of Process in Criminal Proceedings’ (London, Butterworths, 2003) 96).

148 This last proposition raises difficult and still unresolved issues of the proper regard to be had to the interests of victims and witnesses. There are strict rules governing access to material held by a third party and any approach cannot be employed as a disguised form of discovery intended to find material that might be solely of use in cross examination on issues of credibility (see R v Reading Justices, Ex parte Berkshire County Council [1996] 1 Cr App R 239 and Re: Ronald A Prior and Co (Solicitors) [1996] 1 Cr App R 248) This approach obviously contrasts sharply with the wide Keane (or now the CPIA) type test for disclosure applicable to material held by the prosecution (see R v Brushett [2001] Crim LR 471 where the Court of Appeal attempted to reconcile these two tests). It is notable: that the issue is often apparent with regards to highly sensitive records held by third parties such as social services, medical practitioners and counsellors that relate to the victims of sexual offences (see Re: H (L) where Sedley J referred with disapproval to this trend and noted that that it had ‘become standard practice’ for the defence to seek such material [1997] 1 Cr App R 176). It does seem surprising, notwithstanding the Reading Justices line of authority, that the prosecution is not just entitled, but positively encouraged and expected, to conduct extensive enquiries into the background information concerning victims and witnesses that are held by third parties to see if there is anything there that might conceivably assist the defence. It is arguable that this is extending the duties of the prosecutor, even as a minister of justice, too far. It has even been suggested that defence lawyers would rather the prosecution to carry out their enquiries into third party material (see Fisher, S, ‘The Prosecutor’s Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England’ (2000) 68 Fordham L Rev 1379 at FN 94,1396 and FN 117, 1400-01).


150 See the note of dissent offered by the leading academic, Michael Zander, in the Report of the Royal Commission on Criminal Justice that originally proposed legislation such as the CPIA (RCCJ, above n 132, [1] and [2], 221).
strengthened, rather than diminished.\textsuperscript{151} It was submitted after the recent unhappy experiences of disclosure that it was unrealistic and undesirable to expect the police and prosecutors to objectively and impartially consider what might or might not be relevant to an accused.\textsuperscript{152} As one barrister categorised it, putting the police or the prosecutors in charge of disclosure was tantamount to the ‘fox [being] in charge of the henhouse’.\textsuperscript{153} It was further contended it was wrong and unfair to entrust the flow of information in a criminal trial to the prosecution.\textsuperscript{154}

Whatever one’s opinion as to the merits of the CPIA may be it is fair to say that the regime it established has satisfied virtually nobody in practice. It has been widely regarded as unworkable and unduly bureaucratic. None of the parties in the criminal process has escaped criticism in the operation of the CPIA. The police have been accused of submitting incomplete and misleading schedules of unused material and of omitting and not revealing important, if not vital, information. The prosecution lawyers have been accused of failing to check the unused material and failing to consider properly what should be divulged by way of primary and secondary disclosure. They have also been said not to insist on adherence to the requirements of the CPIA. It has been said that the prosecution has still not embraced the spirit of candour and transparency that one would expect of a ‘minister of justice’. The defence lawyers have been accused of routinely submitting defence statements so bland as to be virtually worthless and of continuing to submit lengthy ‘shopping lists’ and speculative ‘fishing trips’ as to unused material into areas of no real significance in the often wishful hope that ‘something’ might turn up. The courts have been accused of ignoring the clear requirements of the CPIA and of failing to ensure that the both prosecution and defence abide by both the substance and spirit of the Act.\textsuperscript{155} The English CPIA regime has hardly served as an ideal role model for a system of disclosure.

\textsuperscript{152} Ibid. See also Emmerson, B, ‘Prosecution in the Dock’, \textit{The Observer}, 14 November 1999.
\textsuperscript{153} Unnamed ‘senior barrister’ quoted in Emmerson, above n 152. This uncharitable (to the prosecution at least) view was not wholly without substance as later cases would demonstrate (see FN 163 and 164).
\textsuperscript{154} Corker, above n 47, introduction, px. See also Bennathan, J, ‘Made for Miscarriages’, \textit{The Times}, 25 July 2000.
\textsuperscript{155} A concise and damning summary of the operation of the CPIA and its various shortcomings was provided by Auld LJ, above n 108, Chapter 10. See also Goldsmith, Lord, ‘Attorney-Generals’ Speech to Whitehall Prosecutors Conference’, 4 Oct 2005,
The CPIA was designed to simplify the procedures governing unused material and to limit the *Ward* and *Keane* requirements as to just what the prosecution is required to divulge. In both respects the CPIA has arguably failed to fulfil its legislative intent. As one prosecution lawyer commented to Butterfield J, ‘We are spending many times longer over disclosure than we ever did before CPIA: but we are disclosing just as we ever did.’\(^{156}\)

A modern police investigation into a wide category of offences such as fraud, organised crime, drug dealing, murder, terrorism, sexual crimes and tax evasion can acquire interstate and even international dimensions and the sheer mass of material that can be assembled in the course of such an investigation is immense.\(^{157}\) The unused material in a complex case can occupy a whole room and even a warehouse!\(^{158}\) When the prosecuting authorities must also have regard to material in the possession of a third party it can be readily seen that the challenge facing the prosecutor in relation to disclosure, notably of unused material, is enormous.

Clearly dealing with a subject as complex as disclosure and unused material can give rise to difficult questions of judgment and highlights the ongoing tension between the prosecutor’s roles as both ‘minister of justice’ and active advocate in an adversarial system. The prosecutor is placed in a difficult professional position in judging what may assist an accused. As Hinton has noted:

> The tension inherent in being both adversary and minister of justice renders it imprudent to leave the prosecutor with the power to decide what unused

\(^{156}\) Butterfield, above n 99, 258.

\(^{157}\) To illustrate the potential sheer size of a modern police investigation one need only look at the police investigation into the highly publicised murder of two young girls in Soham in England in 2003 (*R v Huntley*). This case involved 160 officers and generated 6820 witness statements, 7341 exhibits and 24,000 documents. There were nine police disclosure officers. Such investigations are far from unusual in the modern age and computer technology does not solve all the problems. The sheer mass of material available in the ‘digital age’ can even add to them. See further Goldsmith, above n 155.

\(^{158}\) Butterfield J, above n 99, 256.
material should or should not be disclosed where that decision requires an assessment of the qualitative nature of the material to the defence.\textsuperscript{159}

There also remain significant problems with prosecuting agencies still failing to disclose pertinent information. Two surveys by the Law Society and the Bar Council in 1999 found that an alarming rate of cogent material was still being withheld, whether wittingly or unwittingly, by police and prosecutors.\textsuperscript{160} There are regular assertions that significant material remains withheld as a matter of routine to this day and that the prosecution is still simply either unable or unwilling to deal with questions of disclosure in the necessary objective and impartial manner.\textsuperscript{161} Even more disturbingly there have continued to be a series of ill-fated post CPIA cases that have featured continued non-disclosure of relevant material by the prosecution and successful appeals against conviction.\textsuperscript{162} This unsatisfactory theme has been especially present in a linked series of prosecutions in England brought by HM Customs involving the alleged large scale smuggling of contraband alcohol and tax evasion where crucial issues of disclosure, notably in relation to public interest immunity, had been incompetently, and even dishonestly, handled by the prosecuting authorities.\textsuperscript{163} The result of this catalogue of prosecutions was the eventual quashing of the convictions of 109 defendants.\textsuperscript{164} The vexed issue of the prosecutor’s role in claims of public interest immunity has proved especially problematic and remains far from resolved.\textsuperscript{165} These continuing problems illustrate that, over a decade after the most celebrated miscarriage of justice cases, disclosure and unused material continue to remain a highly contentious and unresolved part of the criminal process in England.

\textsuperscript{159} Hinton, above n 107, 134. See the discussion of this tension by Lord Mustill in \textit{R v Preston} [1994] 3 All ER at 649 where he noted the recent developments in disclosure had ‘blurred the edges’ in the prosecutor’s traditional adversarial role.

\textsuperscript{160} See the discussion in Ede & Shepherd, above n 151, 8-10.


\textsuperscript{163} See \textit{R v Early and Ors} [2003] 1 Cr App R 19 and \textit{R v Patel and Ors} [2002] Crim LR 304. As the commentary in the Criminal Law Review to \textit{Patel} makes clear the collapse of these and various linked cases resulted in the waste of millions of pounds of public money in the various trials and appeals and the additional loss of several hundred million pounds in lost revenue to the British Exchequer. See further Taylor, C, ‘What Next for Public Interest Immunity’ (2005) 69 Jour Crim L 75 at 77-78.

\textsuperscript{164} Even extending to various defendants who had pleaded guilty! See Taylor (2005), above n 153, 77.

As a result the CPIA was recently amended to tighten up the requirements on all the parties within the criminal trial. Parliament was unwilling to jettison the statutory scheme and clearly contemplated that with certain reforms, it should continue. It will remain to be seen whether these reforms will alleviate the powerful problems of both principle and practice regarding disclosure that have arisen in England since the early 1990s. It has proved easier said than done to devise a solution governing prosecution disclosure that is ‘fair, efficient and effective’. What is clear from the English experience, is that considerable caution should be employed before importing the English model to Australia.

Part 5: Modern Developments to Disclosure in Australia: ‘Catch up’ to England?

It is clear that the issues of disclosure and unused material have traditionally acquired far less prominence in Australia than that accorded to them in England. Hinton in 2001 drew attention to the fact that the appellate courts in Australia had not been troubled by these issues to the same extent as their counterparts in England. Why this is the case is not entirely clear. Hinton speculates that one reason for this may be that unlike the experience in England, ‘miscarriages of justice due to non-disclosure have not occurred with same degree of frequency nor sensationalism in Australia as to cause an appellate court to act so decisively.’ Whatever the reason for the lack of prominence traditionally accorded to questions of disclosure in Australia, it would appear that many Australian prosecutors, in contrast with their English counterparts, would probably not, until very recently at least, have had to confront or deal with questions of disclosure. However, any hope on the part of prosecutors in Australia that they might have been spared the formidable problems of principle and practice that have confronted English prosecutors is now likely to be dispelled. The recent decision of the High Court in *R v Mallard*, suggests that Australian prosecutors will also now have to wrestle with the same difficult issues that have troubled their English colleagues for over a decade and a half.

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166 The much criticised subjective primary disclosure stage was replaced with an objective test for ‘initial disclosure’. There are stricter requirements for a detailed defence statement to trigger ‘continuing disclosure’ by the prosecution.

167 Hinton, above n 107, 123.

168 Ibid.

It will be recalled that in the 1970s the informal ‘Old Boys Act’ system for disclosure operated and the formal obligations on the prosecution in Australia were comparatively modest.\(^{170}\) This was confirmed in 1979 by the High Court in the important, if now largely overlooked,\(^{171}\) decision in \textit{R v Lawless}.\(^{172}\) The accused had been convicted of murder after two trials. The principal prosecution witness, a Mrs Joyce, had described a disagreement between Lawless and the deceased that had led to Lawless fatally shooting the deceased. Mrs Joyce was clear that no-one else had been involved or present at the scene. There was fingerprint evidence on a packet of cigarettes linking the accused to the scene of the murder. Two other prosecution witnesses, residents in the vicinity, had indicated that there may have been two men (excluding the deceased) present at the scene of the shooting. The accused at the trial raised an alibi and asserted that he was elsewhere. He also claimed that the police had ‘framed’ him. The packet of cigarettes had been ‘planted’ at the scene and Mrs Joyce had been coerced into incriminating him. It transpired that another person, a Mrs Telford, had made a statement to the police in which she had clearly described two men present at the shooting. This evidence clearly contradicted that of Mrs Joyce. This statement was furnished to prosecuting counsel at trial but he decided not to call Mrs Telford. It would seem that the prosecutor regarded her as an honest witness but simply mistaken in her account of the presence of two men. The prosecutor neither informed the defence of her statement nor of its contents or even of her existence.\(^{173}\) The defence, after the trial became belatedly aware\(^{174}\) of the existence and contents of Mrs Telford’s statement and certain other material.\(^{175}\) This undisclosed material included an initial statement from another prosecution witness, a Mrs Boland, which the first trial judge had ordered to be produced to the defence. The accused sought to challenge his conviction on the basis of the undisclosed material.

\(^{170}\) This emerged from cases such as \textit{Van Beelen and R v Charlton} [1972] VR 758.
\(^{171}\) At least in terms of its significance to the issue of disclosure.
\(^{172}\) (1979) 142 CLR 659.
\(^{173}\) It will be noted that the prosecutor had failed to meet even the modest obligations suggested by \textit{Bryant and Dickson} and \textit{van Beelen}.
\(^{174}\) Through the Beach Enquiry into unrelated allegations of police misconduct; see (1979) 142 CLR 681 per Murphy J.
\(^{175}\) This included medical information relating to Mrs Joyce’s psychiatric condition and a note of an initial conversation between her and a police officer that was exculpatory of the accused and inconsistent with her later evidence at trial.
This challenge was dismissed by the Full Supreme Court of Victoria. The court held, reflecting the position adopted in cases such as *van Beelen* and *Bryant and Dickson*, that there existed no general rule requiring disclosure of such unused material as the statement of Mrs Telford. Indeed, Lush J went further and stated that the prosecution had not even been required to inform the defence of the existence of Mrs Telford. The court considered that the undisclosed material was either irrelevant or inadmissible. It would not have affected the outcome of the trial.

It is, nevertheless, worthy of note that O'Bryan J was less than impressed with the somewhat partisan nature of the conduct of the prosecution at trial. The failure of the prosecution to comply with the order of the first trial judge could not be excused. His Honour was clearly conscious of the need for the prosecutor to act as a 'minister of justice'. He commented:

It has been said by high authority that the prosecution has a duty to conduct the prosecution with fairness towards the accused with a view to determining and establishing the truth... There were a number of matters that occurred in the course of the trial of Lawless that reflect failure on the part of the prosecution to maintain that concept of fairness. Notwithstanding that the trial was lengthy and complicated and that Lawless might have been regarded by the prosecutor as obstructive and difficult to deal with at times, the prosecution must uphold the standards prescribed in authorities such as *R v Lucas*... On further appeal to the High Court the defence chiefly complained of the prosecutor’s failure to have supplied the statement of Mrs Telford. The majority of the High Court; Barwick CJ, Stephen, Mason and Aickin JJ, reached a similar conclusion as the Full Court of the Supreme Court. Their Honours considered that the statement of Mrs Telford was not significant or powerful enough to have either prejudiced the defence case at trial or to have led the jury to arrive at a different verdict. As the accused had relied on an alibi defence, Mrs Telford’s statement did not materially advance his defence. The evidence of Mrs Joyce remained


177 Lush J and O'Bryan J delivered separate judgments. Young CJ agreed with both his colleagues.

178 Transcript, 22.

179 It can be argued that the note of the conversation with Mrs Joyce was relevant and potentially admissible for the purpose of cross-examination.

180 Transcript, 56. This is a reference to the prosecutor’s role as a minister of justice.
ample to sustain a conviction.\textsuperscript{181} In any event the defence could by reasonable diligence have uncovered Mrs Telford's evidence as they should have been able to infer her existence and to have approached her if they truly wished to call her at trial.\textsuperscript{182} The members of the High Court differed as to whether the statement of Mrs Telford should have been disclosed to the defence. Barwick CJ considered that it would have been better for the prosecutor to have informed the defence of the identity of Mrs Telford as she had seen something of the events in question. However, consistent with both \textit{Bryant and Dickson} and \textit{Van Beelen}, that was the extent of the prosecution's obligations. The Chief Justice commented:

\begin{quote}
It is good practice, in my opinion, in general for the prosecution to inform the defence of the identity of any witness from whom a statement in the possession of the prosecution has been obtained. But, clearly, in my opinion, there is no obligation of any kind resting on the prosecution to provide the defence with a copy of such a statement.\textsuperscript{183}
\end{quote}

Stephen J absolved the prosecutor from any direct criticism and was satisfied that the withholding of the statement was neither an act of misconduct or impropriety nor even 'a conscious act designed to prejudice the defence.'\textsuperscript{184} Nevertheless, His Honour did accept that 'it would certainly have been better' had the statement's existence been revealed to the defence.\textsuperscript{185} Aickin J did not consider the issue. Mason J commented that he 'did not condone the failure of the Crown to give the defence any information about Mrs Telford's statement.'\textsuperscript{186} However, his Honour accepted in the present case 'that there is no rule of law which compels the Crown to provide the defence with statements made by persons it does not propose to call as witnesses.'\textsuperscript{187}

Murphy J offered a typically forthright dissenting opinion. He was emphatically of the view that the statement of Mrs Telford was

\begin{footnotes}
\footnote{181}{The majority judges of the High Court offered various scenarios as to the reasons that the jury could have still arrived at a verdict of guilty notwithstanding the effect of Mrs Telford's statement. Subsequently, in \textit{R v Mallard} (2005) 224 CLR 125 at 134-135 the High Court ruled that this type of appellate speculation was impermissible.}
\footnote{182}{Her husband had been a prosecution witness and he had mentioned being home with his wife that night. This approach is contrary to that of cases as \textit{R v Livingstone} [1993] Crim LR 597. As the High Court made clear in \textit{R v Grey}, the defence should not be required to 'fossick for information' to which they were entitled (2001) 184 ALR 593 at 599).}
\footnote{183}{(1978) 142 CLR 659 at 667.}
\footnote{184}{(1978) 142 CLR 659 at 673.}
\footnote{185}{(1978) 142 CLR 659 at 674.}
\footnote{186}{(1978) 142 CLR 659 at 678.}
\footnote{187}{(1978) 142 CLR 659 at 678.}
\end{footnotes}
significant. It was impossible to reconcile her account with that of Mrs Joyce. Mrs Telford’s statement went both to the credibility and the veracity of the account of Mrs Joyce. Whether there were one or two men present at the shooting was a very material point. There was no excuse for the non-disclosure of the statement by the prosecutor. Murphy J impliedly raised the minister of justice role of the prosecutor:

Those prosecuting on behalf of the community are not entitled to act as if they were representing private interests in civil litigation. The prosecution’s suppression of credible evidence tending to contradict evidence of guilt militates against the basic element of fairness in a criminal trial. Even if the prosecution could be excused for not making Mrs Telford’s statement available to the applicant earlier, it could not be excused for failing to do so after the applicant had attempted to show from Mr Telford and Mr Goldsworthy [the two residents who had given evidence] that another person was present.

In my opinion, the verdict of guilty was brought about by conduct which departed from the standard required of those prosecuting on behalf of the community.188

At least one commentator at the time expressed his preference for the view of Murphy J over that of the majority.189 But in 1979, notwithstanding the dissenting opinion of Murphy J and the widespread criticisms of the majority decision,190 it is important to appreciate that the majority judgments in Lawless did not provide any support for any suggestion that the prosecution was subject to a wide duty of disclosure and actually clearly militated against the existence of any such duty.

It is significant to note that, even at the time of Lawless, powerful misgivings were being expressed in Australia as to the lack of any formal disclosure regime and the consequent potential for injustice. Indeed, prompted by the experiences he had encountered in connection with the trial of Lawless, Justice Beach offered the following recommendation for the introduction of a comprehensive and formal duty of disclosure:

However, in light of what occurred in the Lawless matter, in my opinion police should be directed to supply to the coroner (where appropriate) and

188 (1978) 142 CLR 659 at 682.
to the Crown, all statements of whatever kind obtained from witnesses to a particular offence, whether they be in conflict with one another or not, and the Crown should be obliged to make available to the defence copies of all such statements. That the interests of justice require that such a full disclosure of the contents of all witnesses’ statements be made to the defence has been made abundantly clear to me...That experience impels me to state emphatically that legislation should be urgently enacted to overcome the inhibiting effect of the decision contained in R v Charlton.191

However, this call went unheeded in Victoria192 and the issue of disclosure was to remain largely dormant in Australia throughout the 1980s.193 However, in the 1990s, despite the apparent comparative absence in Australia, unlike England, of wrongful convictions due to non-disclosure,194 there was increasing awareness in Australia that the notion of trial by ambush was not permissible in a modern criminal justice system.195 There were increasing judicial suggestions of the need for some enhanced and formal duty of prosecution disclosure.196 The issue was considered in considerable detail by the various state courts, but with no degree of uniformity.197 The High Court also considered the issue in 2001 in R v Grey.198 It is fair to say that these decisions, whilst agreeing broadly on the need for prosecution candour in disclosure, did not agree on the precise extent of any such duty and took divergent paths. The High Court in Grey was critical of the prosecutor’s failure in that particular

192 The ‘Norris Committee’ concluded that no legislation was necessary in Victoria on the issue of disclosure (Norris Committee Report, ‘Police Procedures Relating to the Investigation of Crime’ (Melbourne, Govt Printer, 1978) Part 1, 195).
193 Though there were occasional decisions that raised the issue such as R v Easom (1981) 28 SASR 134 or even more occasional decisions that granted some measure of disclosure of unused material such as R v Perry (No1) (1981) 27 SASR 172. See also Elkington, G, ‘Discovery upon Indictment in New South Wales’ (1980) 4 Crim LJ 4 at 26-27 and the Shorter Trials Committee, above n 85, 87-93 that also raised the issue and criticised the existing law.
194 See Hinton, above n 107.
195 See Hunter & Cronin, above n 190.
196 See the call in R v Lun (unreported, NSW Court of Appeal, 4 Dec 1992) for guidelines in Australia similar to the Attorney-General’s Guidelines in England.
198 (2001) 184 ALR 593.
case to supply relevant material to the defence but it proved unnecessary for the High Court to offer any meaningful contribution to this issue in light of the prudent concession of Nicholas Cowdrey QC, the New South Wales Director of Public Prosecutions, that the material should have been provided. It is significant, and perhaps not wholly coincidental in light of subsequent developments, that the jurisdiction to insist most strongly on a comprehensive duty of prosecution disclosure was Western Australia.

The issue first arose in any prominent sense in Western Australia in 1997 in *R v Bradshaw*. The accused had been convicted of bribery and corruption in the course of his position as a Councillor. He contended that various items held by the prosecution, especially relating to the credibility of two vital prosecution witnesses, had been wrongly withheld and not disclosed at trial. Though these criticisms were rejected by the Court of Appeal it is notable that in stating the prosecutor’s duty of disclosure, the court specifically approved and adopted the principles laid down by the English cases such as *Ward, Winston Brown* and *Keane*. Of particular significance was the fact that the threefold test governing the relevance of what should be disclosed from *Keane* was specifically approved. Malcolm CJ stated that, ‘In order for there to be a fair trial the Crown is obliged to disclose to the defence all material available to it that is relevant or possibly relevant to an issue in the case.’ This duty extended not only to disclosure of any relevant material in the prosecutor’s possession but also included a positive obligation to make enquiry to determine if any disclosable material existed and to ensure its preservation. As in many of the English cases, if material was available to the prosecution in the sense that its existence was known to the police, than the accused remained entitled to it, whether or not it was known to the prosecuting lawyer. Though the conviction was upheld on the facts of

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199 A so-called ‘letter of comfort’ in respect of the main prosecution witness that would have been of considerable assistance to the defence in cross-examination.

200 Why this is so is unclear. Disclosure does appear to have been a recurring problem in Western Australia. See further *R v Mallard* (2005) 224 CLR 125, *R v Button* (2002) 25 WAR 382 and *Narkle v Western Australia* [2006] WASCA 113.

201 Unreported, 13 May 1997, West Australian Court of Criminal Appeal, No. 970228.

202 The Chief Justice quoted, with apparent approval, a passage from *Archbold*, stating the prior CPIA law on disclosure as had existed in England.

203 See *R v Taylor and Taylor* (1994) 84 Cr App R 361 for an example of this strict approach in England.
the case, the breadth of the proposition adopted by Malcolm CJ in *Bradshaw* is obvious.

It was surprising that Malcolm CJ in *Bradshaw* made no reference to any of the earlier Australian authorities such as *Lawless* or *Van Beelen*. Indeed, the Chief Justice largely confined his brief discussion on disclosure to the English authorities. He offered no explanation as to why the Court of Appeal should suddenly embrace the English approach to disclosure, arguably in defiance of the views expressed by the majority of the High Court in *Lawless*, and certainly against the whole trend of past Australian authority and experience. Though there may well have been sound policy factors in favour of the change adopted by Malcolm CJ, it is not entirely satisfactory that over a century of prior practice and authority should be ignored and the wide English duty of disclosure imposed upon the prosecution without real explanation or discussion of the reasons for doing so.

Nevertheless, whatever doubts may be entertained as to the foundations of the views expressed by Malcolm CJ in *Bradshaw*, a number of subsequent decisions in Western Australia have confirmed the wide English approach to disclosure embraced in *Bradshaw*. These cases also unequivocally applied the pre CPIA English law to Western Australia. In 2002 in *R v WK* Miller J summarised the law applying in Western Australia:

In *Buller v R* Malcolm CJ stressed that the duty of the Crown with respect to disclosure in order to ensure a fair trial is of the utmost importance. It is a duty to be scrupulously observed in order to ensure that an accused has a fair trial. The duty to disclose certainly extends to all material available to the Crown which is relevant or possibly relevant to any issue in the case. That was made clear in *R v Bradshaw*...
Miller J went on to emphasise that ‘these principles are of universal application to all cases’. 210

It is also notable that recently the courts in New South Wales, albeit with more considered and persuasive reasoning than that displayed in Bradshaw, have embraced the law from England in relation to disclosure. 211 Keane has now been accepted as representing the law governing what is required to be disclosed by the prosecution in that jurisdiction. 212

The decisions in Western Australia and the recent decisions in New South Wales form the immediate backdrop to the decision of the High Court in 2005 in R v Mallard. 213 In that case the accused had been convicted in Western Australia of the brutal murder of a female jeweller in her shop. The deceased had been beaten to death with a heavy instrument that was never recovered. The prosecution case partly rested upon various admissions the accused was said to have made in a number of interviews with the police. 214 Only one of these interviews had been taped by the police. While various witnesses had placed the accused in or about the shop at or about the time of the murder, there was no forensic or scientific evidence linking him to the crime. Though there were various ‘conflicts’ in the prosecution case the High Court noted that there had been sufficient evidence to sustain the original verdict of guilty. 215 The accused had explained in interview that he had used a ‘wrench’ from a shed at the back of the store to carry out the murder and had drawn a sketch of the presumed murder weapon with the word ‘Sidchrome’ on it. 216 It later transpired after the trial that the defence had not been provided with various items of unused material by the prosecution. 217

212 See R v Spiteri [2004] NSWCCA 197 at [17]-[20].
214 Though it is relevant that some of the assertions and claims made by the suspect in interview were dismissed by the joint judgment as ‘highly fanciful, indeed incredible’ (2005) 224 CLR 132.
216 The suspect asserted at trial that he had never admitted to murdering the deceased with any weapon and his drawing of the wrench was simply to fit the ‘theory’ of the murder the police officers had conveyed to him.
217 The items were plainly in the possession and knowledge of the police. It is unclear to what extent, if any, the prosecution lawyers were aware of or, in possession of, this material. The majority stated it was unnecessary to investigate this issue ((2005) 224
Though the West Australian Court of Appeal had dismissed, somewhat perfunctorily, the significance of these items, it is notable that they all fitted uneasily, if not inconsistently, with the prosecution case. Kirby J commented that the undisclosed material was ‘contradictory’ or, at the very least, ‘highly inconvenient and troubling’ to the prosecution case. The most significant items concerned various tests and police enquiries that undermined any assertion that a wrench, especially the one sketched by the suspect, had been used to commit the murder. The High Court was critical of the prosecution’s failure to provide these items to the defence. The joint judgment observed that the:

…it has been denied an opportunity to explore and exploit forensically [the prosecution evidence]. The body of unpresented evidence so far mentioned was potentially highly significant in two respects. The first lay in its capacity to refute a central plank of the prosecution case with respect to the wrench. The second was its capacity to discredit, perhaps explosively so, the credibility of the prosecution case, for the strength of that case was heavily dependent on the reliability of the confessional evidence, some of which was inexplicably not recorded, although it should have been recorded.

It was conceded by the prosecution on appeal that the non-disclosure of some, at least, of this material breached the guidelines of the Director of Public Prosecutions Statement of Prosecution Policy and Guidelines that had been made and gazetted pursuant to the Director of Public Prosecutions Act 1991 (WA). These guidelines aside, the joint judgment briefly, but crucially, noted that the decision of the High Court in R v Grey was authority ‘for the proposition that the prosecution must at common law also disclose all relevant evidence to an accused person, and that a failure to do so may, in some circumstances, require the quashing of a verdict of guilty.’ Their Honours commented that the undisclosed material in the present case was no less probative than the material that

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CLR 132-133). Kirby J was more explicit. His Honour commented that at least some of the undisclosed material was ‘certainly known’ to the prosecutors and all of the items ‘would have been available’ to the DPP’s office ((2005) 224 CLR 149). In any event as the prosecutor’s duty of disclosure is clearly not dependent upon actual possession of the material or even knowledge of its existence (it is enough if it is in the hands of the police; see R v Taylor and Taylor (1994) 84 Cr App R 361, it is unnecessary to resolve this issue.

219 (2005) 224 CLR 125 at 135.
220 It is significant to note that some Australian jurisdictions such as NSW and the Commonwealth (though seemingly not Tasmania) now also possess similar official guidelines from their DPP in respect of disclosure.
221 (2005) 224 CLR 125 at 133.
had not been disclosed in *Grey*. The undisclosed material in *Mallard* was of ‘significant forensic value’.

Kirby J commented that the DPP guidelines, despite having the status of a statutory instrument and, in theory, prevailing over the common law, were not designed to exclude the operation of the common law. Rather they ‘were intended to express, clarify, elaborate and make public the “longstanding prosecution policy” that had developed conformably with the common law.’ His Honour noted that the law in Australia had developed from the decisions in *Lawless* and *Grey*. It was also illustrative and useful to consider the approach that had been taken in other common law jurisdictions on the issue of prosecution disclosure. Indeed, Kirby J noted that the jurisprudence of various common law jurisdictions, the *European Convention of Human Rights* and international law had all increasingly recognised the importance to an accused of knowing any probative material in the hands of the prosecution. There was ‘an increasingly insistent demand for the provision of material evidence known to the prosecution which is important for the fair trial of the accused and the proper presentation of the accused’s defence.’

Kirby J adopted the following statement of Lord Hope in *R v Brown* in 1998 as representing an accurate statement of the law in Australia:

*The prosecution is not obliged to lead evidence which may undermine the Crown case, but fairness requires that material in its possession which may undermine the Crown case is disclosed to the defence. [T]he prosecution is not obliged to lead the evidence of witnesses who are likely in its opinion to be regarded by the judge or jury as incredible or unreliable. Yet fairness requires that material in its possession which may cast doubt on the credibility or reliability of those witnesses whom it chooses to lead must be disclosed.*

All the members of the High Court agreed that the prosecution had failed in its clear duty, whether under the DPP’s own guidelines or at common law, to reveal probative material to the defence. In those circumstances the conviction had to be quashed. Notwithstanding the ‘defects’ or

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222 (2005) 224 CLR 125 at 141.
223 (2005) 224 CLR 125 at 149. In this respect in stark contrast to the deliberate but not wholly successful effort of the *Criminal Procedure and Investigations Act* 1996 in England to extinguish the common law.
224 (2005) 224 CLR 125 at 150. It will be noted that Kirby J regarded the DPP guidelines in a similar manner as the courts in England came ultimately to regard the *Attorney General’s Guidelines* of 1981.
225 (2005) 224 CLR 125 at 151.
‘challenges’ in the prosecution case it was not without strengths and a retrial was ordered.\textsuperscript{228}

It will be seen that \textit{Mallard} is a crucial decision. Whatever may have been the previous position, it is now clear that the prosecution in Australia is subject to a formal and wide duty of disclosure. It is instructive to compare \textit{Lawless} with \textit{Mallard}. Though \textit{Lawless} was not formally over-ruled,\textsuperscript{229} it is difficult, if not impossible, to see how \textit{Lawless} can stand alongside \textit{Mallard}. Following \textit{Mallard} the precise origin of the prosecutor’s duty of disclosure is irrelevant. It is no longer tenable to rely upon rules of etiquette or informal arrangements stemming from the prosecutor’s ethical position in the criminal process as a ‘minister of justice’ to govern the prosecutor’s responsibilities as to disclosure. The prosecutor is manifestly not entitled to act as an adversarial advocate in relation to disclosure. However, it is notable that in formulating or confirming the existence of this duty of disclosure, the High Court seemed unaware of the powerful problems of both practice and principle that have arisen in England as regards the operation of the disclosure regime. The High Court, perhaps surprisingly given the strength of those problems, made no reference to any issue of either practice or principle that might have a bearing on the performance by the prosecution of its duty of disclosure. Be that as it may, it is now clear following \textit{Mallard} that the role of the prosecutor in respect of disclosure is one of a ‘minister of justice’ and that any lingering misapprehension that the question of disclosure could be left to be resolved by the prosecutor on an individual and informal basis under the so called ‘Old Boys Act’ has been utterly dispelled.

\textbf{Part 6: Conclusion: The Prosecutor must be a ‘Minister of Justice’ in Disclosure}

Various rationales have been offered in both Australia and England to account for the modern insistence that an accused be afforded full and frank disclosure of the prosecution case, both as to the evidence and unused material. They include the fact such disclosure is crucial to the basic or fundamental right of every defendant to receive a fair trial in an

\textsuperscript{228} The WA DPP decided not to proceed with a retrial in due course. It now appears that Mallard was in fact wholly innocent and another man, a convicted murderer, called Simon Rochford was the actual culprit (see Hughes, G, ‘Police Apologise for Wrongful Conviction’, \textit{Australian}, 11 Oct 2006).

\textsuperscript{229} Indeed, there is surprisingly little discussion of Lawless in either Mallard or Grey.
adversarial process where the police and the prosecutors control the investigatory process; a comprehensive duty of disclosure is necessary to alleviate or redress the stark imbalance in resources that exists between the typical positions of the prosecution and the accused in the criminal process; and that such a duty arises under the European Convention of Human Rights to ensure an 'equality of arms' between the prosecution and defence. The duty of disclosure has even been invoked in administrative law notions of natural justice to overturn a conviction that has been said to have been obtained in breach of the rules of natural justice when important exculpatory evidence had been withheld by the prosecution. However, these various justifications for the prosecution's duty of disclosure are essentially all 'sides of the same coin'. In fact, the duty of disclosure is merely another manifestation of the inherent duties of the prosecutor to act in the role of a minister of justice. Niblett noted the duty of the prosecutor to act as a minister of justice in relation to disclosure:

All those with any responsibility for the prosecution must act in a fair and impartial manner and the disclosure of relevant information and documents to the defence is only one (albeit a very important one) aspect of that responsibility.

This aspect of the prosecutor's duty has received explicit judicial acknowledgement on a number of occasions. For instance in 1992 in R v Berry the Privy Council adopted, with apparent approval, the following statement of principle of Shelley JA:

The 'right' to see statements in the possession of the prosecution is therefore really a rule of practice described in terms of the ethics of the profession and based upon the concept of counsel for the Crown as a minister of justice whose prime concern is its fair and impartial administration.

The experience of disclosure in England over the last decade and a half has certainly proved problematic and controversial. There are regular and

232 See Jespers v Belgium 27 DR 61 at [51]-[56] and Rowe and Davis v UK (2000) 30 EHRR 1.
234 Niblett, above n 47, 13.
236 [1992] 3 All ER 881 at 887-888.
ongoing complaints from both sides of the disclosure debate as to the operation and basis of the disclosure regime. It is clear that statutory intervention has failed to resolve these issues. It is readily apparent that it is easier said than done to arrive at a scheme governing disclosure in practice that is still fair, efficient and effective. However, despite the powerful problems of both principle and practice in relation to the operation of the disclosure regime in England, certain fundamental propositions are clear.

Firstly, whatever one's views may be about the present statutory model in England or the short lived model at common law post Ward and Keane, it is obvious that there can be no return to either the doctrine of 'trial by ambush' as demonstrated by cases such as Holland or the informal ‘Old Boys Act’ approach to disclosure. In particular, the issue of disclosure is simply too important and crucial to the integrity of the criminal process to leave to vague and informal personal arrangements. It is now widely accepted that, as was reiterated in 2004 in R v Taillefer238 by Lebel J, ‘The way in which disclosure was viewed in the past- as an act of goodwill and co-operation on the part of the Crown- played a significant role in catastrophic judicial errors.’239 There can be no escape now from an open and formal system of disclosure. As was noted by Butterfield J, ‘[t]he criminal justice system now operates, and must in my view continue to operate, in a landscape of transparency as far as disclosure is concerned.’240

Secondly, one must have regard to the long and unfortunate legacy of cases such as Ward and Mattan and Livingstone and Mallard. As was highlighted in 2004 in R v H241 by Lord Bingham:

Fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed to the defence. Bitter experience has shown that miscarriages of justice may occur where such material is withheld from disclosure. The golden rule is that full disclosure of such material should be made.242

As Lord Bingham notes, the ‘golden rule’ now is to insist on full disclosure by the prosecution. It may be difficult to arrive at a practical

239 (2004) 233 DLR (4th) 227 at 236. Canada has also had its share of cases such as Kiszko, Ward and Mallard.
240 Butterfield, J, above n 99, 263.
241 [2004] 1 All ER 1269.
242 R v H [2004] 1 All ER 1269 at 1277.
scheme that is entirely satisfactory to meet this requirement but I would suggest that no-one can now seriously dispute the underlying premise behind Lord Bingham’s insistence on full disclosure. Though the precise practices and experiences in Australia and England regarding disclosure may differ, I would suggest that the fundamental proposition that emerges in respect of disclosure is clear. The appropriate role of the prosecutor in this vital area is not that of a partisan or adversarial advocate and is certainly not that of a persecutor. ‘Pompous as that may sound to modern ears’, the prosecutor’s role unequivocally remains that of a ‘minister of justice’. I would suggest that it is impossible to improve upon the following erudite definition provided by Lord Brennan QC in describing the appropriate role of the prosecutor in this area:

The prosecutor must act as a minister of justice, presenting the prosecution evidence fairly, making full disclosure of relevant material and ever conscious that prosecution must not become persecution.244

243 See Murphy, above n 14, and above n 15.